



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Mohsin Patel

**Respondent:** Acorn Care and Education Limited

**HELD AT:** Liverpool via CVP

**ON:** 13, 14 & 15 October  
2021,  
10 & 11 May 2022

**BEFORE:** Employment Judge Shotter (sitting alone)

## REPRESENTATION:

**Claimant:** Mr D Beeman, counsel

**Respondent:** Mr Sugarman, counsel

# JUDGMENT

The judgment of the is:

1. The claimant was not unfairly dismissed and his claim for unfair dismissal is not well-founded and is dismissed.
2. The claimant was not wrongfully dismissed and his claim for breach of contract (notice) is not well-founded and is dismissed.
3. The claim for unlawful deduction of wages is dismissed.

# REASONS

## Preamble

1. In a claim form received on the 6 April 2020 following ACAS Early Conciliation that took place between 29 January and 29 February 2020, the claimant complained that he had been unfairly dismissed and was seeking damages. The claimant also brought a complaint of wrongful dismissal (notice pay) and unlawful deduction of

wages for an unspecified £50.00. In short, the claimant was summarily dismissed for misconduct arising out of two incidents involving pupils, and claims he was unfairly dismissed because the respondent did not comply with the ACAS Code of Practice, did not carry out sufficient investigation, specific conduct allegations the claimant was accused of in the invite to attend a disciplinary hearing were not proven, and the dismissal was procedurally unfair as a result of the respondent's failure to take into account relevant mitigating circumstances, irrelevant demonstrably false and unsubstantiated evidence was taken into account and the appeal was pre-determined.

2. A private preliminary hearing dealing with case management took place on the 17 September 2020 at which the final hearing was timetabled over a period of 3-days. It is unfortunate that by 5pm on the 3<sup>rd</sup> day of the hearing there was insufficient time to hear oral submissions from the parties, and the case was adjourned with some difficulty due to availability to the 10 May 2022 following confusion over the dates given in January 2022. The parties took the view that it was important for oral submissions as opposed to written submissions to be made otherwise the case would have been decided earlier than on the 10 May 2022.

### Agreed issues

3. The issues were agreed between the parties from the outset and prior to oral submissions being made as set out below:

### **Unfair Dismissal**

1. Did the respondent have a potentially fair reason for dismissing the claimant? The respondent relies on 'conduct' as being the potentially fair reason for the claimant's dismissal, pursuant to s. 98(2)(b) ERA 1996. Further or in the alternative, the respondent contends that the claimant was dismissed for 'capability' (s.98(2)(a) ERA 1996) and/or some other substantial reason (s.98(1)(b) ERA 1996).
2. If so, was the respondent's decision to dismiss the claimant reasonable in all of the circumstances of the case, pursuant to s. 98(4) ERA 1996?
3. When considering reasonableness of the dismissal for 'conduct' under s. 98(4) ERA 1996, the tribunal must consider whether the *Burchell* test been satisfied, as follows:
  - (a) Did the respondent believe that the claimant was guilty of the misconduct alleged?
  - (b) If so, did the respondent have reasonable grounds upon which to sustain that belief?
  - (c) Did the respondent carry out such investigation as was reasonable in all the circumstances of the case?
4. Was the claimant's dismissal procedurally fair?

5. Was the claimant's dismissal substantively fair?
6. Was the outcome of the claimant's appeal pre-determined, as alleged at paragraph 49 of the particulars of claim? (For the avoidance of doubt, this is denied by the respondent.)

### **Wrongful Dismissal**

7. Was the respondent entitled to summarily dismiss the claimant?

### **Arrears of pay**

8. At box 9.2 of his ET1 claim form, the claimant has brought a claim for arrears of pay in the sum of £50.
9. Is the Claimant's claim for arrears of pay out of time?
10. If it is not, in 25 of the grounds of resistance, the respondent has requested further and better particulars of this claim. The claimant is willing to provide further and better particulars.

### **Remedy**

11. If the claimant succeeds with his claim(s), what should he be awarded by way of financial compensation?
12. If the claimant succeeds with his claim of unfair dismissal, should the tribunal make an order for reinstatement or re-engagement? This issue is disputed by the respondent (see section 4.2 of the Joint Case Management Hearing Agenda).
13. Has the respondent failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures? If so, was that failure unreasonable? If so, should the claimant be awarded an uplift on compensation? If yes, by what percentage should the claimant's compensation be uplifted?
14. If the tribunal finds that the claimant's dismissal was unfair, should his compensation be reduced on account of:
  - (a) Polkey;
  - (b) Contributory fault.If so, by what amount or percentage should the claimant's compensation be reduced?

### Witness evidence

4. The Tribunal heard oral evidence from the claimant under oath, and on behalf of the respondent it heard from Craig Albon, dismissing officer and assistant head, and James Joyce, appeals officer and regional director employed by the respondent. The case is heavily documented and much of the evidence is supported by contemporaneous letters, notes and transcripts of recordings.

5. The Tribunal was referred to an agreed bundle of documents consisting of 502 pages plus additional documents produced during the hearing, the written statements, video evidence and a chronology. Having considered the oral and written evidence and written and oral submissions presented by the parties (the Tribunal does not intend to repeat all of the oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), I have made the following findings of the relevant facts resolving the conflicts in the evidence.

### Facts

6. The respondent own and operates in excess of 30 schools including Belmont School, that provides specialist education for children who have been diagnosed with social, emotional and mental health difficulties (SEMH) and autism (ASD). The schools operate outside mainstream education due to needs of the children who attend them. The children who attend the school are aged 5 to 16 and the purpose of the schools is to give them the opportunity to access education. The children are particularly vulnerable. They struggle to communicate and can exhibit challenging behaviour including being disruptive and aggressive towards each other and teachers, who have the difficult task of managing behaviour in a learning environment. It is apparent from the evidence before me that many of the teachers, including the claimant, are highly committed to helping the children managing the difficulties they have in circumnavigating learning and education in what can be a difficult and stressful classroom situation where all the children attending possess special educational needs.

7. The pupils pay a fee to attend Belmont School, and the evidence before me was that the respondent and the schools it managed were well resourced, governed by statutory and regulatory safeguarding. Safeguarding the vulnerable children was fundamental and is it undisputed staff are regularly trained in safeguarding matters and expected to possess an awareness and comply with statutory requirements including the DfE Use of Reasonable Force document and DfE Teaching Standards.

### The DfE Use of Reasonable Force July 2013 document

8. The DfE Use of Reasonable Force July 2013 document is particularly relevant in that it defines the term reasonable force which “covers the broad range of actions used by most teachers at some point in their career that involve a degree of physical contact with pupils.” The following are relevant to this case although this is not an exhaustive list:

8.1 Reasonable force should be used to “control or restrain” using “no more force than is needed.” The term “restraint” means “to hold back physically or bring a pupil under control” under “extreme circumstances” for example, when intervening in a fight.

8.2 The document clarifies that force cannot be used as a punishment “it is always unlawful.”

- 8.3 The DfE Use of Reasonable Force July 2013 sets out a requirement that “every school is required to have a behaviour policy and to make this known to the staff, parents and pupils” and “any policy on the use of reasonable force should acknowledge their legal duty to make reasonable adjustments for disabled children and children with special educational needs (SEN).”
- 8.4 A “panel of experts” had identified a sharp upward jab under the nose (referred to as the ‘nose distraction technique’ as a technique presenting an “unacceptable risk.” I find that it must follow as a matter of logic punching a pupil in the face also presents unacceptable risk.
- 8.5 “Where a member of staff has acted within the law – that is, they have used reasonable force in order to prevent injury, damage to property or disorder – this will provide a defence to any criminal prosecution or other civil law actions.”
- 8.6 In response to the “Frequently Asked Questions” including “How do I know whether using a physical intervention is ‘reasonable’ teachers were advised “The decision whether to physically intervene is down to the professional judgment of the teacher concerned. Whether the force used is reasonable will always depend on the particular circumstances of the case. The use of force is reasonable if it was proportionate to the consequences it is intended to prevent. This means the degree of force used should be no more than is needed to achieve the desired result...” With reference to pupils with SEN or disabilities reasonable force can be used “but the judgment on whether to use force should not only depend on the circumstances of the case but also on information and understanding the needs of the pupil concerned.”
9. Additional guidance was available for staff working with children with severe behaviour difficulties and autism. There was no specific reference to the steps which teachers could take in self-defence.
10. Craig Albon was responsible for safeguarding and during the relevant period was the lead designated safeguarding lead (DSL), a qualified MAPA instructor and advance team teach instructor. MAPA and Team Teach are physical intervention providers used by the respondent to train staff in the management of challenging behaviour and difficulties pupils have in communicating which can result in challenging behaviour. Staff are trained to de-escalate a situation, and use physical intervention as a last resort. The claimant received such training.

