EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100198/2016

Held in Glasgow on 3, 4, 5 and 6 April 2017 and 23 and 24 August 2017

Employment Judge: Robert Gall
Members: Ijaz Ashraf
Peter Kelman

Mr R D Hutchison	**Claimant** **In Person**
Renfrewshire Council	**Respondent** **Represented by: Ms E Mannion – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that:-

(1). The dismissal of the claimant by the respondents is not automatically unfair in terms of Section 103A of the Employment Rights Act 1996, it being the case that the reason or principal reason for dismissal was not that the claimant made a protected disclosure.

(2). The dismissal of the claimant by the respondents was not unfair in terms of Section 98(4) of the Employment Rights Act 1996.

REASONS

1. This claim proceeded to a Hearing which was largely conducted during April of 2017. Unfortunately, on the final day set down for Hearing in April of 2017 the claimant was unwell and was unable to attend to conduct the case. Two further days therefore were set down for the Hearing, being 23 and 24 August 2017. The Hearing continued on those dates, concluding on 24 August 2017.

2. The claimant represented himself in the Hearing. The respondents were represented by Ms Mannion. A joint bundle of productions was lodged.

3. The Tribunal heard evidence from the following parties:-

- Gordon McKinlay, Head of Schools with the respondents.
- Trevor Gray, Education Officer with the respondents, Investigating Officer.
- Anne McMillan, formerly Head of Resources, Social Work Services with the respondents, Investigating Officer in relation to former Headmaster at Johnstone High School Renfrew.
- Dorothy Hawthorn, Head of Children's Services within the respondents at time of dismissal of the claimant, dismissing officer.
- Linda Mullin, Advisor in HR and Organisational Development within the respondents, Advisor to the Panel at appeal against dismissal.
- The Claimant.
- Joanne Sturgeon, Deputy Head at Johnstone High School.
- Kit (Christopher) Gilbert, former Deputy Head Teacher at Johnstone High School.

- Laura McAllister, Education Manager, who managed the absence from work of the claimant's partner.

4. The following parties are also relevantly named at this point, although evidence was not taken from them.

- Walter Hayburn, who was the Headmaster of Johnstone High School at the time of the claimant's dismissal.

- Kenny Fella, Secretary of the Union of which the claimant was a member.

- Stephen McCrossan, EIS representative who attended the disciplinary and appeal hearings with the claimant.

Brief summary of the position of parties

5. The claimant had been dismissed by the respondents. He said that this was an automatically unfair dismissal on the basis that the reason or principal reason for dismissal was a protected disclosure which he had made. There was one such disclosure. That was accepted by the respondents as being a protected disclosure. The claimant also argued that the dismissal was unfair. The respondents said that the dismissal was fair, the reason for dismissal being conduct. The claimant admitted the conduct in question. He alleged that there were procedural failings such that the dismissal was unfair. He said that there were breaches of the ACAS Code of Practice. He further maintained that although the respondents did not say either in the "*charge*" or in their decision letter that there had been any sexual impropriety on his part, in his opinion the dismissing officer had been of that view. If he was right in his opinion then it had influenced her decision to a substantial degree. The dismissal was unfair on that basis. It was also unfair on the basis that it was outwith the band of reasonable responses of a reasonable employer.

6. The respondents maintained that the dismissal of the claimant was unrelated to the protected disclosure he had made. They said that the conduct admitted was very serious. It was such that dismissal on the basis of misconduct and indeed gross misconduct was appropriate. The decision to dismiss lay within the band of reasonable responses of a reasonable employer.

7. If successful, the claimant wished to be reinstated. The respondents opposed that as not being practicable. The claimant sought compensation if the Tribunal did not order reinstatement in the event of success on his part in the claim.

Facts

8. The following are the relevant and essential facts as admitted or proved.

Background

9. The claimant is a Registered Teacher. He was born on 9 March 1959. He was employed by the respondents from 11 August 1981 to 18 September 2015. He had 34 years of service at time of dismissal. At that point he was Head of Faculty for Science within Johnstone High School. He was at that time, and had been for some time, a trade union representative for the EIS Union.

10. At time of dismissal the annual salary of the claimant, gross, was £47,508. The salary for someone in his post increased in April of 2016, moving to £48,705.

