EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103114/2023

Held at Dundee on 4, 5, 6 and 7 March 2024 and by means of the Cloud Video Platform on 12 March 2024

Employment Judge W A Meiklejohn
Tribunal Member Ms D McDougall
Tribunal Member Mr R Martin

Mr Mark Dibnah	**Claimant** **Represented by:** **Mrs C Dibnah – Claimant's wife**
Craigclowan School and Nursery	**Respondent** **Represented by:** **Mr C McDevitt of Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is as follows –

(a) The claimant's claim of unfair dismissal succeeds.

(b) For the reasons explained below, no award of compensation is made at this stage. If the parties are unable to agree compensation, the case will be listed for a remedy hearing.

REASONS

1. This case came before us for a final hearing to deal with both liability and remedy. The claimant was represented by Mrs Dibnah and the respondent by Mr McDevitt.

2. The case had originally been listed for a five day hearing but circumstances dictated that this be curtailed to four days being 4-7 March 2024. It was not possible to conclude the hearing within that timescale but, fortuitously, all participants were available on 12 March 2024 when the hearing was completed by means of the Cloud Video Platform ("CVP").

Nature of claims

3. The claimant complained of unfair dismissal. He suggested in his ET1 claim form that he had been dismissed (a) because the respondent was in severe financial difficulties, (b) because he had involved himself in trade union work at the school or (c) for a reason related in some way to a child of the Ukranian family which he and Mrs Dibnah had hosted.

4. The respondent admitted dismissal and contended that the claimant had been fairly dismissed for gross misconduct. The claimant's dismissal related to an incident which occurred on 20 February 2023, and we refer to this in detail below.

Anonymisation

5. It was agreed that the identities of the respondent's pupils to whom reference was made in the course of the evidence we heard should be protected. I have issued an Order under Rule 50(3)(b) of the Employment Tribunal Rules of Procedure 2013 to that effect.

Evidence

6. For the respondent we heard evidence from –

   - Mrs J Moffat, Deputy Head Teacher
   - Mrs E Henderson, Head Teacher
   - Mr J Weatherby, School Governor.

7. For the claimant we heard evidence from –

- The claimant himself
- Ms S McDermott, former Teaching Assistant
- Mr A Reynolds, Teacher
- Mr J Gilmour*, former Head Teacher

*Mr Gilmour gave his evidence by CVP. We heard from the other witnesses in person.

8. We had a joint bundle of documents extending to 440 pages to which we refer below by page number.

Findings in fact

9. The claimant was an experienced teacher. His career spanned some 25 years. He was engaged by the respondent with effect from 28 August 2008. His contract of employment was signed on 14 March 2008 (38-51). It made reference to the respondent's Discipline and Dismissal policy (53-58).

10. The respondent is an independent school based in Perth. It comprises nursery and preparatory departments and caters for children aged between 3 and 13. The day-to-day management of the school is undertaken by the Senior Management Team ("SMT") which, at the time of the events described below, comprised Mrs Henderson, Mrs Moffat and Mr T Kerrigan, then Bursar. Strategic oversight is provided by the School's Board of Governors.

Incident on 20 February 2023

11. The claimant was teaching a class of 9 pupils on this date. The claimant described the pupils as

"*behaving in a very silly manner*" .

It was the first day back after half-term and the claimant said they were

"not back in the groove of learning".

He divided them into two groups. He assigned them a task which they were not carrying out.

12. The claimant focussed his attention on pupil A. He said that pupil A's behaviour had previously been *"exceptional"* but he had started to *"mimick the less good behaviour of the rest of the class".* In his evidence the claimant described what happened next in these terms –

> "*I went over to A. I took his arm, sat him down, looked him in the face and told him his behaviour was not acceptable. I told the rest of the group, then told the other group. It had the desired effect. They got down to the activity …."*

13. The respondent has a system for recording incidents, for example if some form of sanction has been applied. The claimant did not record what happened with pupil A. He did not regard it as an *"incident".* As he put it, *"I'd achieved what I wanted in the lesson".*

Complaint

14. On 21 February 2023 Mrs Henderson received an email (105) from pupil P's mother. Pupil P had been in the same class as pupil A the previous day. Pupil P's mother said in her email that pupil P –

> *"….got the fright of her life as the teacher yelled and grabbed a pupil by the arm and yanked him across the desk whilst shouting at him. He then grabbed his hair and lifted his head up and back whilst still shouting at him…."*

15. Mrs Henderson called in Mrs Moffat, showed her the email and asked her *"to find out if there was any truth in it".* Mrs Moffat then went to speak to the claimant. They met in the corridor outside the claimant's classroom. She showed the email to the claimant. When the claimant indicated that something had happened the previous day, the discussion moved into the claimant's classroom. Mrs Moffat said that the claimant told her that he *"had grabbed A's arm but not touched his hair".* The meeting between Mrs Moffat and the claimant was brief – *"a few minutes"* according to Mrs Moffat and *"two minutes"* according to the claimant.

16. Mrs Moffat then prepared a note recording her conversation with the claimant (107). In this she indicated that she had not disclosed to the claimant who had sent the email. She wrote this about the incident –

"….*He immediately said it did happen and that the child involved was A. Mark said A had been really silly during the lesson. Mark said he had grabbed his arm to get his attention and shouted at him. I asked about the other part of the email and he said he hadn't touched his hair or head…."*

Meetings with pupils (1)

17. Mrs Henderson then asked Mrs Moffat and Ms F Grant, another Teacher and Head of Pastoral Care, to speak to *"the children"*. They did so on 21 February 2023, speaking to pupil A and pupil P. Mrs Moffat prepared notes of these meetings (107). So far as relevant, these recorded as follows –

Pupil A

"….We asked him if he had enjoyed Monday's lesson and he said "not so much". When we asked him why he said Mr Dibnah had been angry and had shouted. We asked him to tell us what exactly had happened. He explained that they were in groups for discussion but they didn't have enough time in the groups. He said [pupil H and pupil W] were playing a game called who blinks first. [Pupil A] said the boys were playing it and he was spectating. The game was funny and he had been laughing along with other children. [Pupil A] said "Mr Dibnah got very angry and kicked the table. He pulled my hand and pulled up my hair and head. He shouted at us all. One group and then the other….""