#### Code of Conduct and Ethics

11. In the Code of Conduct and Ethics applicable to all staff and updated July 2019 to be read in conjunction with ‘Guidance for Safer working practice for those working with children and young people in educational settings, 2019 and ‘Keeping children Safe in Education, 2019” one of the “key points” was “the welfare of the child, young person...is paramount and all those working with them must set an appropriate good example. You should always ask yourself; ‘Am I being a good role model an act accordingly.” The Code set out the requirement to treat children and young people “fairly and with respect,” comply with all NFA Group Policies and procedures and those of local safeguarding partnership arrangements...maintain

public confidence in their ability to safeguard the welfare and best interests of the children. They should adopt high standards of personal conduct in order to maintain confidence and respect of the general public and those with whom they work.” The claimant was responsible for working according to the Code and complying with, and he was aware of this requirement and the principals involved.

12. Under the heading “Behavioural Management” at paragraph 9 staff are required to follow the behavioural management policy, not use force as a form of punishment, behave as a role model and “refer to national and local policy and guidance regarding Restrictive Physical intervention (“RPI”). The claimant was experienced in using RPI in an education setting.

13. Under the heading “Physical Intervention” paragraph 10 “staff should adhere to the physical intervention policy and: I always seek to defuse situations and avoid the use of physical intervention whenever possible ii where physical intervention is necessary, only use minimum force and for the shortest time needed.”

#### Statutory guidance

14. The Department for Education produced statutory guidance for keeping children safe at school, and provided a document titled “Part One; Information for all school and college staff, September 2019 setting out a number of safeguarding provisions and emphasising staff have a responsibility to provide a safe environment, and should regularly receive the appropriate safeguarding and child protection training. The claimant received this training.

15. The respondent issued a Disciplinary Policy and Procedures that included “violent, abusive or intimidating conduct” as an example of gross misconduct. The Policy in the bundle was updated October 2020.

#### 1<sup>st</sup> incident: 30 September 2019 incident involving DR

16. On the 30 September 2019 the claimant was allegedly involved in an incident involving DR, which was reported by the respondent to LADO on the 3 October 2019.

17. A Lancashire County Council Management of Allegations Notification Form was completed that included the name of DR’s social worker and the report by his foster carer that on the 30 September 2019 “DR’s taxi escort had observed through a classroom window DR being pushed into a wall by a teacher.”

18. The taxi escort was employed by the local authority and at a strategy meeting she was reported to have advised “she viewed the incident through a school window concerning DR being pushed very forcibly against the wall in his classroom by his teacher Dr Patel” and an immediate concern was raised.

19. The claimant was referred to LADO but was not suspended until the second alleged incident involving EA. The police were informed and attended the strategy meeting along with various other people including LADO, the head teacher and a safeguarding lead. It was treated as a serious matter.

20. DR was spoken to on the 2 October 2019 when he alleged the claimant had made a personal comment about his face and when he was walking down the corridor “we (me and Mr Patel) banged into each other, I’m not sure if it was on purpose or not...He (MP) followed me in aggressively and I turned around. When I turned around he pushed me into the wall by putting his hands on my shoulders (indicated front of the shoulders.) He was really close to my face and he said, ‘why you bang into me’ and other things I can’t remember. Miss Rawson who stood near the door put her hand on his shoulder and said ‘you go and calm down. He said to me ‘next time you do that, I’m going to kick your fucking head in’ and then he left.”
21. The claimant reported the incident at 9.32 on the 1 October 2019 stating it had taken place at 3.15 on the 30 September 2019 when DR “shoulder barged me which was unprovoked and uncalled for...I therefore followed him into the room and confronted him regarding his unnecessarily aggressive behaviour towards me. Staff in the room...saw that I was very irate at this point with his actions so they calmed me down and advised me to go back into my room and have a few minutes out...” The claimant alleged DR had repeatedly been rude and disrespectful in the past and “but this time he had stepped it up when he showed verbal aggression towards me.” Other witnesses including teachers reported hearing raised voices, the claimant looking “agitated” and being told to leave the room to calm down.” DR was sent to his taxi. Another teacher witness confirmed the claimant “looked very agitated” Mr Patel asked D why he had just elbowed him in the doorway. At this point it got a bit verbal between them both” and the claimant was asked to leave the room”.
22. It is undisputed after the DR incident the claimant was instructed, following a risk assessment, that he ought to avoid physically restraining any schoolchildren
- 2<sup>nd</sup> incident: 8 October 2019 involving student EA
23. On the 8 October 2019 the operations manager was called to deal with an incident involving a 14-year old school boy EA (who was taller and larger than the claimant) and the claimant, which he recorded in a written statement made at the time referring to the assistant teacher who were present. The written report sets out EA’s disruptive behaviour in class that culminated in a female assistant teacher attempting to guide EA out of the classroom and when he refused, the female teacher with the claimant applying a “figure of 4” physical restraint which should be a last resort. EA broke free and there is an issue as to whether he punched the claimant in the face on 3 or 4 occasions before the claimant punched EA in the face causing injury, following which the claimant “contained the situation” by “wrapping EA” and they both fell onto the floor with EA possibly cutting his head on the water cooler. The claimant suffered injuries to his shoulder and aching jaw where he had been punched. It was a serious incident.
24. The claimant was suspended pending investigation, and LADO consulted.
25. A Management of Allegations Notification form was completed which referred to the female assistant teacher using a “Team-Teach technique, the claimant then supporting her by using a two-person figure of four, “punches were thrown and the hold was taken to the floor. During the incident the pupil sustained injuries to

his face and head and graze to the knee. Shortly after the incident Mr Patel disclosed to senior staff that he had punched EA in the face during the incident.”

26. The claimant provided a statement of events which reflected the difficulties he was having controlling EA in the classroom despite threats of sanctions and how he asked the female assistant teacher (who referred to him as “Sir”), who had been out of the room, “to remove him from the room” which she was unable to do. EA got on better with the assistant female teacher than he did with the claimant, and usually responded well to her when she tried to control his behaviour.
27. The claimant described how the Team Teach hold of figure of 4 was used followed by EA “pushed us both away” having “slammed” the claimant into a filing cabinet and the female assistant teacher a wall before “he turned and started to punch me, landing three or four punches on my face...I fearer for my safety...I defended myself by punching him once...because he was showing no signs of stopping. This did not stop him...I closed the gap between him and me by ducking my head down and placing my hands around his body, to prevent him from getting any more direct hits on my face. He then continued by lifting me and we both fell to the ground...” The claimant’s reference to him closing the gap and holding EA around the body is a recognise RPI known as a “bear hug” aimed at avoiding violence and injury. The figure of four hold is also a recognised RPI.
28. The female assistant teacher was a key witness, and she provided a written report at 14.59 following the incident that had taken place at 1.20 according to the “Detail Listing” form completed. She referred to EA “causing serious disruption...so made the decision to try to escort EA out of the room...I asked Mr Patel to help escort EA out of the room with myself. We held E team teach figure of four times two, first of all E was laughing as he walked across the room but as we got to the door he became really aggressive and barged Mr Patel into the filing cabinet and then barged me onto the floor...E turned towards Mr Patel and swung a few times as I tried to get out of the door I saw Mr Patel take E to the floor for the safety of both of them. E caught the right side of his face on the drinking fountain....Mr Patel knelt down and held E left arm and went behind E and tried to calm him down, he was still quite irate so I swopped with Mr Patel and E was calm enough to walk to the removal room with me.”
29. EA’s version was that the claimant “threw himself into the cupboard and pushed EA. Due to this EA punched MP in the belly. MP then punched EA in the face, so EA started to hit MP a number of times. MP then speared EA into the wall where EA banged his head and fell onto the floor...” EA was taken to hospital by a teacher, his Mother was “really upset” and earlier she had expressed her concern that EA’s father “will come to school to hurt the member of staff involved.”
30. A strategy meeting took place on the 11 October 2019 with Lancashire County Council, which records the claimant admitted punching EA in self-defence, defined as a physical abuse towards a pupil who has “social and emotional difficulties alongside autism – he struggled with boundaries and can present with challenging and at times defiant behaviours...struggles with anxiety and his triggers are normally when he believes he has been treated unjustly or unfairly...Mr Patel reported that he was subjected to a significant number of



punches from E...he felt he was in a position that he couldn't protect himself without the need to use physical defence resulting in him punching E to the face as he feared his own welfare...Mr Patel suffered a fractured shoulder...and concussion."