Protected Disclosure

11. The claimant made one protected disclosure. This was made by him on 8 June 2016 to Mr McKinlay of the respondents. The protected disclosure was that the Headmaster at Johnstone High School had not processed reports of incidents of violence against staff with a large number of such incidents going unrecorded at Council level. This was said to be placing staff at risk of further assaults. These forms are known as PERV forms. The disclosure was made at a meeting with Mr McKinlay. Also present at that meeting was Julie Smith who had recently been appointed a representative of the EIS. Ms Smith did not suffer any detriment due to the making of this disclosure.

Relevant documentation in relation to conduct and disciplinary matters

12. In addition to the ACAS Code of Practice which applies to employment situations in general, there were three relevant documents in relation to the claimant's employment with the respondents. The first of those was the Respondents' Code of Conduct. A copy of that appeared at pages 135 to 147 of the bundle.

13. Secondly, there was a document known as and referred to in this Judgment as JNC14. The full title of that document is "*Procedures and Conduct of the Disciplinary Process for Teachers, Quality Improvement Officers, Educational Psychologists and Music Instructors*". A copy of it appeared at pages 149 to 163 of the bundle.

14. The third document is the Code of Professionalism and Conduct of the General Teaching Council for Scotland ("the GTC Code of Conduct"). A copy of this appeared at pages 165 to 180 of the bundle.

15. All of these documents applied to the employment relationship between the claimant and the respondent. The claimant, as a teacher, was one of those to whom all three documents applied. He had a good working knowledge of JNC14. Like other teachers he would be expected to be aware of the GTC Code of Practice and its terms. He was conscious that it was likely that

there would be a Code of Conduct prepared by the respondents which affected his employment.

16. The respondents' Code of Conduct contains the following relevant passage which appeared at page 139 of the bundle:-

> "***Personal Conduct***
>
> *You should also remember that you are a public official and that misconduct or activities outside work may have a bearing on your employment with the council*."

17. JNC14 contains the following provisions:-

(a) At page 153 of the bundle:-

> ***"****3.5 In more serious circumstances a precautionary suspension may be appropriate. The precautionary suspension is with full pay and should not be associated with any presumption of guilt. Precautionary suspensions should only be used in the most serious cases of misconduct or poor performance or where the teacher's presence at the normal place of work could prejudice the investigation. Consideration could be given to a temporary transfer pending the conclusion of the investigation and any subsequent disciplinary process. Where such a suspension has been effected, the appropriate trade union secretary and the personnel services manager will meet at the earliest opportunity to discuss the likely duration of a suspension and any possible alternatives. The suspension will be subject to a review after a maximum of 10 working days and at least every tenth working day thereafter."*

There is no right provided for an individual who is to be suspended to be accompanied at any meeting at which he/she is informed of the decision to suspend.

(b) At page 155 of the bundle:-

"4.4 Where the teacher subject to the disciplinary process is a trade union representative, the personnel services manager should be informed immediately and he/she will in turn inform the appropriate trade union of this fact.

(c) At page 155 of the bundle.

"4.7 Additionally, in terms of this procedure, a teacher has the right to be accompanied at all stages of the process including the point at which he/she is informed of any allegation made. The teacher should be informed of this when arrangements are being made to meet to inform them of the allegations."

(d) At page 158 of the bundle:-

"6.4 Gross misconduct are (sic) *acts which are so serious as to justify possible dismissal, such as theft or fraud; physical violence or bullying; deliberately accessing internet sites containing pornographic, offensive or obscene material; serious insubordination; serious incapability at work brought on by alcohol or illegal drugs; a serious breach of health and safety rules; or a serious breach of confidence.*

6.4.1 It should be noted that this list is not exhaustive."

(e) At page 159 of the bundle:-

"*7.3.1 Officers hearing an appeal should arrange a date at the earliest opportunity, in consultation with the teacher and/or the teacher representative, for the appeal to be heard. The date should be set giving reasonable notice so that each side has the opportunity to prepare their case. A date should also be set, at least 5 working days in advance, for the exchange of relevant papers. Procedures to be followed at the hearing are outlined in Appendix E.*

Appendix E was not before the Tribunal and was not spoken to in evidence.

(f) At page 162 of the bundle in Appendix A which contains guidance notes for investigating officers:-

"*3.2 Statements: …must contain facts only (not opinions/judgments/assumptions)"*

18. The GTC Code of Conduct contains the following provisions:-

(a) At page 170 of the bundle:-

"1.2 you must maintain appropriate professional boundaries, avoid improper contact or relationships with pupils and respect your unique position of trust as a teacher.