Pupil P

"….*[Pupil P] said [pupil A] was being annoying and rude in the class and wouldn't stop. When Mr Dibnah asked him to stop he had answered "OK" which [pupil P] had thought could seem rude but [pupil P] didn't think [pupil A] understood that. [Pupil A] realised quickly that he said the wrong thing and said "I'm sorry, I'm sorry".*

[Pupil P] said then Mr Dibnah pushed his spinny chair back quite hard against the desk. He turned and grabbed [pupil A] by one hand, pulled him towards him whilst shouting angrily at him. [Pupil P] was quite

taken aback ….He was shouting at everyone else too. He pulled [pupil A]'s hair at the front and pulled his head back to get his attention. [Pupil P] said it wasn't roughly pulled.

Afterwards he was talking loudly to the class but not shouting.

We asked if he had ever been like that before and [pupil P] said no."

18. Mrs Moffat sent an email to Mr Kerrigan and Ms C Quinn, his assistant, on 22 February 2023 (106) attaching the notes recording her meeting with the claimant on 21 February 2021 and the meetings she and Ms Grant had with pupil A and pupil P on the same date. It was not clear from the evidence whether the scope of speaking to *"the children"* was determined by Mrs Henderson or left to the discretion of Mrs Moffat and Ms Grant. However, we believed it was more probable that this was decided by Mrs Henderson, in consultation with her SMT colleagues, than left to the discretion of Mrs Moffat and Ms Grant. We formed that belief because it was Mrs Henderson who directed the rest of the investigation into the incident.

Further information (1)

19. On 21 February 2023 Mrs Henderson called the family with whom pupil A and his family were staying at the time. She received an email response on 22 February 2023 (108) which included the following –

"[Pupil A]'s recollection of what happened on Monday is that there was a group of around 9 children in the class and that a couple of them were playing a game of staring at each other to see who would blink first. [Pupil A] said that he was not playing the game, just a spectator. Mr Dibnah came up to them and slammed the table and shouted something. [Pupil A] did not understand what Mr Dibnah said. [Pupil A] said he was smiling as he had been laughing at the game the children were playing. He said he was not laughing at Mr Dibnah. Mr Dibnah then pulled [pupil A]'s hair by his fringe and pulled his arm back. Mr Dibnah said something to [pupil A] which he thinks was along the lines of "take that stupidness out of your face". [Pupil A] said after this the children were quiet for the remainder of the class.

[Pupil A] does not have a bruised arm. He said it hurt a little bit when his hair was pulled …. Both [pupil A] and his Mum said Mr Dibnah has always been kind and treated [pupil A] well in the past. [Pupil A]'s Mum has said she is not looking for any action to be taken as she is comfortable it will not happen again…."

Mrs Henderson speaks to claimant

20. During the afternoon of 21 February 2023 Mrs Henderson went to speak with the claimant in his classroom. According to the claimant, she *"asked to have a chat"* about what had happened the previous day. Children were coming into the classroom and the claimant declined to speak to Mrs Henderson at that point. Mrs Henderson asked the claimant to *"put it in an email".*

21. When asked about this during cross-examination, Mrs Henderson said this –

"*I initially asked Mrs Moffat and Ms Grant to find out what happened. Following that I asked [the claimant] to write down what had happened – to give him a chance to write it down without me asking more questions. What [the claimant] and the children said was not the same. I wanted to allow him to write down his version of events."*

22. Later on 21 February 2023, the claimant sent an email to Mrs Henderson (143). After briefly describing the nature of the classroom activity, the claimant continued –

"*There had been various silly comments and behaviour during this part of the lesson from [two named pupils] and [pupil A].*

When it came to the activity that they were to do in a group, [named pupil], [pupil P] and [pupil W] were in the same group, [pupil A] was being silly and distracting the group. I was with them at the time and talking to them, so I grabbed his arm to get his attention and told him that he needed to take part sensibly…."

23. On 22 February 2023 the claimant wanted to know what was going on so he dropped in to speak to Mrs Henderson in her study. Mrs Henderson

recorded what they discussed in an email she sent to Mr Kerrigan, Ms Quinn and Mrs Moffat on 23 February 2023 (109) in these terms –

- *He told me he'd passed the information that I'd requested*
- *I highlighted that there were discrepancies between his and the what was reported to me*
- *He repeated quite a few times that he did not grab hair*
- *He wanted to know what we were looking at and asked if this could be dismissal*
- *I told him that it would be a formal process and at this stage I don't know what the outcome would be but yes it could be dismissal*
- *It wouldn't happen straight away and he would be given 5 days notice and would be able to be accompanied by someone*
- *We had a bit of a discussion about getting this right and that it wasn't a straightforward incident. He's been here many years but this shouldn't have happened. Reputation of school, putting children first and also looking at MD as a long term member of staff.*

24. When asked during cross-examination about her reference to *"dismissal",* Mrs Henderson said *"we were gathering information, investigating".* She accepted that *"no named person"* was appointed as investigator, and that no formal investigation meeting took place with the claimant.

School trip

25. The claimant and another teacher were due to take a group of pupils on a school trip on 24 February 2023. In advance of this, the claimant and the other teacher carried out a risk assessment and documented this. Mrs Henderson said that the SMT discussed this trip and decided that, while they did not consider the claimant to be a risk to the children, he should not travel alone with them.

26. This was not communicated to the claimant, nor to the other teacher. In the event, the claimant did travel with the children in one minibus while the other teacher travelled on the other minibus.

Further information (2)

27. On 27 February 2023 Mrs Henderson had a meeting with pupil C's parents. The purpose of the meeting was unrelated to the incident on 20 February 2023 but pupil C's parents brought this up. Mrs Henderson recorded this in an email she sent to Mr Kerrigan, Ms Quinn and Mrs Moffat on 27 February 2023 (110). In this she said –

> *"[Pupil C's parents] reported that Mr Dibnah in a lesson had kicked the chair in anger, shouted at [pupil A] something along the lines of "now you'll listen". Put his hand behind or on his head to make him look at him. Grabbed his arms. He shouted angrily. Others were scared."*

28. Mrs Henderson also stated in her email that pupil C's parents referred to the claimant having "*stabbed a football"* in front of pupil C and other pupils and being *"overly angry".* Mrs Henderson asked pupil C's parents to confirm pupil C's version of events in an email and pupil C's mother did so on 9 March 2023 (122).