31. The respondent and EA's parents reported the matter to the police.
32. An investigation meeting involving the claimant was held on the 21 November 2019.
33. Police informed the respondent that no further action would be taken, having indicated in an undated email that EA was the aggressor and instigator, the claimant had "acted in self-defence by punching E to the face once in an attempt to prevent him from hitting him repeatedly in the face. The injury received by E was a small cut to his lip suggesting minimal and reasonable force was used by Mr Patel. Of concern is that this was the second incident involving Mr Patel in eight days and that both involve allegations of assault, however based on the actual evidence available neither of these incidents meet the criminal threshold for prosecution."
34. In an internal investigation commenced by John Stryker who carried out a number of investigatory meetings between the 15 and 21 November 2019 during which student EA and DR, SC (the female teaching assistant involved) and various other teachers and pupils gave statements. SC's evidence was recorded, and she dealt with the "shoulder barge" incident giving very little detail other than to say the claimant had told her DR had shoulder barged him and "made comments about his family or something." SC dealt with the allegation involving AE in greater detail having been asked by John Stryker to "talk me through it."
35. SC described AE as being calm and laughing as she took him towards the door. SC could not recall whether it was a single or a figure of four and when "we got to the door, the whole mood changed and he shoulder barged Mr Patel...he barged me to the other side...and the E walked out, sir walked after him and I was behind sir so I couldn't get to him. At this point I saw E square up, bearing in mind he's 16 and a half stone, he's bigger than me and Sir. It sort of happened so quick, it was within seconds and I remember them holding onto each other...so he was on the floor with Sir...the police asked me "did you see a punch" I never saw...I saw E square up to get Sir but I was behind him and I'm looking round saying to the kids 'go back to your seat.' SC Confirmed AE could be aggressive, had then a teacher "down the banking...he just sort of goes he kicked me in the private parts a couple of months ago...Really hurt me but he was so apologetic later." She confirmed the school had a violent pupil and it was not AE "diffuse it and he'll go." SC described the claimant's behaviour as out of character and he was well respected by staff and pupils, "a good fella....it's a shame that this has happened."
36. John Stryker interviewed another teacher SH concerning the DR incident who confirmed DR had entered the room "followed by Mr Patel. It was obviously...something had gone on in the hallway, so I stepped immediately between them. There was some verbal going on between the two of them...they were face to face, both arguing with each other...He'd come in face to face with

him. Really he should have probably not gone that far but obviously he was angry and spur of the moment it happened...they were squaring up...Ms C took Patel out and I just stayed with D”.

37. John Stryker interviewed another teacher Ms C who confirmed the claimant “looked a bit upset...I think he said he’s been shoulder barged...there were a bit raised voices...I just took Mo [ a reference to the claimant] out of the situation...”
38. The claimant was invited to an investigation meeting described as a “fact finding meeting” to explore “safeguarding concern following a physical intervention with a pupil” and “that the above intervention has resulted in physical harm to the young person.” There was no reference to the alleged earlier incident involving DR in the letter of invite, although it was brought up at the meeting.
39. The claimant attended the meeting on the 21 November 2019 with John Stryker and a notetaker and was told from the outset “here to discuss two incidents which occurred” to which the claimant responded “yes.” In relation to the DR incident the claimant expressed surprise that “it has got to this stage” referring to the difficulties he had with DR prior to the incident, acknowledging “I know working in that type of environment you get that...” The claimant alleged DR shoulder barged him “I am sure that was physical aggression towards me. I went straight in the room and confronted him...I was angry at the time...staff that were there saw I was a bit angry...I felt that he was targeting me...”
40. The claimant was shown video footage of the alleged shoulder barge in the corridor. I have viewed the footage numerous times. The claimant was recorded walking one down the middle of the corridor and DR walking in the opposite direction and more to the side, there was an almost imperceptible contact in the corridor as a result of it being narrow, DR continued without looking at the claimant as if nothing had happened as the claimant swung round and followed DR into the classroom. The incident in the classroom had not been caught on CCTV.
41. The claimant acknowledged that after the DR incident a risk assessment had been put in place, and he made a conscious effort to stay away from DR. It was put to the claimant that the video did not show a shoulder barge but “barely a brush” to which the claimant responded that the he had been racially abused by DR whose behaviour was “escalating.” The claimant denied pushing DR against the wall, threatening to “kick your head in” and swearing at him. The claimant was asked if he had logged DR’s behaviour on the sleuth system, which he had not.

#### Incident involving EA 8 October 2019

42. The claimant was questioned about the incident involving EA on 8 October describing how EA had ignored the warnings and how “I was reluctant to get my hands on and touch him because I was told so and there was no one in the room to witness. And it is not safe to do RPI’s when on your own especially with bigger lads...Mrs [C]...asked me to help her and I walked over guided his hand off the window frame...we got him at figure of 4 to escort him out of the classroom. He’s finding it funny...We get to the door...so Mrs [C] uses one hand to open the door,

he sees it as an opportunity to shoulder barge me into the filing cabinet...He's got free...he punched me 3 or 4 times and there is no sign of him stopping...He was really angry...I had to defend myself...I feared for my life...I don't want to hit him again...let me close the gap between me and him and I put my head near his chest. So he can't get any clean punches on me..." The claimant confirmed he discussed Positive Plans for Pupils at meetings, that EA had been aggressive to other staff before.

43. When asked "would you have done anything different" the claimant answered "no," and again "on reflection, looking at the incident as a whole, would you have done anything different" the claimant repeated his answer stating his behaviour was reasonable and proportionate "I was trying to do self-defence. He was nonstop punching." In contrast to Mr Beemah's submissions, I find the claimant was given the opportunity to fully set out his response to the incidents involving DR and EA, and he was aware that the fact finding meeting concerned a serious incident to the extent that by the end of the meeting the claimant was upset because it was the "last thing I wanted in my life. I am not a confrontational person." At no stage did the claimant state he had received insufficient training to deal with the known behaviour of DR and EA.

Investigation report dated 30/9/19 and 8/10/19

44. John Stryker produced an investigation report, following which the claimant was invited to a disciplinary hearing chaired by Craig Albon in a letter dated 4 December 2019 which attached 7 appendices and 19 documents. The claimant was alleged to have "pinned a pupil up against the wall after a verbal confrontation and then verbally threaten the pupil with violence, using abusive language; further particulars being that on 30/9/19 you behaved outside of the code of conduct and Ethics and team teach guidelines in your handling and de-escalation of pupil DR." The second allegation alleged "that you used excessive force by assaulting a pupil (EA) during an altercation on 8/10/19 resulting in physical harm to both bodies."
45. The claimant was provided with a copy of John Stryker's Report together with a number of documents including 5 statements and 28 appendixes. In paragraph 3 "Findings" the following was referred to:
- 45.1 "It is alleged on the 30 September whilst walking to their respective form rooms that DR(pupil) has shoulder barged Mohsin Patel (staff member) in an unprovoked manner. This led Mohsin to follow after D to confront him over his aggression in the room. It is alleged that once in the room Mohsin has squared up to D and then pinned him up against the wall...on the way out of the room Moshin threatened D...This incident was reported by D's taxi driver..." I find that the claimant was made fully aware this was one of the allegations he would need to deal with at the disciplinary hearing.
- 45.2 "On the 8 October 2019 in a science lesson EA (pupil) has displayed a number of disruptive behaviours and after utilising the school's behavioural systems was given a removal and asked to leave the room. After attempts to persuade E to leave the room failed Moshin along with another member of staff have deemed it necessary to physically remove E from the classroom...It is

alleged that E has thrown a number of punches at Moshin, causing him to retaliate with a punch in self-defence...”

46. John Stryker's report included a number of conclusions and recommendations as follows:

46.1 In relation to DR “I believe that Mo's conduct has fallen below the professional standards expected of a staff member in one out settings...there is no evidence to suggest that shoulder barge...would constitute any form of aggression...upon reviewing the CCTV footage of the incident there appears to be what can at best described as a slight brushing of clothing between Mo and DR....I believe that Mo's assertion that this alleged act of aggression was noticeable due to DR 'having intent in his eyes' to be insufficient and does not justify the manner in which he has reacted. Consequently, I believe that Mo has shown significantly poor judgment...and fall well below the expectations set out in the NFA code of conduct and ethics section 9 (subsections 3 and 7) which focuses on always trying to defuse situations before they escalate...which I consider, Mo clearly failed to do...”

46.2 John Stryker took the view that the alleged events in the classroom “is less clear cut” and it clear from the report he was attempting to consider the evidence before him objectively, including criticism of staff.

46.3 In relation to EA of John Stryker explored the incident and concluded the police “viewpoint” that the claimant acted in self-defence was perfectly understandable and “in line with the law of the land...though the police have a basic knowledge of the school, the environment and the types of pupil we have in our care and their only focus is ensuing the law hasn't been broken...there is a response to Mo's actions from a company policy and procedural standpoint...Team Teach provides a framework for the staff...actions should be reasonable, proportionate and necessary...I can empathise with the panic that Mo may have been feeling when met with the level of aggression he claims...I...fail to believe that striking EA was his only option. Mo demonstrates this by his actions after his punch whereby he moves close to EA and wraps his arms around him to prevent further strikes. This is one of a number of possible alternatives...I believe Mo hasn't been fully sported by the ethos, policies and procedures in place at the school and consequently this hasn't allowed his behavioural management skills to develop past the rigid structures that are in place. Thus meaning that these situations have occurred and Mo cannot effectively reflect on the errors of his practice, because essentially that is all he knows and doesn't see errors in his practice.”

46.4 It is apparent John Stryker was not adverse to criticising the respondent's ethos, policies and procedures around the use of sanctions, which he described as not being “conducive to effectively supporting SEMH pupils. Especially pupils with additional needs such as EA has....Despite this, I do however believe he has shown substantial poor judgement that has led to issues not being managed in a way that effectively safeguarded the needs of pupils in his care.”

46.5 A number of learning points were set out including “risk assessing the claimant, the respondent's failure to provide Positive Handling Plans and more

worryingly for all staff at Belmont, it appears that there is no provision for them to learn about a pupil's triggers, stages of crisis, or appropriate responses in dealing with said crisis. Whilst nothing is certain with regards to these two incidents, I feel that if Mo had been provided with this facility then he may have approached each incident differently and better prepared." I found the investigation report to be reasonable, objective and covered the main allegations.