1.3 you should avoid situations both within and outwith the professional context which could be in breach of the criminal law, or may call into question your fitness to teach.

1.4 you must uphold standards of personal and professional conduct, honesty and integrity so that the public have confidence in you as a teacher and teaching as a profession;

1.6 you should maintain an awareness that as a teacher you are a role model to pupils."

(b) At pages 171 and 172 of the bundle:-

"***Pupils***

Teachers should establish professional boundaries and recognise the negative impact that actual or perceived breaches of these would have upon pupils and the confidence of the public.

With regard to relationships with pupils you should: …

- *be mindful that professional boundaries can be perceived to extend beyond a pupil's educational establishment leaving date; therefore, in situations of this nature, you should exercise great care and professional judgement, taking into account all the factors involved.*

- *be mindful that the internet and social networking can quickly blur the professional boundary between teacher and pupil. Teachers need to be alert to the risk that actions which might, on the face of it, seem quite innocent, can be misunderstood and misconstrued by others.*

- *be mindful of the negative impact of being under the influence of alcohol in the professional setting."*

The Claimant's personal position as at June 2015

19. At June of 2015 the claimant was in a position where he carried a substantial workload. He was also the EIS union representative within Johnstone High School. He had been a teacher at the school for some 34 years. There were issues within the school which saw the claimant being consulted by staff members by virtue both of his position as a union representative and as a staff member of long standing within the school.

20. The claimant was at this point finding his workload something with which he was having difficulty coping. He raised the fact that he was working extra hours with Ms Sturgeon as his line manager and Deputy Head of the school on one occasion. In her view the claimant's workload was not out of the ordinary and she encouraged him to be mindful of his contractual hours.

21. The claimant also had stresses in his home life. His partner was using/abusing alcohol in an extreme way. There were substantial and significant demands placed upon the claimant in seeking to assist and care for his partner in that circumstance. She had been hospitalised on occasion.

22. The claimant's own health history had involved periods of depression and anxiety and stress. He had been issued with medication to help him to deal with these conditions. In the period prior to June of 2015 the claimant had used/abused alcohol as a coping mechanism in respect of the work and domestic stresses by which he was affected. He consumed alcohol to excess in the evenings or at weekends.

Events of 12 June 2015

23. An end of term senior prom was organised by the pupils of Johnstone High School, the date set for this event being 12 June 2015. The event was

open to those who wished to attend and who were in the category of having left school in the period immediately prior to the prom or who were due to leave school in the period between the date of the prom and the date of end of term at school, a fortnight or thereabouts later.

24. The event was held at Burnside Manor near Beith. The event was licensed. The ticket price included provision of wine.

25. Teachers, including the claimant, were invited to attend if they wished so to do. They were invited due to having taught those who were to be at the prom.

26. The event had a close connection with Johnstone High School. It was a senior prom to mark those attending leaving or having left school. Those attending were pupils, ex-pupils (who had left the school in the immediately preceding period) and teachers. The claimant had attended many similar senior proms over the years.

27. The claimant drove to the event. He took with him pyjamas and a blanket. He had not booked a room at the hotel where the event was being held. His plan was to "*play things by ear*". He would either drive home, take a taxi home or sleep in the car.

28. During the evening, the claimant consumed a substantial amount of alcohol. The level of alcohol consumed by him was such that he has no recollection of some of the events which unfolded during the evening.

29. A term in use at this point was "*gaffing*". A "*gaff*" is a pretend kiss or a peck on the cheek type of kiss carried out by way of a joke or prank by one male to another. It is not a kiss with any sexual element or with any passionate connotation.

30. At one point in the evening one of the leavers attending remarked to a fellow leaver "*I bet I could gaff him"*, referring to the claimant and saying that he was of this view as the claimant was so drunk that he thought this might happen. The claimant was asked by this leaver to gaff another leaver. The claimant responded by gaffing the leaver, giving him a peck on the cheek. This was videoed at the time on the phone of one of the leavers.

31. Later in the evening, some of the male leavers said to the claimant that if he wished so to do he could stay in their room with them. This was not an invitation with any sexual connotations.

32. The invitation was repeated in course of the evening. The claimant decided to accept this invitation and to sleep in the room with some of the male leavers.