29. In her email pupil C's mother referred to the claimant having –

> *"completely lost it"*
>
> *"slammed his chair into the wall and [thrown] another chair out of the way"*
>
> *"[taken] hold of [pupil A']s head"*

She said that pupil C had described the way in which the claimant held pupil A's head as his *"hand was flat against the back of [pupil A]'s head".* She also stated that this had been said by pupil C on the journey home from school on 20 February 2023.

30. On 6 March 2023 Mrs Henderson had a meeting with pupil W's parents. Again the purpose of the meeting was unrelated to the incident on 20 February 2023. Pupil W's parents spoke about the incident and, when reporting this to Mr Kerrigan, Ms Quinn and Mrs Moffat in her email of 6 March 2023 (119), Mrs Henderson told them that pupil W had referred to pupil A being *"roughly pulled by the arm and taken by the hair to be made*

to look up". She also said that pupil W had spoken about this on his way home from school on 20 February 2023.

31. Mrs Henderson asked pupil W's parents to confirm pupil W's account in an email. Pupil W's mother did so on 9 March 2023 (120-121). In this she referred to –

> *"Pushed his chair to the side so fast it fell over"*
>
> *"started pointing at [pupil A] and shouting at [pupil A] to stop interrupting his lesson"*
>
> *"pulled [pupil A]'s arm"*
>
> *"slammed [pupil A]'s hand onto the top of the desk and leant on it"*
>
> *"grabbed [pupil A]'s hair and pulled his head backwards so [pupil A] was looking upwards"*

Meetings with pupils (2)

32. Mrs Moffat and Ms Grant spoke again with pupil A and pupil P on 1 March 2023, and also spoke with pupil C. We understood they did so at Mrs Henderson's request. The evidence of Mrs Moffat was that Mrs Henderson *"was taking the decisions"* and was "*determining the scope of the investigation".* Mrs Moffat emailed Mrs Henderson, Mr Kerrigan and Ms Quinn on 1 March 2023 (112) attaching notes of the meetings she and Ms Grant held with the pupils on that date (113). The notes relating to two of these meetings refer to their taking place on 1 February 2023 but we were satisfied that this was a typographical error.

33. Those notes included the following –

Pupil A

> *"We asked him if he could show us what happened last week using FG to demonstrate. He took Fiona by the arm and showed us what happened. Fiona Grant was pulled forward off her chair by [pupil A] pulling on her one arm. [Pupil A] said that he was pulled off his chair onto the desk which was in front of him.*

We asked him to show us what happened with his hair as he had already reported to us that Mr Dibnah had pulled his hair up. He showed his hair being pulled up at the front which also moved his head up. He said his hair was pulled up …."

Pupil P

"We asked [pupil P] to show us what had happened and [pupil P] said [pupil A] was pulled by the hand and [pupil P] showed us that it pulled [pupil A] out of his seat and forward onto the desk. [Pupil P] said that Mr Dibnah had pulled [pupil A]'s hair causing his head to go up …. "

Pupil C

"Mr Dibnah had pushed his desk chair hard against the desk and then went down in front of [pupil A]. [Pupil C] said "Mr Dibnah was shouting sternly". [Pupil C] said Mr Dibnah touched [pupil A]'s head to lift his head to get him to look at him."

"….Mr Dibnah was very angry and was shouting at [pupil A] and then shouted at other children."

Disciplinary process

34. Mrs Henderson wrote to the claimant on 3 March 2023 (150-151) inviting him to a disciplinary hearing on 13 March 2023. She told the claimant that Mr Kerrigan would act as notetaker and advised him of his right to be accompanied. She set out the allegations against the claimant in these terms –

"1. That on Monday 20 February 2023 …. you physically "grabbed and pulled" [pupil A] by the arm and used your hand to forcibly move his head.

2. At the same time you lost your temper and acted in an unprofessional manner by which your actions had the impact of being intimidating to other children with[in] the class."

35. Copies of relevant emails and meeting notes were enclosed, along with the respondent's Discipline and Dismissal policy (52-58) and two other documents –

Document 1. Appendix 3 – Code of conduct for Staff: guidance on interaction with Pupils (59-63).

Document 2. GTCS Code of Professionalism and Conduct - Pt 1 Professionalism and maintaining trust in the profession (64-79).

36. The Discipline and Dismissal policy contained a non-exhaustive list of examples of gross misconduct. These included –

"Unlawful or inappropriate and/or improper conduct towards or relating to a pupil, child or other vulnerable person"

"Conduct likely to bring the School into disrepute, including abusive language, violent behaviour, fighting, threatening violence, immoral or obscene conduct, whether within or outside the school"

37. The policy dealt with *"Investigations"* in these terms –

"Disciplinary action will not be undertaken until all the necessary facts have been established. A member of the management team will normally be responsible for conducting the investigation which may include the taking of statements from, and usually meeting with relevant parties, including where appropriate and witnesses to the incident/s of misconduct. Any witnesses to the alleged misconduct may be required to make a signed, written statement.

The investigatory meeting will be confined to establishing the facts and the investigating manager may be accompanied by a note taker. You do not have a statutory right to be accompanied at this meeting and this meeting will not by itself result in disciplinary action. However, the investigating manager will make it clear to you that the investigation may lead to disciplinary action.

You will be advised of the reasons for the investigation and you will be invited to give your response.

If, in light of the investigation, it is decided that you have a disciplinary case to answer, the formal procedure, detailed below, will be followed."

38. The Code of Conduct for Staff dealt with *"Physical Contact and Restraint"* in terms which included –

- *Physical contact should only be for the purpose of care, instruction, health and safety, physical intervention or restraint.*
- *Staff should always be able to justify resorting to physical contact in any situation.*
- *The nature of the contact should be limited to what is appropriate and proportionate.*
- *….All incidents of physical intervention should be logged, dated and signed in a log kept for that purpose.*

39. Mrs Henderson wrote to the claimant again on 10 March 2023 (152) enclosing additional documentation. This included the emails dated 9 March 2023 from the parents of pupil C and pupil W.