#### Disciplinary action

47. In a letter dated 4 December 2019 the claimant was invited to a disciplinary hearing to answer two allegations; "it is alleged to have pinned a pupil up against the wall after a verbal confrontation and then verbally threaten the pupil with violence using abusive language; further particulars being that on 30/9/19 you behaved outside of the code of conduct and Ethics and team teach guidelines in your handling and de-escalation of pupil DR." The second allegation alleged "that you used excessive force by assaulting a pupil (EA) during an altercation on 8/10/19 resulting in physical harm to both parties." The letter complied with the requirements set out in the ACAS Code of Practice, although criticism can be made of the fact the allegations did not expressly include a reference to the claimant's behaviour after the alleged shoulder barge by DR, which it could have done. However, the position was made clear in the Investigation Report provided to the claimant, who was fully aware of what was to be explored at the disciplinary hearing, that he would be given "every opportunity in the hearing to answer the...issues" and if proven, the allegations could constitute gross misconduct resulting in summary dismissal. The claimant was provided with 28 documents in all, including the Disciplinary Procedure.

#### Disciplinary hearing

48. The disciplinary hearing took place on the 11 December 2019 with Craig Albon, assistant head of another school unknown to the claimant and other teachers working at Belmont School and involved in the incident, and a note taker. The claimant had been informed of his right to be accompanied and welfare support attended. The hearing was recorded and a transcript, which I considered in great detail, provided.
49. At no point did the claimant raise any issue with understanding the allegations or lack of training, having been asked at the outset "did you do safeguarding and team teach as part of that stuff?" when exploring the claimant's induction and training, to which the claimant responded that he had.
50. With reference to the allegation involving DR the claimant acknowledged the shoulder barge "doesn't look like this" on CCTV "but I did feel the barge at the time." The CCTV evidence was viewed again and Craig Albon explored with the claimant whether the statement he had given "accurately reflects" the footage and his use of terminology such as "confronting," questioning whether vulnerable young people in a school setting should be confronted as opposed to teachers modelling the behaviour they expect. The claimant conceded he was at fault, "it is not something I have been trained to do... I would have done something differently" acknowledging that whilst he did not accept DR had been approached

in an “aggressive manner...but I can see how someone would perceive what I did was aggressive” and “I wish on reflection I would have dealt with it another way ...I was irate...agitated...the reason staff have asked me to leave the room is because...I’m a member of staff...more likely to follow instructions.”

51. The allegation that the claimant had pushed DR against the wall was explored, and Craig Albon accepted this incident had not taken place and the claimant had not sworn at DR or threatened him, and I am satisfied Craig Albon dealt with the evidence objectively and without favour to DR, ensuring the claimant had a fair hearing.
52. The claimant was questioned about rewards and sanctions, RPI’s and TT techniques, which he confirmed he was “ok and confident” at using. He acknowledged that after the DR incident the respondent following a risk assessment had told him to “stay away from intervention and where there will be physical intervention...”
53. TT training/safeguarding was discussed and from the notes it is clear the claimant did not dispute he had been given this training, and nor did he raise any issues of inadequacy of training or incomplete training, confirming he was comfortable using RPI, and used physical intervention “once a fortnight, once a week.” When Craig Albon commented “I know you have the training” the claimant did not say that he required further training and/or training was incomplete. There were a number of references to the claimant’s Team Teach training throughout the hearing, with the claimant acknowledging the training he had received, the significance and importance of it including recording and reporting which the claimant did not always do, and some of the writing up was brief.
54. The claimant set out his recollection of the incident with EA from the outset, which I do not intend to repeat here other than to record he made it clear EA was acting in such a way that he could be a danger to himself and others. The claimant informed Craig Albon it was “not uncommon” for EA to shout and disrupt lessons, “there’s been a lot of bending backwards for this lad” and he asked the teaching assistant to remove EA from class. The claimant’s decision to remove EA was explored and the alternative of getting someone else to support rather than ending up in physical intervention following EA throwing chairs around, “which he tends to do stuff like that.” Reference was made to EA being on the spectrum and staff being “ultra-cautious” EA’s parent having “made numerous complaints” in the past.
55. The claimant described to Craig Albon how EA was compliant when he was walked out of the room by the claimant and teaching assistant using RPI, then slammed the claimant into the filing cabinet...punched me 3-4 times three or four times at least in the face and, considering the size of him and his build....I feared for my life. I was scared...being assaulted by a 16-year old....It was a split second to defend myself...” The claimant explained that he did not have the time to think about doing the bear hug until later, “I’ve struck him once in the face to stop him momentarily, that worked for a couple of seconds he, he stopped and that gave me enough time to gather my thoughts and he come at me again...he was throwing more punches and at that point my Team Teacher training had kicked in and I just bear hugged him.”

56. Craig Albon explored with the claimant why he had not continued to use the Team Teach techniques when he was already in a figure of four using Team Teach and close the gap down earlier, to which the claimant responded that he did not get time to think and have the opportunity to implement “my Team Teacher skills” in contrast with earlier incidents involving physical aggression by children when “I’ve used my Team Teach training...we’ve resolved the situation that way...”
57. Craig Albon also explored the “variants” in the evidence concerning when EA had hit the claimant stating “I appreciate your honesty that you’ve said that you’ve hit him once, I look at that and I can’t put myself in your position, I really can’t and I struggle to see hitting a young person when we’re training many different ways is the go, the first go-thing.” Mr Beehmah submitted Craig Albon’s comment showed a closed mind and was evidence he had prejudged the claimant’s guilt. I do not agree, and the comment should be interpreted in the light of everything else that was said and explored during a lengthy disciplinary process when Craig Albon was genuinely attempting to understand why the claimant had punched EA in the face.
58. The claimant’s position was “We’re are both victims...It’s always using Team Teach, but in this situation, he’d given me no opportunity to do that.” The claimant explained he had used techniques outside TT before “sometimes like the bearhug method but not to the level of this....I think I managed the situation from the beginning but I don’t know what else I could have done apart from the bear hug.” Whether or not the claimant should have carried out a bear hug rather than punch EA in the face was one of the key issues for Craig Albon. The claimant when asked whether striking EA in the face was reasonable, proportionate and necessary, an appropriate action or could he have attempted something else responded “other than striking him, the only thing that comes to mind...like you said...it was, the bear hug or the hold, but it was a split second decision I had, that I made at the time to protect myself from, you know, permanent damage... when I was given the opportunity to think...that one or two seconds, I did revert to my training.”
59. Reference was made by the claimant’s welfare support representation supporting the claimant to the following; “there are some systematic issues at the school and we are working on them. He is a first-class member of staff...I believe there are mitigating circumstances...”
60. Following the hearing Craig Albon reviewed the CCTV footage again and held a follow up call with SC, the female assistant teacher/ pupil support worker, which was recorded concerning the incidents with DR and EA. With reference to the DR incident SC described hearing raised voices and the claimant’s voice was “heightened” and he looked upset. With reference to EA SC described how she the claimant went out of the door in front of her, she saw EA “with his hands up...raised and really aggressive like he was going to go for Sir.” SC confirmed taking EA out of the class and not the other pupils was “my call at the time,” that EA had forcefully pushed the claimant into the filing cabinet...Sir went after him and then he turned round and his face was really aggressive and he’s like swinging his arms about...raising his arms up in front of him...squaring up, puffing your chest out...swearing...fists up and clenched...I didn’t see any

punches, anybody punch, any punches, I just saw the squaring up to him, and then obviously I was turning round trying to calm the kids.” SC reiterated a number of times that she had not seen any punches and EA said, “Sir’s punched me in the face” when she was cleaning up his head, telling him “I didn’t see it...I saw you lashing your arms out at Sir”. SC described how she was in shock and shaking when she wrote up the report, panicking because EA was covered in blood.

61. Craig Albon at the disciplinary hearing covered all of the allegations in full, taking into account the claimant’s responses to questions and the information provided and representations made by the claimant, which he objectively assessed. The claimant was given a fair disciplinary hearing at which he could fully put forward his defence including the mitigation, his good character and work ethos. Discrepancies between the witness reports were noted, and the discussion with SC was aimed at resolving some of these.
62. With reference to DR, Craig Albon concluded there was not enough evidence to hold the claimant had threatened DR with violence or sworn at him, but he did believe on balance the claimant had raised his voice to DR, a decision that was reasonable and fell within the band of reasonable responses taking into account evidence from teachers, SC and the claimant’s admission.
63. Craig Albon concluded the claimant’s conduct towards DR was not appropriate, and contrary to the claimant’s allegation that DR had shoulder barged him, he accepted that from the CCTV evidence it looked more like a “nudge.” Craig Albon was concerned that the “clear discrepancy” in the claimant’s allegation made it difficult to understand why he followed DR into the room. He did not accept the claimant’s evidence that he wanted to “nip in the bud” DR’s historic behaviour was not reasonable justification and “did not marry up with the reports of the claimant being in a heightened emotional state and being asked to leave the room by other staff members.” Craig Albon held a genuine belief that the claimant, who was “very irate” at the time, approached DR to confront him, he was not in control and the situation had to be de-escalated by other staff. He genuinely believed the claimant had escalated the situation into an incident and his actions could have led to a physical altercation with EA “which could have placed the pupil, himself and others at risk. I felt that the claimant had taken that risk unnecessarily.”
64. Craig Albon was concerned with the claimant’s admission that it was not a response he had been trained to adopt, and yet he still attempted to rationalise it, concluding on balance “the claimant had not acted in the way a responsible teacher and adult should be acting. I understand that working with children who attend a school like Belmont would have been challenging...staying in control and following safeguarding policies is crucial to prevent situations from escalating which will ultimately safeguard pupils and staff...the claimant had failed to act in line with Teachers’ Standards Part 1 section 7”. Reference was made to the school’s behavioural policy and sanctions system. Craig Albon held a genuine belief that the claimant had not acted in line with Part Two of the Teacher’s Standards, he had “fallen short of the requirements of Team Teach” and the “Code of conduct and Ethics, including the need to set a good example, treat children and young people fairly and with respect (paragraphs II and III



respectively), safeguard...(paragraph 2) and manage behaviour appropriately (paragraph 9).