33. Whilst in the room later in the evening with some of the male leavers, the claimant was asked by them about his partner, with the leavers asking how he had managed to become her partner as she was "*hot*". The claimant in answer referred to such things as using charm and making a woman laugh as being how to please a woman. He did not make any sexual, rude or derogatory remarks in relation to his partner or in relation to women in general.

34. In preparation for sleeping, the claimant removed his suit. He wore his shirt and boxer shorts and did not ever fully undress.

35. Pictures of the claimant were taken when he was in the room. These included a picture of the claimant, with back to the camera, urinating. The claimant was unaware of these photos being taken.

36. Leavers shared some of these photographs and the video mentioned above with other, including other leavers, through use of social media sites such as Facebook and Snapchat. Tweets were also posted by some of the

leavers. A copy of one such Tweet appeared at page 271 of the bundle. It read:-

"Never seen anyone as fucked as Mr Hutchison before tonight."

37. A further Tweet posted was factually inaccurate and posted simply as a joke. It read:-

"*Why am a sleeping in a bath with Mr Hutchison."* .

38. A further Tweet was posted on 17 June. A copy of it appeared at page 267 in the bundle. It read:-

"Just met Mr Hutchison there for the first time since prom, awkwaf."

39. This Tweet was accompanied by three emojis showing someone laughing to the point of tears.

40. There was another tweet posted. It read "*The question is … did (name redacted) actually gaff Mr Hutchison last night?".*

Awareness by the Respondents of these events

41. The day after the prom (Saturday 13 June) some of the leavers attended school for the purposes of the dress rehearsal of the school show. Some of the teachers were present at that point, although the claimant was not present.

42. The leavers showed to some of these teachers the images which had been sent to them of the claimant in the room where he slept that night. They showed a picture of the claimant sitting in a chair with a pint of beer in one hand and his phone in the other. They showed a picture of the claimant with his shirt unbuttoned and a picture, mentioned above, of the back of the claimant as he stood in his boxers in the toilet urinating with the toilet door

open. Reference was made by the leavers to there being a video involving the claimant and showing him gaffing one of the leavers. The teachers did not see that, saying that the images should not be shown elsewhere and that this was not a laughing matter.

Suspension of the Claimant

43. Information as to events which apparently involved the claimant had been provided to the Headmaster, Mr Hayburn. Mr Hayburn had been present at the senior prom. He had been unaware of the claimant sleeping in a room with pupils or of any of the events which occurred within that room until a member of the school staff told him that she had received a text saying that the claimant had stayed overnight in a hotel bedroom with pupils following the senior prom.

44. Mr Hayburn asked Ms Sturgeon together with Mr Gilchrist to speak to the claimant. This was at 8.50am on the morning of 16 June.

45. Ms Sturgeon and Mr Gilchrist spoke with the claimant at that point. They asked the claimant whether he had spent the night in a hotel room with pupils from the school who were at the prom. The claimant replied that he had and that he did not know what the issue was. Ms Sturgeon and Mr Gilchrist asked that the claimant remain in the building so that a letter could be given to him on behalf of the local authority. That was the extent of the communication between the claimant and Ms Sturgeon and Mr Gilchrist at this point.

46. There was no reference made by either Ms Sturgeon or Mr Gilchrist to any right on the part of the claimant to have a companion with him when they spoke to him at this stage. This meeting was not part of the disciplinary process or of the investigative process. What was put to the claimant was not an allegation. A question was asked of him to establish whether there was some substance in the information which Mr Hayburn had received.

47. Mr McKinlay contacted Mr Fella by telephone and confirmed that the claimant was subject to the disciplinary process. This was done as the claimant was a trade union representative. It is accordance with the provisions of paragraph 4.4 of JNC14, which appeared at page 155 of the bundle.

48. There was no meeting between the trade union secretary and the personnel services manager following suspension of the claimant, such a meeting being detailed as an appropriate step in that circumstance in terms of JNC14, paragraph 3.5 (page 153 of the bundle).

49. Mr Gray had been appointed in the course of 16 June as the Investigating Officer. Prior to commencing the investigation Mr Gray spoke with the claimant later in the day of 16 June.

50. When Mr Gray spoke with the claimant on 16 June he gave to the claimant a letter confirming his suspension. A copy of that letter appeared at page 197 of the bundle. The contact between Mr Gray and the claimant at this point was limited to the handing over the letter and to brief communication regarding it. Suspension was on full pay. The letter stated that the suspension would be subject to review within ten working days.