Disciplinary hearing

40. The disciplinary hearing took place on 13 March 2023. It was conducted by Mrs Henderson, with Mr Kerrigan acting as note taker. The claimant was represented by Mrs Dibnah. The minutes (version 3 – 154-161) disclosed that Mrs Dibnah sought permission to record the meeting, and this was refused by Mrs Henderson.

41. The minutes recorded that Mr Dibnah denied the allegations against him, and Mrs Dibnah read out a statement (162-168) setting out the claimant's position. Mrs Dibnah then put a series of questions to Mrs Henderson. There was an adjournment after which Mrs Henderson and Mr Kerrigan returned to the meeting, and Mrs Henderson provided answers to Mrs Dibnah's questions. The hearing then proceeded in a more conventional way with Mrs Henderson questioning the claimant about the incident on 20 February 2023.

42. There was a dispute about the accuracy of Mr Kerrigan's minutes of the disciplinary hearing. In particular, there was disagreement as to whether Mr Kerrigan asked Mrs Dibnah if she would like to adjourn the hearing so that statements could be taken from the other pupils who were present on 20 February 2023. Mr Kerrigan believed he had done so, and emailed Mrs Dibnah on 14 March 2023 (171) repeating his offer. Mrs Dibnah did not respond to this, and no further statements were taken.

Police involvement

43. Mrs Henderson contacted the police on 13 March 2023, prior to the disciplinary hearing. She did so after speaking to an officer at Perth and Kinross Council. She acknowledged that she should have done so earlier. The outcome was that an inter-agency referral discussion ("IRD") involving the police and social work was arranged for 14 March 2023.

44. The IRD took place on 14 March 2023. Mrs Henderson said that she was advised by the police and social work to postpone issuing the disciplinary hearing outcome. This ran contrary to the indication Mrs Henderson gave at the disciplinary hearing that she would give her decision the following day. However, she followed that advice, and confirmed the position to the claimant in an email of 14 March 2023 (174). She instructed the claimant to remain at home and not to come into work while the external investigation was ongoing.

45. When Mrs Henderson returned from a period of annual leave she contacted the police again on 31 March 2023. On this occasion she was told that she could conclude the disciplinary process. For the sake of completeness we should add that the claimant learned in November 2023 no further action was to be taken.

Disciplinary outcome

46. Mrs Henderson wrote to the claimant on 6 April 2023 (178-181) with the outcome of the disciplinary hearing. She noted that the claimant had provided various character references but indicated that she had to base her decision on what occurred on 20 February 2023. She said that the crux

of the matter was whether the incident happened as described in the allegations against the claimant. She decided that it had done so.

47. Mrs Henderson did not accept the claimant's argument that the respondent had failed to provide adequate training (on classroom discipline). She referred to the annual child protection training provided by the respondent, which highlighted the four acceptable purposes of physical contact - care, instruction, health and safety, and physical intervention or restraint. Mrs Henderson also referred to the Code of Professionalism and Conduct published by the General Teaching Council for Scotland ("GTCS") (64-79) which provides that a teacher must not *"harm or use physical violence against a child or pupil".*

48. Mrs Henderson told the claimant that, in considering alternatives to dismissal –

> "*I have looked at your time with Craigclowan and note that there have been other incidents where you have lost your temper with pupils. While these prior incidents have not been of the same level of seriousness, they show that it is not a one-off incident for you to have lost your temper and for this to have manifested itself in an unacceptable manner ….*"

Her decision was that the claimant should be dismissed for gross misconduct, without notice of payment in lieu of notice. She advised the claimant of his right to appeal.

Other incidents

49. In her letter of dismissal Mrs Henderson referred to two other incidents. We deal with these here.

Football incident

50. This occurred at some point during the coronavirus pandemic in 2020. Some boys were playing with a football in an area where they should not have been doing so. When the claimant told them for a second time not to do so, he warned that if they did it again, they would lose the football. They

persisted and so the claimant went out to them carrying an art knife and burst the football.

51. At the time Mr Gilmour was the Head Teacher. His recollection was that the claimant reported the matter to him (although he accepted he might have heard from another member of staff). He had an "*open and frank"* discussion with the claimant. He regarded it as important that the claimant followed through on his warning. He believed that the claimant had been frustrated, rather than angry. He mentioned this in his letter of support for the claimant as a demonstration of the claimant's honesty. He agreed that it might have been better if the claimant had confiscated the football instead of bursting it.

Pupil B incident

52. On 29 November 2022, Mrs Henderson was showing a prospective parent round the school. They came across the claimant telling off pupil B. In an email Mrs Henderson sent to her SMT colleagues on that date (98), she said the claimant was *"speaking aggressively"* to pupil B. She also said that *"it took a split second to realise that Mark looked as if he was being intimidating and bullying towards the child".* Mrs Henderson told the claimant to stop. The prospective parent was unimpressed with what she saw.

53. Mr Kerrigan conducted an investigatory meeting with the claimant during the afternoon of 29 November 2022. He worked through a template and recorded the claimant's answers to a series of pertinent questions about the incident (102). Mr Kerrigan then emailed the claimant on 29 November 2022 (100-101) capturing the claimant's version of the incident, which included some prior misbehaviour by pupil B.

54. Mrs Henderson emailed the claimant on 30 November 2022 (103) to advise that no disciplinary action would be taken. She continued –

> "*I do acknowledge that it was appropriate to reprimand [pupil B], however I do have some outstanding concerns as to the manner of how this reprimand was carried out. I would, therefore, like to enrol you on a suitable Pupil Behaviour Management course as part of your*

Continuing Professional Development as soon as the school can identify an appropriate one."

55. Mrs Henderson also told the claimant that she wanted to speak to him informally about the incident and asked him to make an appointment with her. They met on 1 December 2022 and Mrs Henderson recorded the discussion in an email to her SMT colleagues on that date (104). That email included the following paragraphs –

"Explained what I disagreed with was the manner in which this was carried out – intimidating and shouting and angry and that this was not what I want in school"

"He asked about CPD – I said none of us have had training in children's behaviour so we are going to organise a CPD INSET for everyone so as not to single MD out"

"INSET" is an acronym for in-service training. That training had not taken place before the events described above.