65. Mr Bheemah in submissions criticised Craig Albon for reaching findings that do not relate to the allegations put to the claimant, maintaining the conclusions drawn do not relate to the allegations and suggesting the claimant should have been provided with the policies referred to in the dismissal outcome letter. I do not agree. It is apparent from the contemporaneous evidence that the claimant fully understood the allegations and Craig Albon dealt with them all in his outcome letter, which reflected the incidents set out within the Investigation Report and fully explored at the disciplinary hearing. The claimant was aware of the policies and procedures referred to and in which he had received training. He was fully aware that there could be consequences for his behaviour towards DR and EA. The claimant was subject to a risk assessment and instruction not to take part in physical restraints, and that no policy expressly provided a provision whereby a teacher could punch a pupil in the face, even as an act of self-defence.
66. With reference to the allegation concerning EA Craig Albon took the view it was "concerning" the claimant and SC had removed EA using an RPI hold (A 'figure of four hold') when EA was leaving the room willingly and not posing a safeguarding risk...EA had an autism diagnosis can mean heightened sensitivities to sensory input, I was concerned that the decision to use a RPI hold (physical contact with pupil) could have escalated EA while he was potentially already heightened. It is also concerning that the claimant was already on a risk assessment which advised him to avoid physical intervention (and of which he was aware) and he still engaged in it, particularly where there did not seem to be sufficient cause for it." On the evidence before Craig Albon I found it was reasonable for him to have held this view, and his conclusion fell well within the band of reasonable responses.
67. Craig Albon was concerned the claimant had not safeguarded EA by looking for additional support from other staff, and as EA's disruptive behaviour in lessons was "quite common" he should have appreciated the situation could escalate, a figure of four was used "which suggested there was a safeguarding risk and a heightened situation." Craig Albon was worried the claimant had misjudged the situation and had not been aware the situation might escalate further.
68. With reference to the claimant punching EA in the face, Craig Albon noted the account of the incident from the claimant did not "entirely correlate" with the account of SC in which EA went out the door first followed by the claimant before the violence occurred, and he was entitled to conclude preferring SC's evidence that by following EA the claimant escalated the situation and this led to EA squaring up to the claimant. There is a difference in accounts, although it is uncontroversial the claimant punched EA in the face. Craig Albon had concerns about the recording of such incidents by the claimant, SC and other staff with good reason. It is apparent SC's written record was less detailed than the information she provided to Craig Albon many months after the event in which she referred to EA swinging at the claimant "a few times," was not asked and/or did not provide any information on whether she had witnessed any punches closer to the event, and did not mention the fact that when she was assisting EA

who was covered with blood, being told he had been punched in the face by the claimant. The proper recording of such incidents is key when minds are fresh in the immediate aftermath if at all possible.

69. It was not unreasonable for Craig Albon to prefer the evidence of SC as to what transpired on the day in question, and his view that the claimant punched EA, a vulnerable pupil whose health and safety was the responsibility of the claimant, was outside the Team Teach framework. Craig Albon on the evidence before him, genuinely held a belief that the claimant should have taken other actions, such as moving away, block punches or as suggested by the claimant, bear hug sooner. He took the view the claimant punched EA as a “knee-jerk reaction...not in control of his own actions, at least until he engaged in the bear hug technique.” Craig Albon concluded the claimant’s use of force was excessive, and throughout his career he had never heard of a member of staff punching a pupil. I find it was reasonable for Craig Albon to arrive at this conclusion and hold this belief based on the evidence before him.
70. With reference to the findings made by the police that the claimant acted in self-defence, Craig Albon concluded this was a legal point “separate from the expectations on school staff who had been trained to work with vulnerable pupils and manage challenging behaviour safely.” His genuine belief that the claimant’s actions “fell far below those expectations” were reasonable, and fell well within the band of reasonable response given the vulnerability of EA who was autistic and had a number of behavioural issues that required specialist management by teachers, for which they received training including the claimant who confirmed to Craig Albon he felt comfortable using Team Teach. Craig Albon was satisfied the claimant had not acted maliciously, however, “he had made some very poor decisions which resulted in EA and the claimant being quite badly injured....he had failed to follow the Code of conduct and Ethics...as well as Teacher Standards...”
71. The claimant’s mitigation was taken into account, including a statement to the effect that the claimant was an “exemplary member of staff” with a good work ethic concluding that whilst it may be true, the two incidents “painted a different picture.” Craig Albon was entitled to take this view, which fell within the band of reasonable responses.

Dismissal: effective date of termination 19 December 2019.

72. The claimant was summarily dismissed. Craig Albon held a genuine belief that the claimant had “reacted emotively to both historic comments and a perceived coming together which you have taken as a shoulder barge...you have failed to follow professional boundaries and practice...as outlined in the Teacher standards Part 1 section 7 and part 2, based on a reasonable investigation.
73. Craig Albon held a genuine belief that the claimant’s action of punching EA in the face “were not malicious to inflict harm but you have failed to follow the NFAAG code of conduct and Ethics and professional boundaries...as outlined in the Teacher Standards...” based upon a reasonable investigation.

74. Mitigation was taken into account, including the claimant's remorse, "openness" at the disciplinary hearing and his previously good employment record. Craig Albon took the view the claimant "did not adequately prove to me that you understood the impact of failing to comply with Team Teach and RPI procedures, safeguarding procedures, Teacher Standards and the NFA Group Code of Conduct and Ethics. The claimant was dismissed for both allegations taken cumulatively, although Craig Albon explained in evidence at this liability hearing that the more serious allegations which amounted to gross misconduct for which the claimant could have been dismissed was punching EA in the face.
75. The outcome letter complied with the ACAS Code of Practice.

#### Appeal

76. The claimant appealed on the 24 December 2019 setting out a number of grounds including unfair harsh decision that showed bias, maintaining the police report had been disregarded and given no weight. The claimant referred to Teaching Standards and Code of conduct maintaining he had not failed to follow it; however, the claimant did not say he lacked training and/or was unaware of the policies and should have been provided with copies either at or prior to the disciplinary hearing.
77. The claimant's appeal grounds were summarised by an employee relations advisor in a letter dated 6 January 2020 following which an appeal hearing before James Joyce, the assistant director, took place on the 16 January 2019 the claimant having provided a number of character references, including one from the head of science, describing him in glowing terms that were not before Craig Albon. It is clear from the tenor of the character references that the claimant was well respected by his colleagues, who were shocked and upset when he was dismissed against a backdrop of pupils, with specific reference by SC in her reference to EA's disruptive behaviour, running around the school and behaving aggressively towards staff. Other staff also refer to EA's difficult behaviour and history of aggression, "his unpredictability and non-compliance." The character references underlines the strain on teachers between managing difficult pupils such as EA and putting themselves at risk of disciplinary action culminating in a summary dismissal, when they are trying their very best and it is this factor which makes it all the more difficult to avoid substituting my subjective view coloured by the difficulties facing the claimant (and his colleagues) by stepping into the respondent's shoes as to the mitigation and sympathy for the claimant. I have expanded upon this further below.
78. The appeal invite letter met the requirements set out in the ACAS Code of Practice.

#### Appeal hearing 16 January 2020

79. I intend to only briefly deal with the appeal hearing having found the decision to dismiss by Craig Albon fell well within the band of reasonable responses open to a reasonable employer, and there were no procedural deficiencies to be corrected on appeal.