Investigation

51. There had been no discussion with the claimant regarding events of 12 June at the time when the suspension was intimated by Mr Gray to the claimant.

52. Mr Gray then commenced his investigation. He sought to have sight of some of the photographs or videos which had been mentioned or had been referred to in relation to the events at the senior prom. Some of those were on Snapchat. That app/programme involves deletion of images sent within a short time of them being sent. The images were not available therefore to

Mr Gray. He did however have access to the Tweets and to information from those to whom he spoke.

53. In course of his investigation Mr Gray met with the leavers who had been present in the hotel room with the claimant. He met with those who had knowledge of the images of the claimant via social media. At no time, whether in course of Mr Gray speaking to leavers who shared the room with the claimant (including the leaver involved in the gaffing incident) or at any other point, did any of the leavers say they were uncomfortable with the claimant's behaviour that evening or with him staying in the room with them. Mr Gray met with teaching staff who had awareness of the images of the claimant via social media. He met with pupils who had stayed overnight in the hotel room close to where the claimant had stayed overnight. He spoke to a further pupil. He obtained written statements from all pupils or leavers and staff interviewed. He spoke with the claimant at an investigation meeting. At that investigation meeting the claimant was accompanied by Mr Fella, EIS rep. Mr Gray took a note of the investigation meeting held with the claimant.

54. Mr Gray produced an Investigation Report. A copy of that report with the relevant statements appears at pages 203 to 261 of the bundle.

55. In course of the investigation meeting with Mr Gray, the notes of which appeared at pages 259 to 261 of the bundle, the claimant confirmed that he had slept in the room, explaining that one of the leavers had said to him that he could sleep on the floor of the hotel room. The claimant said that he had been "*very very drunk*" He said that his recollection was "*hazy*". He said that he didn't remember a lot at the point in the night where he had gone to the hotel room and that he did not recall anyone taking photographs. He did not recall kissing a male pupil. He explained issues which he had in relation to alcohol and pressures which were affecting him. It was said on his behalf by Mr Fella that staff were under the misapprehension that pupils had left school and that the relationship was different. It was further said that the

claimant would not have behaved as he had done if the pupils had still been at school.

56. Mr Gray's report was dated 3 July 2015. It recommended that the respondents proceed to disciplinary hearing. It noted that the claimant had separately been offered support through the respondents' Occupational Health service given his disclosure of his own alcohol abuse.

Disciplinary Hearing

57. The disciplinary hearing was convened. It was initially set down for 4 September 2015, notification being given to the claimant by letter of 4 August 2015. A copy of that letter appeared at pages 283 and 284 of the bundle. The claimant's representative had contacted the respondents to explain that this date was not suitable. The disciplinary hearing was therefore re-scheduled for 14 September. Confirmation of that was issued by the respondents to the claimant by letter of 12 August 2015, a copy of which appeared at pages 287 to 289 of the bundle.

58. In the interim, the suspension of the claimant had been extended. This occurred in terms of a letter of 30 July 2015. A copy of that letter appeared at page 281 of the bundle.

59. That letter referred to suspension being subject to review after a maximum of ten working days and at least every tenth working day thereafter. It stated that the period 27 June to 10 August was categorised as school holiday/school closure with the time between these dates not therefore being working days. It was said that suspension was to be reviewed on 12 August.

60. By letter of 11 August (page 285 of the bundle), the suspension of the claimant was confirmed as continuing from 12 August pending the outcome of the disciplinary hearing, it being noted that that hearing was to be re-scheduled from 4 September.

61. The letter of 12 August confirming the re-scheduled date of the disciplinary hearing set out, as had the earlier letter of 4 August, the allegations. It sent a copy of the Investigation Report, which included a copy of the statements obtained by Mr Gray. The letter confirmed the claimant's right to be accompanied at the disciplinary hearing and sought details of any witness from whom the claimant might wish to lead evidence at the hearing. It warned that all disciplinary sanctions were potentially open to the respondents.

62. The allegations intimated as being the ones which would be dealt with at the disciplinary hearing were as follows:-

> "*1. That at the senior prom on the 12th June 2015 you consumed alcohol to the point of drunkenness.*
>
> *2. That you kissed a pupil at the prom.*
>
> *3. That you slept in a hotel room with a number of pupils in a state of undress.*
>
> *4. That you displayed poor judgement in your interactions with pupils on the 12th June 2015.*
>
> *5. That your actions potentially bring the Council into disrepute."*

63. Dorothy Hawthorn was asked by Gordon McKinlay to conduct the disciplinary hearing. Mr McKinlay provided no information to Ms Hawthorn that there had been any protected disclosure made by the claimant to the respondents. He expressed no opinion as to the events in which the claimant had been involved or as to the claimant's employment with the Council.