Claimant appeals

56. The claimant exercised his right of appeal by his letter to Mrs Henderson dated 14 April 2023 (330). The reasons for the claimant's appeal were expressed as follows –

- *I feel that there is a flaw in the original decision making process and a failure to follow procedures.*
- *I do not feel that I received a fair, impartial disciplinary hearing on March 13th 2023.*
- *I feel that the decision to dismiss me was too harsh and my defence evidence was not taken into proper consideration and that new evidence has not been considered at all*.

57. Three items of additional evidence were submitted by the claimant. These comprised –

(a) a statement from Mr Reynolds to the effect that he had been teaching in the neighbouring classroom on 20 February 2023 and did not hear anything out of the ordinary (332).

(b) a document relating to pupil C indicating that he was prone to exaggeration (333).

(c) Details of the unpaid extra curricular activities undertaken by the claimant (334).

58. Mr Wetherby was appointed to hear the claimant's appeal. He is one of the respondent's Governors. He sits on the respondent's Child Protection committee. He is employed as Senior Deputy Head at Fettes College.

Appeal hearing

59. This was conducted using Microsoft Teams on 10 May 2023. The claimant was accompanied by Mrs Dibnah. Ms E Coyne was the independent note taker. We found no reason to doubt the accuracy of the appeal hearing notes (201-207).

60. After Mr Wetherby had referred to the claimant's grounds of appeal, Mrs Dibnah read out an appeal document (189-200). This expanded on the reasons for the appeal. The claimant explained that he was constrained in what he could say because of legal advice that he should not say anything which might be taken up by the police, but he maintained his innocence.

61. The claimant challenged the adequacy of the investigation. Mrs Henderson had relied on the evidence from the pupils but this was not consistent and had varied between the two occasions when statements had been taken. The claimant also challenged the fairness and impartiality of the disciplinary hearing; Mr Wetherby understood that this related to the involvement of the SMT in all aspects of the case. The claimant criticised the failure to speak to Mr Reynolds who had been teaching in the neighbouring classroom at the time of the incident.

62. The claimant was also critical of the lack of direction from Mrs Henderson on what constituted acceptable behaviour. He asserted that she should have given direction on what constituted acceptable behaviour in line with

the relevant policies. This had not been done over the past 15 years. There had been Child Protection training but this had not covered behavioural management.

Follow up

63. Mr Wetherby met with Mrs Henderson and Mr Kerrigan on 16 May 2023 to ask various questions relating to the appeal. The note of this meeting (208-209) included the following, regarding what happened after the email of 21 February 2023 was received –

- *MD was approached in a public place by Jill Moffat (JM).*
- *JM and Fiona Grant (FG) were appointed as interviewing officers and interviewed children from the class. LH attempted to contact MD in order to get his version of the events.*
- *Meeting between LH and MD did occur before disciplinary meeting.*
- *LH was not one of the staff to interview the students from the classroom.*
- *MD had opportunities to give his version of events right up to, and including, the disciplinary meeting.*
- *TK was note taker during the disciplinary meeting although he did answer questions.*
- *LH was the sole decision maker.*
- *LH mentioned that the Police affirmed the decision to not interview the entire class as there was enough of a theme to suggest that MD had touched the head of the student.*

64. The discussion on 16 May 2023 also covered the claimant's "*three conjectures"*, Child Protection training provided at the start of the 2022/23 school year and the school trip shortly after the incident on 20 February 2023. In relation to the school trip, Mrs Henderson told Mr Wetherby that the claimant *"was not alone as the attending staff member and that risk assessments were carried out re keeping MD employed at the school during this time".*

Appeal outcome

65. Mr Wetherby provided his outcome letter to the claimant by email on 31 May 2023 (210-214). Within this Mr Wetherby addressed the three grounds of appeal advanced by the claimant.

Flaw in original decision making process and failure to follow procedures

66. After setting out the detail of the process followed by the respondent, Mr Wetherby said this –

> "*….whilst the investigation process with you could have been better handled, you were given opportunity to present your account, and you did so. Jill Moffat and Fiona Grant carried out the interviews with the children, Liz Henderson was the disciplinary chair, and Tom Kerrigan was the notetaker."*

67. Mr Wetherby acknowledged that the conversation between Mrs Moffat and the claimant on 21 February 2023 should have taken place in a private setting, and apologised for this. He did not regard this as fatal to the sufficiency of the investigation –

> "*You also had the opportunity to speak with Liz Henderson in a meeting before the disciplinary meeting. I also can't find that not deeming a meeting as the "investigatory meeting" renders the investigation itself deficient or insufficient, because your account was sought and you gave comments (albeit in a setting that, I accept on review, should have been somewhere more private)."*

Fair, impartial disciplinary hearing

68. Mr Wetherby said this –

> "*Whilst acknowledging that it would have been prudent for an investigating manager to have been identified as soon as this incident was raised, I do not feel that it prejudiced your case, or prevented you from giving your version of events, and I do not believe that the investigating senior staff at Craigclowan were impartial or unfair."*

Decision too harsh/defence evidence not considered/new evidence not considered

69. Mr Wetherby commented favourably on the claimant's history of good service to the respondent. When referring to the school trip undertaken shortly after the incident on 20 February 2023, Mr Wetherby stated "*there were risk assessments carried out and you did not travel alone when on the school trip".* Referring to the Child Protection training provided annually by the respondent, Mr Wetherby said "*these presentations have made it clear that each member of staff has a responsibility to know their duty of care and the relevant school policies relating to, amongst other things, when it might be appropriate to ever touch a pupil".* Mr Wetherby had dealt with the evidence relating to Mr Reynolds earlier in his letter where he said *"I can't agree that not speaking to Alex Reynolds as part of the investigation suggests that it was not thorough or sufficient".*

70. Mr Wetherby expressed his conclusion in these terms –

> "*In summary, you have not provided me with new evidence to suggest that these events didn't happen or to overturn the decision of the Craigclowan disciplinary meeting. I am satisfied that the accounts given by the pupils demonstrate that you grabbed Pupil A, forcibly moved his head, lost your temper and acted in an unprofessional manner, as set out in the allegations."*

Mr Wetherby upheld the decision to dismiss the claimant.