80. The appeal hearing was heard by James Joyce, it was recorded and the claimant accompanied. Contrary to Mr Bheemah's submissions the claimant agreed at the outset that the letter dated 6 January 2020 was an accurate reflection of the appeal points, which were subsequently explored in full of the claimant being given a full opportunity to have his say, which he did referring to various policy documents including the Department of Education: Use of Reasonable Force Guidance that "Governing Bodies should always consider where a teacher has acted within the law when reaching a decision on whether or not to take disciplinary actions against the teacher" arguing the conclusion made by the police that he had no other recourse other than the actions taken in self-defence, had been disregarded. A similar argument was put forward by Mr Bheemah in submissions today.
81. With reference to the first allegation involving DR, Mr Bheemah's submission to the effect that the claimant was surprised the first incident had been raised as an allegation in the first place, and it had been so with a view to ensuing the claimant's dismissal on the grounds of gross misconduct, was not a strong one. It is notable at the appeal hearing the claimant stated "I am naïve to the fact that as serious as the incident was, I am a victim to this. Maybe...going into the room after DR wasn't the best thing to do at the time...there was no malice...there was nothing aggressive I had thought I would get a written warning for this."
82. When James Joyce put to the claimant "there appears to have been two incidents...there is a potential that this could happen again, how would you respond again, the claimant stated "It is difficult to know at that" and agreed with the proposition that "no employee is experienced enough, or equipped to know how they would react they were to be punched."
83. The claimant accused John Stryker of asking leading questions, which was explored with him, including John Stryker' disregarding the views expressed by the police, and staff making statements that "gives insufficient evidence." There is a reference to the claimant stating, "I always said I am happy to do further training" and the risk assessment that was in place. In essence, the claimant's issue with Craig Albon's decision and the Investigation Report was that it was different to the conclusions drawn by the police, which the claimant believed, the respondent should have followed; he was the one who had been assaulted by a young man who was heavy and over 6 feet tall, and reacted in self-defence using reasonable force as defined by the European Convention of Human Rights. The minutes record the claimant questioning why EA had been allowed to return to school "Where do I stand in that? I see it that I am the victim here, and D has been able to return and I have been dismissed for defending myself against his assault" evidencing a complete and fundamental misunderstanding of the professional relationship between a teacher and a student with special needs who due to his autism and behavioural difficulties; a student unable to enter into main stream education. Mr Bheemah expressed a similar view during oral submissions, questioning whether EA was vulnerable in the first place, despite his presence at the school and the uncontroversial fact that he was difficult to manage in a classroom situation as evidenced by a number of the claimant's colleagues, not least the character references Mr Bheemah criticised the respondent for failing to take them into account.

84. The appeal took from 11am to 12.50pm and covered all of the grounds. Contrary to the claimant's belief, James Joyce dealt with the agreed grounds objectively and fully, he heard what the claimant had to say and took it into account before arriving at the decision. James Joyce was fully aware as regional director having been employed by the respondent for 18-years, of the training and safeguarding requirements, the training undertaken in safeguarding and restrictive physical intervention, and difficulties teachers had in managing pupils with social, emotional and mental health issues, and as in the case of EA, a autism diagnosis. He was aware of the policies and procedures including Team Teach, and their importance in safeguarding students and staff.
85. James Joyce through HR carried out additional investigation by asking a number of questions put to Craig Albon who confirmed the decision he made was based on his own conclusions arrived at on the balance of probabilities, and not the investigative report which he used to ask questions at the hearing, and the police report taken into account. James Joyce also spoke with John Stryker who confirmed the CCTV footage had not shown a shoulder barge, which was a correct analysis. I have viewed the CCTV footage a number of times, having been sent a copy by the respondent prior to oral submissions being made, and it is apparent there was no shoulder barge, as conceded by the claimant during the disciplinary process.
86. James Joyce considered the conclusions set out within the police report and was satisfied the fact it was not in the public interest to prosecute the claimant or EA did not preclude the claimant from being subject to the respondent's internal disciplinary policy, and the police investigation/conclusion was separate to the respondent's internal processes, a conclusion that fell well within the band of reasonable responses.
87. James Joyce set out the reasons why he believed Craig Albon's conclusions were not unreasonable in full (which I do not intend to repeat) referring to the School's and respondent's policies and safeguarding. The appeal outcome letter records "It is my belief that, even if the claimant had acted in self-defence in law, he had not acted in line with the above policies, or his Team Teach training by striking a pupil in the face...It was difficult to see how punching a child could be reasonable or proportionate...the claimant also realised that he was not using reasonable force when he punched EA. This was highlighted by the fact that once he the claimant punched EA and the attack continued, he adopted a different approach i.e. a bear hug, which I thought was probably more appropriate....I felt this has not created a safe learning environment for EA, and did not safeguard EA...while I accept that the police had found that the claimant had acted within the law, I felt that striking a pupil in the face did not meet the professional standards expected of teachers at the respondent's schools, including as set out in the Group Code of conduct and Ethics Policy, the Team Teach standards".
88. Finally, James Joyce made reference to the character reference, and concluded they "did not, in my mind, dismiss the serious nature of the incidents...the claimant stated he had two years of unblemished service...I thought the fact that he had been involved in two serious incidents of a similar nature weakened that argument." He concluded the claimant's behaviour had "created a major

safeguarding risk” and the situation regarding EA had become a safeguarding incident. He appreciated that staff can make mistakes and if that happens “able to reflect effectively and understand how they can handle the situation differently moving forward” concerned the claimant’s response that striking a pupil seemed appropriate at the time, and his reference to referring to himself as a victim and highlighting he had done nothing wrong. James Jones expressed his concern about reinstating the claimant “worried that training would not be effective to prevent similar incidents” in the future because he disagreed with the claimant’s statement that no employee would be experienced or equipped enough to know how they would react if they were punched by a pupil. Similar situations do arise and staff are trained to deal with them, and he was not confident the claimant had “reflected or could see that there were other, positive ways to approach and support young people in similar situations.” I find it was not unreasonable for James Joyce to reach this conclusion taking into account the claimant’s responses to his questions.

89. James Joyce held a genuine concern that the claimant could not be trusted to much has been learn from his mistakes and allowing him to return would seriously risk student welfare since safeguarding was fundamental. In short, he could no longer trust the claimant to work with vulnerable pupils, based on the responses the claimant gave to questions and his behaviour and the seriousness of both allegations taken cumulatively including his query why EA was allowed to return to the school when the claimant was the victim, which coming from a teacher responsible for a vulnerable student with autism, seemed “odd”.

Advertising the claimant’s job 23 January 2020

90. On the balance of probabilities I accept the evidence of James Joyce that he communicated the appeal outcome before the 27 January 2020 letter was sent to the claimant, on or before the 23 January 2020 and advertising the claimant’s role was not evidence of James Joyce prejudging the outcome. By the 22 January 2020 he had received the clarification from Craig Albon and was in a position to make a decision, which he did and communicated it to HR. The timing of the events is unfortunate, and it would have been better for the claimant had the vacancy been advertised after receipt of the appeal outcome letter, nevertheless, there was no procedural unfairness.

Appeal outcome letter

91. The appeal was dismissed in a 3-page letter dated 27 January 2020 setting out the reasoning of James Jones. The letter set out all the documents references including the Group code of Conduct and Ethics Policy and The Department of Education: Use of Reasonable Force Guidance – Published July 2013. There is no reference to reputational impact of the claimant’s actions and no satisfactory evidence James Joyce took into account this or the threat by EA’s parents to go to the press. In short, there is no reference in either the dismissal or appeal outcome letter that reputational damage caused to the respondent was in the forefront of any decision-making process, and so the Tribunal found.

Law

92. The legal principles are largely undisputed between the parties.

93. Section 94(1) of the Employment Rights Act 1996 (“the 1996 Act”) provides that an employee has the right not to be unfairly dismissed by her employer. Section 98(1) of the 1996 Act provides that in determining whether the dismissal is fair or unfair, it is for the employer to show the reasons for the dismissal, and that it is a reason falling within section 98 (2) of the 1996 Act. Section 98(2) includes conduct of the employee as being a potentially fair reason for dismissal.

94. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent’s undertaking) the employer acted unreasonably or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

95. Where the reason for dismissal is based upon the employee’s conduct, the employer must show that this conduct was the reason for dismissal. For a dismissal to be procedurally fair in a case where the alleged reason for dismissal is misconduct, Lord Bridge in Polkey –v- A E Dayton Services Limited [1981] ICR (142) HL said that the procedural steps necessary in the great majority of cases of misconduct is a full investigation of the conduct and a fair hearing to hear what the employee has to say in explanation or mitigation. It is the employer who must show that misconduct was the reason for the dismissal, and must establish a genuine belief based upon reasonable grounds after a reasonable investigation that the employee was guilty of misconduct – British Home Stores Ltd v Birchell [1980] CA affirmed in Post Office v Foley [2000] ICR 1283 and J Sainsbury v Hitt [2003] C111. In short, the Tribunal is required to conduct an objective assessment of the entire dismissal process, including the investigation, without substituting itself for the employer, which I have carried out in the case of Mr Patel, satisfied that the legal principles were met at investigation, disciplinary hearing and appeal stage.

96. The Court of Appeal in British Leyland (UK) Ltd v Swift [1981] IRLR 91 set out the correct approach: “If no reasonable employer would have dismissed him then the dismissal was fair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair...in all these cases there is a band of reasonableness, within which one employer might reasonably take one view and another reasonably take a different view.

97. In between extreme cases of misconduct there will be cases where there is room for reasonable disagreement amongst reasonable employers as to whether dismissal for the misconduct is a reasonable or unreasonable response: LJ Mummery in HSBC Bank Plc v Madden [2000] ICT 1283.