64. Ms Hawthorn had no knowledge from any other source of any protected disclosure having been made by the claimant to the respondents. She dealt with the disciplinary hearing on the basis of the information before her at that hearing.

65. At the disciplinary hearing Ms Hawthorn was present. She was accompanied by Ms Chisholm as HR representative. Ms Chisholm took notes. The claimant was present, accompanied by Mr McCrossan. Mr Gray was also present, it being potentially the case that Mr Gray would speak to his report.

66. The notes of the disciplinary hearing appeared at pages 309 to 318 of the bundle. Those notes are an accurate record of the events at the disciplinary hearing.

67. At the outset of the meeting, as reflected by the notes at page 309 of the bundle, the allegations were put to the claimant. The claimant confirmed that he accepted the factual basis of all of the allegations. He said that he wished to give a statement in mitigation.

68. It was agreed that as the claimant accepted the factual basis of the allegations, there was no need for the Investigating Officer, Mr Gray, to present the management case or to call witnesses. It is specifically noted that the claimant was content not to question Mr Gray or witnesses who had been invited to the hearing regarding any aspect of the investigation. Mr Gray therefore departed from the disciplinary meeting.

69. For the remainder of the disciplinary meeting the claimant put forward the position in mitigation. He referred to and expanded upon his own medical history and stress by which he was affected. He referred to stresses both at home in relation to the illness of his partner and his stresses at work. He set out his position fully upon these matters. When he began to explain about the position with his partner, Ms Hawthorn said that this involved a lot of very personal details being given about his partner. Ms Hawthorn

highlighted that his partner had already provided a written statement about her situation and that Ms Hawthorn recognised that the content of the statement and the circumstances to be verbalised were personal and sensitive. She did not discourage or prevent the claimant from providing information as to his partner's illness or as to any other matter. The claimant made no complaint at the time of the disciplinary hearing or at appeal that he had been precluded or discouraged from placing any relevant matters before Ms Hawthorn. He was asked whether there was anything further which he wished to add as the meeting drew to a close. He confirmed that that there was not.

70. The claimant said at the disciplinary hearing that the prom was "*a wake up call"* to him that his reliance on alcohol had gone too far given that he could put himself in this position. He emphasised that the kiss was not a sexual advance. He said that staying in the room was "*not a clever thing to do",* however he was *"not in his normal state of mind."* He highlighted that none of the boys had felt uncomfortable and that there was no sexual element to that aspect.

71. It was also accepted by the claimant at the disciplinary hearing that he had "*displayed poor judgment"* and that it was *"a stupid thing"* he had done and *"a sobering experience."* He said that he did think that his actions had brought the Council into disrepute. He is quoted in the notes at page 317 of the bundle as stating that "*no one wants to see this in the press"* and that he *"had not covered himself in glory."* He said that he "*regretted"* that he had *"brought the name of the school down"* through his actions. He confirmed that he had developed a leadership role at the school and said that he had let himself down horribly.

72. The claimant had no prior history of disciplinary proceedings of any kind in his 34 years of work with the respondents. He set that out as part of his evidence to Ms Hawthorn in mitigation. He emphasised the dedication he had shown to the school over a lengthy period of time. He detailed the impact the events had had in his own life. It had caused difficulties with his

daughter who was about to get married. It had caused him difficulties in general. The claimant also confirmed that he was attending a counsellor in connection with alcohol issues. He referred to a report from Occupational Health which was before the respondents and spoke about that.

The outcome of the Disciplinary Hearing

73. Ms Hawthorn considered all matters placed before her at the disciplinary hearing. She had no knowledge of and was therefore uninfluenced by the disclosure made by the claimant. Her decision was solely based upon the admitted allegations and the information placed before her as to those allegations together with the information in mitigation presented by the claimant and his representative, including the information as to the illness of the claimant's partner and the extent of that.

74. Ms Hawthorn did not personally know if there was no sexual element involved in the kiss or gaff or not. She proceeded on the basis that there was no evidence to support such a view. She disregarded any reference in a Tweet to the claimant having slept in the bath with a leaver. She concluded that this had no substance.