Character witnesses

71. The claimant produced more than 20 character testimonies from colleagues, parents of pupils and acquaintances. While these might not have been wholly unsolicited, they painted a picture of the claimant which we believed it was appropriate to record here by quoting from some of them –

> *"My experience of Mark as a teacher was nothing but positive. From the very first time I watched him with a class he showed a natural ability to engage with the children in his care. He could stimulate their interest and imaginations whatever the subject and would respond*

thoughtfully to the children's contributions. He was calm, kind, encouraging, patient and funny, but also serious and firm if the occasion demanded. He was able to bring out the best in his pupils, who clearly liked and respected him very much."

"Mark leads with kindness in his approach to the behaviour management of pupils and, in my experience of time spent in his classroom, he has an excellent relationship with the pupils in his class. However, he also has high expectations in terms of pupil behaviour which was consistent with and in line with both the behaviour policy of the school and the culture within the wider staff and SMT. In my experience, when pupils have crossed the line and taken things too far, he has seldom ignored this poor behaviour but has addressed it firmly and head on though always with both humour and compassion."

"Mark has a "firm but fair" style of teaching. He treats all pupils as equals and provides each individual with encouraging and achievable ways forward. I have taught alongside Mark when there have been disruptive pupils in his class and I have always admired how Mark handles such situations with a calm empathy and in such examples, the pupil has responded well and with Mark's measured approach has led to a positive outcome."

Other processes

72. As well as reporting this matter to the police, the respondent submitted reports to GTCS and Disclosure Scotland. The GTCS report was made on or around 6 April 2023. The Disclosure Scotland report was made on 15 August 2023. Neither of these processes had concluded at the date of our hearing.

73. We understood that the respondent was obliged to make these reports. The effect of them was that the claimant was not able to work as a teacher, nor with children or other vulnerable groups, while these matters were ongoing. The claimant did not have a timescale within which these matters might be concluded.

Three conjectures

74. Within his ET1 the claimant put forward three conjectures as to why he had been dismissed –

(a) Because the respondent was in financial difficulty and by dismissing him, as a teacher at the top of the pay scale, achieved an immediate saving.

(b) Because Mrs Dibnah was a trade union representative and the claimant had assisted her in dealing with a situation in 2022 when the respondent's Governors had proposed redundancies.

(c) Because of what the claimant perceived as some reluctance on the part of the respondent to admit as a pupil child D, whose Ukrainian family were hosted by the claimant and Mrs Dibnah.

75. Suffice it to say that we found no evidence that these matters played any part in the decision to dismiss the claimant.

Mitigation

76. The claimant told us that he was *"not in a good place mentally"* following his dismissal. It took him some time to recover and he began to look for work in the summer of 2023. He decided to start up a gardening and house maintenance business, and this had generated income from September 2023.

77. The claimant's schedule of loss (435-439) disclosed earnings at the rate of £260 per week from his new business. He accessed his Scottish Teacher's pension in October 2023. The claimant accepted under cross-examination that he could have found other employment, although it might have proved difficult to fit this round his own business (where the hours/days of work could be weather dependent). He said that he liked to do a job from which he got satisfaction.

78. The claimant had withdrawn from taking pupils skiing at weekends around the time when he faced disciplinary action. He denied that he had lost faith in the respondent after the pupil B incident. He described the respondent

as a *"superb school"* with "*excellent teachers".* He accepted that he had withdrawn his goodwill but denied the suggestion put to him in cross-examination that he would have resigned had he not been dismissed (and we accepted his evidence on this point).

Comments on evidence

79. It is not the function of the Tribunal to record every piece of evidence presented to it, and we have not attempted to do so. We have focussed on those parts of the evidence which we considered to have the closest bearing on the issues we had to decide.

80. Mrs Moffat presented as a slightly reluctant witness. She accepted that she had been asked to speak to the claimant about the email on 21 February 2023 and that thereafter she and Ms Grant had been tasked with speaking to pupil A and pupil P on two occasions, and later also to pupil C. However she was clear that she was not the investigating officer and indicated no-one was appointed to that role. She said that Mrs Henderson "*was taking the decisions".*

81. Mrs Henderson gave her evidence in chief confidently but was less assured under cross-examination. There was a degree of antipathy between Mrs Dibnah and Mrs Henderson and this resulted in Mrs Henderson answering questions defensively when she was subjected to criticism. She gave the impression that she was out of her comfort zone when dealing with the disciplinary process relating to the claimant.

82. Mr Wetherby was both confident and credible. He was willing to acknowledge where aspects of the disciplinary process which could have been handled better.

83. The claimant's passion for teaching was very apparent as he gave his evidence. His belief in himself as a good teacher was supported by the content of the character references. He *"stuck to his guns"* in giving his version of the incident which led to his dismissal. He appeared to find it difficult to understand why events had unfolded as they did.

84. We imply no criticism of Ms McDermitt and Mr Reynolds when we say that their evidence added little to the issues we had to decide. Both were credible witnesses.

85. Mr Gilmour was an impressive witness. He recognised that he could provide no useful input into an incident he had not witnessed. His focus was on the positives of the claimant's professionalism as a teacher and his character. Responding to the description that the claimant "*completely lost it"* he made the comments that *"pupils tend to hyperbolise"* and that *"they love a drama".*

Submissions

86. Mr McDevitt and Mrs Dibnah provided written submissions upon which they expanded orally. We are grateful to them for the evident care taken in the preparation of those submissions. As they are available in the case file, we will summarise them only briefly.

87. Mr McDevitt referred to the cases mentioned in paragraphs 93, 94 and 96 below and invited us to find that the respondent had shown belief in the claimant's misconduct and that the evidence demonstrated that there were grounds for that belief. He also invited us to find that the investigation conducted by the respondent fell within the band of reasonable responses. It had not been essential to hold a formal investigatory meeting with the claimant. By the time she made her decision to dismiss, Mrs Henderson had before her all that the claimant wished to say (by reference to the document provided at the disciplinary hearing). If we found the dismissal unfair, Mr McDevitt submitted that the reduction in compensation for both ***Polkey*** and contributory conduct should be 100%.