98. Mr Bheemah referred to the case referenced above, and the following principles;

- 98.1 Boys and Girls Welfare Society v McDonald [1996] IRLR 129, the EAT clarified that there is a neutral burden of proof when it comes to establishing whether the *Burchell* test has been satisfied. If the tribunal finds that the *Burchell* test is satisfied, it will then consider whether the decision to dismiss fell within the range of reasonable responses available to a reasonable employer in the circumstances. The tribunal's findings in this regard will depend on the individual circumstances of the case.
- 98.2 The range of reasonable responses test applies both to the decision to dismiss and to the investigation Sainsbury's v Hitt (above). This means that the tribunal has to decide whether the investigation was reasonable, not whether it would have investigated things differently.
- 98.3 It is irrelevant whether or not the tribunal would have dismissed the employee if it had been in the employer's shoes: the tribunal must not substitute its view for that of the employer: Foley v Post Office; Midland Bank plc v Madden (above).
- 98.4 The degree of investigation required very much depends on the circumstances. The Court of Appeal in Shrestha v Genesis Housing Association Ltd [2015] EWCA Civ 94 made it clear that it is not necessary for an employer to extensively investigate each line of defence advanced by an employee. This would be too narrow an approach and would add an "unwarranted gloss" to the *Burchell* test. What is important is the reasonableness of the investigation as a whole. The employer should assess its approach taking account of the following: The strength of the prima facie case against the employee, and the seriousness of the allegations and their potential to blight the employee's future.
- 98.5 In Ilea v Gravett [1988] IRLR, it was pointed out that: "At one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation, including questioning of the employee, which may be required, is likely to increase."
- 98.6 In A v B [2003] IRLR 405, it was stated that the employer's investigation should be particularly rigorous when the charges are particularly serious or the effect on the employee is far-reaching. The principles were reinforced by the Court of Appeal in Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721, in which an employee with four years' service faced a not only a "*a real risk that her career would be blighted by this dismissal*" but certain deportation and the end of any opportunity for her to build a career in this country (*paragraph 60*).
- 98.7 In A v B (above) Elias J made the following points:
- Serious allegations of criminal misbehaviour must always be the subject of the most careful investigation (at least where they are disputed), bearing in mind that the investigation is usually being conducted by laymen and not lawyers.



- Even in the most serious cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial. However, careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as they should on the evidence directed towards proving the charges.
- This is particularly the case where, as is frequently the situation, the employee is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses.
- Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field. In such circumstances anything less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances. (Paragraphs 60 and 61.)

98.8 Roldan was considered by the Court of Appeal in Crawford and another v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402, which held that the dismissal of two nurses for tying a patient to a chair was unfair due to defects in the disciplinary procedure followed. The court made it clear that where a finding of misconduct will blight an employee's future career, the standard of fairness and thoroughness required from the employer will be high, and it will be correct for tribunals to scrutinise the procedures followed particularly carefully.

98.9 The term "gross misconduct" connotes the most serious types of misconduct, such as theft or violence, warranting instant dismissal. It will be conduct that "*so undermines the relationship of trust and confidence ... that [the employer] should no longer be required to retain [the employee] in his employment*" (Neary v Dean of Westminster [1999] IRLR 288).

98.10 What constitutes gross misconduct is a mixed question of fact and law, per Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09, in which the EAT summarised the case law on what amounts to gross misconduct and found that it involves either deliberate wrongdoing or gross negligence (paragraph 113).

99. The question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case, having regard to equity and the substantial merits of the case. The Tribunal will not substitute its own view for that of the respondent. In order for the dismissal to be fair, all that is required is that it falls within the band of reasonable responses open to employer. It is necessary to apply the objective standards of the reasonable employer – the "band of reasonable responses" test – to all aspects of the question of whether the employee had been fairly dismissed, including whether the dismissal of an employee was reasonable in all the circumstances of the case.

100. The test remains whether the dismissal was within the range of reasonable responses and whether a fair procedure was followed. Section 98 (4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to

the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.

#### Wrongful dismissal

101. Mr Bheemah referred to a number of cases and legal principles not directly relevant. I agree a wrongful dismissal is a dismissal in breach of contract and fairness is not an issue: the sole question is whether the terms of the contract, express or implied, have been breached. The employee will have a claim in damages if the employer, in dismissing, breached the contract and caused loss.

#### Conclusion: applying the facts to the legal principles.

102. This has been a difficult case to decide as I have a great deal of sympathy with the claimant and the predicament he found himself in with respect to EA particularly, although with reference to DR the claimant was the author of his own misfortune. I agree with the respondent's analysis of this case, which is that the issues are relatively straightforward and involve legal principles well known to the Tribunal. I also find Mr Bheemah in the 53-page written submissions totalling 122 paragraphs, whilst acknowledging the considerable amount of effort he has put into this case to assist the claimant, it has been overly complicated by the minutia. I do not intend to deal with all of the individual submissions, and have concentrated on applying the facts found above to the legal principles.

103. With reference to the first agreed issue, namely, did the respondent have a potentially fair reason for dismissing the claimant, I found that it did. The respondent relies on 'conduct' as being the potentially fair reason for the claimant's dismissal, pursuant to s. 98(2)(b) ERA 1996. Mr Sugarman referred me to the legal principle "the reason for the dismissal "...is the set of facts known to the employer or, it may be, of beliefs held by him which cause him to dismiss...." Abernethy v Mott, Hay and Anderson [1974] ICR 323 at 330 per Cairns LJ). It is agreed between the parties in oral submissions that once the respondent has satisfied the burden of establishing a potentially fair reason for the dismissal, I will then consider the reasonableness of the decision to dismiss (s. 98(4) ERA) and there is no burden on either party at this stage.

104. Further or in the alternative, the respondent contends that the claimant was dismissed for 'capability' (s.98(2)(a) ERA 1996) and/or some other substantial reason (s.98(1)(b) ERA 1996), and with reference to this head I find on the balance of probabilities the respondent has not satisfied the burden. As indicated in the finding of facts I can find no evidence at the time the dismissing officer came to his decision the respondent's reputation was communicated as a reason to the claimant. It is clear from the contemporaneous documents and Craig Albon's evidence including his witness statement, that his primary concern was safeguarding the vulnerable pupils from the claimant, who he was satisfied has received training and support. I will return to this in the light of Mr Bheeman's submission, which I did not accept had any basis, that the claimant's lack of training was a key issue when it

came to unfairness and whether the decision to dismiss fell within the bands of reasonable responses.

105. With reference to the next issue for which the burden of proof is a neutral one, namely, if so, was the respondent's decision to dismiss the claimant reasonable in all of the circumstances of the case, pursuant to s. 98(4) ERA 1996, I found on the balance of probabilities that it was, satisfied that when considering reasonableness of the dismissal for 'conduct' under s. 98(4) ERA 1996, the Burchell test had been met according to the band of reasonable responses test applied to all three strands – Iceland Frozen Foods (above). Turning to the individual strands set out in the Burchell test, on the balance of probabilities I was satisfied Craig Albon genuinely believed that the claimant was guilty of the misconduct alleged for the reasons set out above, he had reasonable grounds upon which to sustain that belief and had carried out such investigation as was reasonable in all the circumstances of the case.

106. With reference to the next issue, namely, was the claimant's dismissal procedurally fair, I found that it was. I did not find the outcome of the claimant's appeal pre-determined, as alleged at paragraph 49 of the particulars of claim. I did not accept Mr Bheemah's submission that the allegations were not properly set out in the disciplinary invite letter and did not correlate with the disciplinary outcome letter. The correspondence should be read alongside the Investigation Report and the fact is that throughout the disciplinary process from investigation to appeal the claimant never complained he was not made sufficiently aware of the allegations in order to properly defend himself. It is apparent from the transcripts of the disciplinary and appeal hearing the claimant understood the allegations, he defended himself in full, answering questions put to him which he understood, including references to policies and procedures he had been trained in, was aware of and had access to, such as Team Teach, the Teacher Standards and so on. Further, the claimant did not need a policy or a procedure to inform him that his behaviour towards DR and EA could amount to gross misconduct and dismissal.

107. The degree of investigation carried out as set out in the Investigation report, and undertaken at disciplinary hearing and appeal stage fell within the band of reasonable responses. It was not perfect but perfection is not a requirement. I have already commented on the written records and circumstances when staff have failed to properly record what happened, for example SC who may have been able to better recollect if she had seen any punches that impacted from either DR and ER had she addressed her mind to recording the incident on the day it happened. SC was the only adult and member of staff who witnessed the incident with EA, nevertheless, I took the view there was sufficient information before the respondent to arrive at a fair determination, bearing in mind the claimant's responses at the investigation, appeal and disciplinary stage as recorded above. Everyone involved in this case was aware of the seriousness of EA and the claimant's behaviour, and the potential career limiting effect on the claimant's future as a teacher.