75. The claimant had taken no point before her that the leavers were not pupils and that therefore the school connection was not appropriately made. She was conscious that the claimant had said to the disciplinary hearing that the leavers were not uncomfortable with him being in the room. Her view however was that it was not for the pupils or leavers to define the standards of professional behaviour of the teaching staff. The responsibility in her view lay with the claimant and any other adult or teacher in that position to determine what was appropriate and what was not appropriate. Ms Hawthorn was not referred to any legislation in relation to education provisions. She was aware of the GTC Code of Conduct, JNC14 and the respondents' own Code of Conduct.

76. Ms Hawthorn kept in mind all the points made by the claimant in mitigation. She considered all sanctions open to her. She came to a decision.

77. The decision reached by Ms Hawthorn was that the allegations, which were accepted by the claimant as reflecting what had happened and were unchallenged by him, presented a very serious situation. All five allegations were very concerning in her view. They all gave her very grave cause for concern. She regarded the prom as being closely connected with school and as, in effect, being an extension of the workplace in the circumstances. She had a serious lack of confidence in the professional judgment of the claimant. He accepted before her that he had been under the influence of alcohol at the event.

78. There were a number of sanctions open to Ms Hawthorn. She considered the admitted allegations and the mitigation put forward. She considered sanctions other than dismissal however concluded that dismissal was the only appropriate decision which she could take. She regarded the behaviour during the evening as being extreme. The claimant had made decisions at different points in the evening. He could have refrained from going to the prom. He could have driven home. He could have used alternative methods to get home, such as taking a taxi. He could have left early. He could have avoided drinking to excess. He could have declined the offer to stay in the hotel room with some leavers. He could have refrained from gaffing the leaver. He took decisions however to proceed otherwise in each of these instances.

79. The decision to dismiss was that of Ms Hawthorn alone. She did not discuss this with anyone in particular and did not discuss it with Mr McKinlay.

80. Ms Hawthorn took a few days to reach her decision, reviewing the material before her. Having met on 14 September she arranged to meet with the claimant on 18 September. She met with him that day. The claimant's representative was there. Ms Hawthorn confirmed to the claimant that she had reached a decision that the claimant be dismissed and that gross

misconduct had occurred resulting in summary dismissal. She gave her reasons at the meeting. She then set those out in a letter of 18 September to the claimant. A copy of that letter appeared at pages 319 and 320 of the bundle. She concluded that letter by referring to the possibility of appeal.

Investigation into Running of the School/Conduct of the head Teacher

81. Ms McMillan was tasked with carrying out an investigation into the running of the school. In particular, she was to consider the conduct of the head teacher. One relevant matter was the completion and submission of PERV forms, or their non-completion and non-submission. This was one of the points raised by the claimant at his meeting with Mr McKinlay on 8 June.

82. Ms McMillan did not interview the claimant. This was as he was absent through suspension when she might have interviewed him. She similarly did not interview others who might have been spoken to about different relevant aspects if they were not available. She also considered that the information which the claimant might give was available from Ms Smith and Mr McKinley who had been at the meeting on 8 June. She spoke with them. Her investigation into the conduct of the head teacher continued beyond the date of dismissal of the claimant.

Appeal

83. By an undated letter, copy of which appeared at page 225 of the bundle, the claimant intimated that he wished to appeal. He set out five grounds of appeal. Those were as follows:-

> *"1. That the disciplinary officer did not exercise her discretion properly when taking into account the mitigating circumstances presented.*

2. *That the Council erred in summarising the full factual basis of the allegations and the appellant's response.*

3. *That there were a number of breaches of JNC/14 and the National Agreement, along with the ACAS Code of practice in respect of disciplinary and grievance procedures.*

4. *Said breaches meant that there was unfair prejudice on the appellant in the process.*

5. *That in all the circumstances the sanction of summary dismissal was disproportionate to the allegations made."*

84. The claimant sought that a lesser sanction be imposed rather than summary dismissal. He produced medical evidence comprising a clinical psychology report, a letter from a doctor, a statement from a nurse team leader and a statement from his partner. He produced the witness statements from the investigatory report. He produced references from former and current colleagues and his counselling services manager. He also presented the pupil attainment report for the school at which he taught. He submitted an online petition and petition comments. The online petition and petition comments related to the reaction of pupils to his dismissal and set out support for him.