88. Mrs Dibnah invited us to prefer the claimant's evidence in relation to the incident on 20 February 2023. She argued that the respondent's investigation had been inadequate. Mrs Henderson had both led the investigation and conducted the disciplinary hearing. There had been no training on classroom behavioural management. Given the claimant's length of service and clean disciplinary record, dismissal was not merited and fell outside the band of reasonable responses.

Applicable law

89. The right not to be unfairly dismissed is found in section 94 of the Employment Rights Act 1996 ("ERA") –

> *(1) An employee has the right not to be unfairly dismissed by his employer.*

90. Section 98 ERA deals with the fairness of a dismissal and provides, so far as relevant, as follows –

> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it –*
>
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
>
> *(b) relates to the conduct of the employee,*
>
> *(c) is that the employee was redundant, or*
>
> *(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*
>
> *(3) ….*
>
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking)*

the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case ….

91. Section 122 ERA (**Basic award: reductions**) includes –

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

92. Section 123 ERA (**Compensatory award**) includes –

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

93. In ***British Home Stores Ltd v Burchell 1978 IRLR 379*** the Employment Appeal Tribunal ("EAT") (per Arnold J) said this –

"….What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to

discharge the onus of demonstrating those three matters, we think, who must not be examined further."

94. In ***Iceland Frozen Foods Ltd v Jones 1983 ICR 17*** the EAT (per Browne-Wilkinson J as he then was) said this –

"*….the correct approach for the industrial tribunal to adopt in answering the question posed by section 57(3) of the 1978 Act is as follows –*

(1) the starting point should always be the words of section 57(3) themselves;

(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many (though not all) cases there is a "band of reasonable responses" to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band it is unfair."

95. Section 57(3) of the Employment Protection (Consolidation) Act 1978 is the statutory predecessor of section 98(4) ERA.

96. In ***Sainsburys Supermarkets v Hitt 2003 IRLR 23*** the Court of Appeal (per Mummery LJ) said this –

"….The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) apply as much to the question whether the investigation into the

suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason."

97. In ***Polkey v A E Dayton Services Ltd [1987] UKHL 8*** both the Lord Chancellor (Lord Mackay of Clashfern) and Lord Bridge of Harwich quoted with approval what Browne- Wilkinson J said in ***Sillifant v Powell Duffryn Timber Ltd 1983 IRLR 91*** including –

"….The only test of the fairness of a dismissal is the reasonableness of the employer's decision to dismiss judged at the time at which the dismissal takes effect. An industrial tribunal is not bound to hold that <u>any</u> procedural failure by the employer renders the dismissal unfair: it is one of the factors to be weighed by the industrial tribunal in deciding whether or not the dismissal was reasonable within section 57(3) …."

"There is no need for an "all or nothing" decision. If the industrial tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage reflecting the chance that the employee would still have lost his employment."

ACAS Code

98. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 includes –

(2) In any proceedings before an employment tribunal …. any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

99. The ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) (the "ACAS Code") includes –

Establish the facts of each case

5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

7. If there is an investigatory meeting this should not by itself result in any disciplinary action. Although there is no statutory right for an employee to be accompanied at a formal investigatory meeting, such a right may be allowed under an employer's own procedure.

Discussion

100. This was a conduct dismissal and we approached our deliberations by applying the approach set out in ***Burchell***. We considered firstly whether the respondent did believe that the claimant was guilty of the alleged misconduct. It was clear from Mrs Henderson's outcome letter that she believed that the incident on 20 February 2023 had occurred as described in the allegations against the claimant. Accordingly, the fact of belief was established.

101. We considered secondly whether the respondent had reasonable grounds upon which to sustain that belief. Mrs Henderson had before her the statements from pupil A, pupil P and pupil C. She also had the emails from the parents of pupil C and pupil W. She was aware that there had been two earlier incidents (the football incident and the pupil B incident) where she perceived that the claimant had lost his temper. We found that, taken together, these constituted reasonable grounds for Mrs Henderson's belief of the claimant's guilt.

102. We pause to observe that, having satisfied us as to the fact of their belief of the claimant's guilt of misconduct and the existence of reasonable grounds

for that belief, the respondent had discharged the onus on them under section 98(1) ERA of showing that the reason for dismissal related to the claimant's conduct.

103. We turned thirdly to the question of whether, at the point at which Mrs Henderson formed that belief on those grounds, the respondent had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. We considered that this question involved a number of interwoven strands –

(a) The nature and scope of the investigation carried out by the respondent.

(b) The manner in which that investigation had been carried out. This included consideration of the procedure adopted by the respondent.

(c) The objective standards of the reasonable employer.

The nature and scope of the investigation

104. The investigation of an incident which took place in a classroom of young children, to whom the respondent owed a duty of care, presented challenges which would not have arisen if the incident occurred in an office or on the shopfloor of a factory. Mrs Henderson was alert to this when she instructed Mrs Moffat and Ms Grant to speak to pupil A and pupil P.

105. It was correct to say that by the time of the disciplinary hearing on 13 March 2023 the respondent had statements from three pupils (twice in the case of pupils A and P) and emails from two parents (of pupils C and W). However, the input in respect of pupils C and W came initially from unsolicited comments made by their parents at unrelated meetings with Mrs Henderson. It was not sought by the respondent as part of their own investigation of the incident.

106. We did not feel able to say that choosing initially to interview only two pupils was outwith the band of reasonable responses open to the respondent. We considered that to do so would be to substitute our own view. However in deciding that it fell within the band of reasonable responses, we regarded it as the bare minimum of what a reasonable employer might be expected to

do. The evidence of Mr Wetherby and Mr Gilmour indicated that speaking to a larger number of pupils would have been better practice.

The manner in which the investigation was carried out

107. The ACAS Code was relevant to our determination of the fairness of the claimant's dismissal. This does not state that the holding of an investigatory meeting with the employee suspected of misconduct is essential. However, in this case we believed that this was what the respondent required to do because their own Discipline and Dismissal policy (52-58) indicates that such a meeting will normally be held. Any employee reading the policy would understand that there would be an investigation undertaken by an investigation manager prior to a decision that there was a disciplinary case to answer.