108. The claimant criticises the respondent for failing to advise him of all the allegations before the investigating fact-finding meeting. I do not find this amounted to an unfairness in the process, preferring Mr Sugarman's submission that there is no such requirement, and accept a number of employers will call employees into an investigation meeting taking them by surprise by the allegations. Given the

seriousness of the events concerning DR and EA, the claimant expected to be issued with a written warning in relation to DR and he would have known as a matter of common sense there would be an investigation into the circumstances that resulted in him punching EA in the face causing injury. It is unlikely the investigation would have taken the claimant by surprise, and there was no procedural unfairness. The investigation fell well within the band of reasonable responses and I do not accept Craig Albon approached the disciplinary hearing and the investigation he carried out with a closed mind, as submitted by Mr Bheemah, for the reasons already set out in the findings of facts above. Had he a closed mind there would be no point in contacting SC to check with her what had taken place, and make so much effort to understand why the claimant acted as he did during which he criticised the respondent's processes.

109. Finally, I found on the balance of probabilities that the dismissal was within the band of reasonable responses taking the proven allegations cumulatively, accepting Craig Albon's evidence that the incident involving EA alone amount to gross misconduct for which the claimant could have been summarily dismissed, although the disciplinary outcome letter does not make this clear, which it should have done. Mr Sugarman relying on the EAT decision in GM Packaging (UK) Ltd v Haslam UKEAT/0259/13/LA and Ham v Governing Body of Beardwood Humanities College, approved by the Court of Appeal [2017] EWCA 1629, see §8) submitted that the conduct in its totality amounted to a sufficient reason for dismissal under section 98(4), which I accepted given the factual matrix in this case.

110. When deciding whether the dismissal fell within the band of reasonable responses I was in danger of substituting what I would have done in the claimant's case, for example possibly not dismissed but issued a final written warning and provided further training, the latter being suggested by Mr Bheemah. Such an outcome would have been incorrect in law in accordance with Foley v Post Office; Midland Bank plc v Madden (above). I am mindful of the fact the damaging effect of EA's behaviour on the claimant and his poor decision making resulting in possibly limiting a teaching career for someone well-respected and valued by colleagues, all performing the difficult task of working under the demands and pressures of a school providing education and care for children who, through no fault of their own, experience social, emotional and mental health issues to such an extent that violence can occur towards staff and their needs are such that main stream school is not an option. I am also mindful of the fact that the pupils are vulnerable, disagreeing with Mr Bheemah that EA due to his age, behaviour and size was not a vulnerable child that had difficulty in managing a classroom/school situation due to his autism and other emotional problems.

111. I am mindful of Mr Sugarman's submission that it is for the employer, who has the expertise of the industry in question, to judge the severity of the offence it has concluded the employee is guilty of. The Tribunal must be particularly careful not to step into the employer's shoes at this stage - Court of Appeal held in Tayeh v Barchester Healthcare Ltd [2013] EWCA Civ 2. The investigating officer, Craig Albon and James Joyce are aware of the safeguarding requirements for vulnerable children, the staff training which the claimant undertook in such matters both for his own protection and that of students, and the seriousness of confronting DR in circumstances where DR had not committed any violence towards the claimant, and punching in the face EA, injuring him to such an extent that SC was in shock,

cleaning up the blood (an injury partly caused by EA falling against a water fountain) when she was told by EA that the claimant had punched him in the face. Taking into account the factual matrix, Craig Albon's decision that the claimant's mitigation did not warrant a lesser penalty than summary dismissal fell within the band of reasonable responses, and it cannot be said no reasonable employer would have dismissed in circumstances where serious breaches of safeguarding, a statutory requirement for those working with vulnerable children, occurred. The undisputed evidence before me was that safeguarding pupils was a fundamental and key requirement of the teaching role, and it was not unreasonable for Craig Albon and James Joyce to form a view that the claimant had no insight into his actions, especially concerning EA, and could not be trusted to continue working with vulnerable pupils as the safeguarding risk was too great.

112. Much has been made of the police outcome by the claimant during the disciplinary process and Mr Bheemah in these proceedings. The point relied upon is different to the legal principles expressed in A v B (above) where it was stated that the employer's investigation should be particularly rigorous when the charges are particularly serious or the effect on the employee is far-reaching. As noted by Mr Bheemah, Elias J made the point that even in the most serious cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a less than an even-handed approach to the process of investigation would not be reasonable in all the circumstances. In Mr Patel's case I found there was an even-handed approach. Mr Sugarman submitted that the fact the police conclude there ought to be no prosecution does not mean an employer cannot investigate or fairly dismiss. Reference was made to Dhaliwal and others v British Airways Board [1985] ICR 513, the fact that there had been acquittals in the criminal courts did not mean dismissals could not be fair. I agreed with Mr Sugarman that the two processes are "obviously different" with different burdens of proof as discussed during oral submissions by both parties, and I took the view that it was sufficient for Craig Albon and James Joyce to refer to the police's decision and explain its relevance to their findings, which they did.

113. Finally, Mr Sugarman referred me to a first instance decision which I am not bound by, and whose facts were different to those before me today.

114. In conclusion, dismissal was within the range of reasonable responses and a fair procedure was followed. The respondent has fulfilled the requirements of subsection (1), and having regard to the reasons shown by the respondent, including the size and administrative resources of the respondent's undertaking, it acted reasonably in treating it as a sufficient reason determined in accordance with equity and the substantial merits of the case. The claimant was not unfairly dismissed. He was fairly dismissed on the grounds of misconduct and the claim for unfair dismissal is dismissed.

#### The remaining agreed issues

115. There is no requirement for me to deal with the "Polkey no difference rule" or contributory fault. In the alternative, had I found the dismissal to have been unfair either substantively or procedurally I would have gone on to find the claimant's conduct was culpable and blameworthy in the sense that it was foolish, perverse or unreasonable in the circumstances (Nelson v BBC (No.2) [1980] ICR 100).

116. Mr Bheemah referred me to Steen v ASP Packaging Ltd [2014] ICR 56, EAT, the EAT, summarising the correct approach under S.122(2), held that it is for the tribunal to: identify the conduct which is said to give rise to possible contributory fault, decide whether that conduct is culpable or blameworthy, and decide whether it is just and equitable to reduce the amount of the basic award to any extent. I did not accept his submission that there should be no reduction to claimant's basic award on account of contributory conduct. The incident involving DR can reasonably be said to have contributed towards claimant's dismissal, the claimant expected a written warning and it cannot be said at the very highest, this was a training issue.

117. With regard to the incident involving EA, it is irrelevant to my assessment of contributory fault that the police report exonerated the claimant of any wrongdoing. I do not accept, having regard to the particular facts of this case, the claimant acted proportionately in self-defence. He may have made a split-second decision to act when in fear for his personal safety, but it was the wrong decision going against all safeguarding principles when dealing with vulnerable children. I find it difficult to reconcile the fact that the claimant in one second punched EA in the face, and then in another followed his training and protected both himself and EA in a bear hug, concluding the claimant had reacted irrationally and to his detriment as a consequence of EA's behaviour that afternoon in breach of all his training and the respondent's policies and procedures. I did not accept Mr Bheemah's submission that the respondent cannot reasonably have expected claimant to make a rational decision in that split-second moment given the aggressiveness of EA's assault and the fact that it took claimant completely by surprise, preferring the evidence before me that the claimant made a number of unfortunately decisions that culminated in EA's actions, which he should have expected given EA's history of poor behaviour and autism diagnosis.

118. I do not accept the claimant was not dismissed because of the *specific allegations* against him and no findings were made in respect of those allegations. I did not accept Mr Bheeman's submission that it cannot be said the specific allegations against the contributed to his dismissal. The allegations were straightforward and not all were made out, for example, allegations concerning the claimant's alleged violent behaviour against DR. The claimant was dismissed for his behaviours towards DR and EA, this was clear to both the claimant and the respondent at the time, notwithstanding the gloss Mr Bheemah attempts to put on the reasons for dismissal now.

119. Turning to the deduction to be made under S.123(6) ERA, a causal link between the employee's conduct and the dismissal must be shown. This means that the conduct must have taken place before the dismissal, the employer must have been aware of the conduct, and the employer must have dismissed the employee at least partly in consequence of that conduct. This test has been met.

120. Mr Bheemah referred to Hollier v Plysu Ltd [1983] IRLR 260, EAT, the EAT suggested that the contribution should be assessed broadly and should generally fall within the following categories: wholly to blame (100 per cent); largely to blame (75 per cent); employer and employee equally to blame (50 per cent); slightly to blame (25 per cent). He submitted that there should be no reduction to the compensatory award on account of contributory conduct for the same reason as the basic award.

121. Taking the claimant's actions towards DR and EA cumulatively, his conduct was foolish, perverse and unreasonable in the circumstances set out within the factual matrix. He was wholly to blame for his dismissal, and unusually, had I found the claimant was unfairly dismissed, I would have gone on to conclude that it was just and equitable in all the circumstances to reduce the basic and compensatory award by 100 percent, despite my sympathy for the claimant who has suffered by the poor decisions he made when dealing with DR and EA.

**Wrongful Dismissal**

122. With reference to the issue, namely, was the respondent entitled to summarily dismiss the claimant, given my findings above, it was. The claimant's conduct constituted a repudiatory breach of contract and his dismissal without notice was therefore lawful.

123. The claimant has not continued with the unlawful deduction of wages claim for £50.00, which is dismissed.

11 May 2022  
Employment Judge Shotter

JUDGEMENT & REASONS SENT TO THE PARTIES ON

16 May 2022

FOR THE SECRETARY OF THE TRIBUNALS