108. In light of the terms of the respondent's policy, two things caused us particular concern. Firstly, the respondent did not appoint an investigation manager. Mrs Moffat was asked to speak to the claimant and, along with Ms Grant, to pupils A and P but she was clear in her evidence that she had not been appointed to conduct an investigation. This contrasted with the way in which the pupil B incident was handled, where Mr Kerrigan did conduct an investigation subsequent to which Mrs Henderson decided that there should be no disciplinary action. We found it difficult to understand why the same approach was not adopted for what must have appeared a more serious matter.

109. Secondly, Mrs Henderson determined the way in which the investigation was carried out and involved herself in it. It was she, and not an investigation manager, who spoke with the claimant after the initial brief conversation between Mrs Moffat and the claimant. It was she who engaged with the parents of pupils C and W. It was she who directed that the second round of pupil interviews should take place. In our view, this was a case where it was practicable for different people to carry out the investigation and the disciplinary hearing, but that did not happen.

The objective standards of the reasonable employer

110. This was the phrase Mummery J used (in ***Hitt***) as equating to the band of reasonable responses. That case indicates that an employer's investigation into an allegation of misconduct needs to come within that band. In assessing whether an investigation came within the band of reasonable responses, it should be judged objectively on the basis of what the reasonable employer would have done.

111. We regarded the ACAS Code as indicative of what a reasonable employer would do. Where it is practicable for different people to deal with the matter at the investigative and disciplinary stages, that is what should happen. It seemed to us self-evident that a reasonable employer will follow their own disciplinary policy. We found that, in the circumstances of this case, (a) the failure to appoint an investigation manager and (b) the involvement of Mrs Henderson in both (i) the investigation of the allegations against the claimant and (ii) the conduct of the disciplinary hearing fell short of the objective standards of the reasonable employer.

112. We did not believe that an investigation, the conduct of which was outwith the objective standards of the reasonable employer, could satisfy the need for "*as much investigation into the matter as was reasonable in all the circumstances of the case"* per ***Burchell***. It was a procedural failure and we required to consider in what way this affected the fairness of the claimant's dismissal.

Procedural unfairness

113. We reminded ourselves of what the House of Lords said in ***Polkey***. A procedural failure does not necessarily render a dismissal unfair. It is one of the factors to be weighed in deciding whether or not the dismissal was fair or unfair in terms of section 98(4) ERA.

114. We took account of the respondent's size and administrative resources. It seemed to us that they are a medium sized organisation with adequate administrative resources for their day-to-day operations, and with the ability to access additional resources when required. This was demonstrated by Mrs Henderson's evidence that Mr Kerrigan obtained external legal advice

when the respondent was dealing with the claimant's disciplinary process. We also noted from information which is publicly available that the respondent's Board of Governors possesses a range of backgrounds and experience which provides an additional resource, as evidenced by Mr Wetherby's conduct of the claimant's appeal.

115. In terms of equity and the substantial merits of the case, we took account of the serious consequences for the claimant as a teacher which flowed from dismissal for misconduct. Not only did he lose his job but his future career was placed in jeopardy as a consequence of the involvement of the police, GTCS and Disclosure Scotland. There was a particular need for care when more than the employee's job was at stake.

116. In our view, that made it all the more important that the respondent's Discipline and Dismissal policy should be followed as it contained safeguards for an employee facing disciplinary action. The same applies to the ACAS Code. One of those safeguards was the need for an adequate investigation. Another was the need for different people to carry out the investigation and the disciplinary hearing.

117. We were satisfied that, having involving herself to a significant degree in the investigation, Mrs Henderson had lacked the necessary degree of impartiality to conduct a fair disciplinary hearing. She had also been involved in another disciplinary matter (the incident involving pupil B) a relatively short time before the events which led to the claimant's dismissal. She had witnessed and participated in that episode. We do not suggest any element of bad faith on Mrs Henderson's part, but this was not a fair disciplinary process. We found that this was, in the particular circumstances of this case, enough to tip the scales in favour of a finding of unfair dismissal.

Remedy

118. Having decided unanimously that the claimant's dismissal was unfair, we turned to remedy. The claimant was seeking compensation. Here we ran into a number of difficulties.

Mitigation

119. We recognised that the claimant was not in a position to mitigate his loss in the usual way. Following his dismissal the claimant could not simply apply for other teaching jobs. We understood that the ongoing processes at GTCS and Disclosure Scotland rendered that impossible. We had no information as to how long those processes might take, nor any sense of a probable result (which might in any event be influenced by the outcome of these proceedings).

120. To complicate matters further, the claimant had accessed his pension and appeared content to work on a part-time basis at his gardening and house maintenance business. We regarded the information before us as to the income this business had generated as less than ideal. It was expressed as a weekly amount, which had been averaged over an unspecified period. We thought it was probable that the claimant would be keeping records for HMRC purposes in due course, and should be able to produce more accurate information about his actual net income since his dismissal.

Pension

121. In relation to pension loss, we noted that the claimant's schedule of loss included 18 months' loss of employer contributions. The position regarding accrued pension benefits was not straightforward as the claimant had participated in the Scottish Teachers Pension Scheme which operated on a final salary basis until March 2015 and on a career average revalued earnings basis thereafter. It seemed to us that further information was required to make a proper assessment of pension loss in this case.

Polkey

122. We were able to agree that there was a very significant probability that the claimant would have been dismissed if a fair procedure had been followed. We were not however able to reach a consensus on the assessment of that probability as a percentage. Based on our current thinking, that is likely to be not less than 75/80% and might well be higher than that.

Contribution

123. We found ourselves in the same position regarding contribution. Once again, based on our current thinking, the level of contributory conduct (applicable to both the basic award and the compensatory award) is likely to be not less than 75/80% and might well be higher than that.

Next steps

124. We decided that we would in the first instance invite the parties to engage with each other and seek common ground on compensation. We do not set a timescale or deadline for this process. At this stage we will say no more than that we expect the parties to work with each other in a constructive and realistic way.

125. If the parties are unable to reach agreement, the case will require to be listed for a remedy hearing.

S Meiklejohn

Employment Judge

26 Mar 2024

Date of judgment

05 Apr 2024

Date sent to parties