85. The appeal was heard on 26 November 2016. Ms Mullin was present as Advisor to the Panel. The Panel consisted of five Councillors. Ms Hawthorn was also present as was Ms Chisholm. The claimant was present together with Mr McCrossan. Mr Gray attended as a witness as did Mr McDonald, former Head Teacher at Johnstone High School.

86. Notes of the appeal meeting appeared at pages 387 to 394 of the bundle. Those notes are an accurate summary of matters which were raised at the appeals hearing.

87. At the appeal hearing, the claimant confirmed that he admitted the five allegations which had been put to him at the disciplinary hearing. He emphasised that in relation to kissing and sleeping in the room there was no sexual element involved. He apologised. He reiterated the information passed in mitigation and added to it by production of a medical report. This comprised the clinical psychology report by Alison Harper. A copy of that report at pages 327 to 342 of the bundle. The claimant said that there were procedural breaches of the JNC14 provisions. He said that he had the right to be represented at all stages in the disciplinary proceedings, including the right to be accompanied at any point of the allegation being put to him. That right had not been given to him. He said that as he was an EIS representative the personnel services manager should have been informed immediately, with the trade union then being informed. There should have been a meeting as early as was possible between the personnel services manager and the appropriate trade union secretary. These requirements had not been met, he said. Further his position was that the review of suspension had not occurred as was stipulated. The appeal hearing had been set down 35 working days after the initial disciplinary hearing rather than within 20 days as was also required, according to the claimant. This is not however a requirement of or provision which appears in JNC14. It may or may not be present in a different document. No document containing that provision was before the Tribunal or was spoken to in evidence at Tribunal.

88. It was highlighted on behalf of the claimant that there were expressions of opinion and assumptions contained within the statements given to Mr Gray as investigating officer. That ought not to have occurred, he said. The Tweet which was accepted as being untrue had also been included in the papers for the disciplinary hearing.

89. Mr McDonald gave evidence on behalf of the claimant, speaking to his service and the good work which he had done. The claimant reiterated the service he had given to the school in various capacities. He emphasised that the police had not been involved, that none of the pupils had felt

threatened and also detailed the progress he had made in tackling his health issue.

90. Mr McCrossan said on behalf of the claimant that this was not gross misconduct as there had been no deliberate acts on his part. He thought that given the circumstances consideration would have been given to alternative sanctions.

91. There was questioning of the claimant both by Ms Hawthorn and by Councillors. The claimant accepted in course of that questioning that it was "*not clever*" to accept the invitation to stay in the room and that he had consumed alcohol which had impaired his judgment, exercising poor judgment in that circumstance. He said that whilst he had behaved stupidly there were mitigating circumstances which applied, with there being no complaints and no police involvement. He highlighted his previous good behaviour.

92. There was discussion regarding the leavers and whether they had in fact left school. In course of that discussion, Ms Hawthorn noted that the code of conduct recognised that the teacher/pupil relationship extended beyond school.

93. The decision at appeal was taken when the hearing concluded. The decision was considered in private. It was reached by the members after discussion of materials before them, including the medical report, and the matters raised at the appeal hearing. That decision was to refuse the appeal.

94. The view taken was that there was a code of conduct in place. It applied to the claimant and applied in particular to an employee who was a teacher. There had been a risk of the respondents being brought into disrepute. Indeed, there had been press coverage since the events, although that did not feature in the decision making of the appeal panel.

95. The panel was very concerned as to the claimant's behaviour. He had been drunk to the point where he did not recall what had happened. There had been a serious lack of judgment on his part in their view in his decision to stay in the room with the pupils. There were various options in course of the evening which he could have followed but did not. The panel was clear that this was a prom related to Johnstone High School and that those attending fell to be viewed as pupils. They did not discuss the legal definition of pupils. Their view was that pupils and teachers were there in connection with school. They considered it had been confirmed that there was no sexual impropriety alleged.

96. By letter of 30 November 2015 the respondents wrote to the claimant confirming that the grounds of appeal had not been substantiated in the view of the respondents and that the appeal was not upheld. It was a unanimous decision of the panel not to uphold the appeal.

The Issues

97. The issues for the Tribunal were as follows:-

a. Was the reason or principal reason for dismissal of the claimant by the respondents the fact that he had made a protected disclosure?

b. If that was the reason or principal reason for his dismissal, what remedy was to be awarded by the tribunal?

c. Was the dismissal of the claimant by the respondents unfair in terms of the Employment Rights Act 1996? Consideration required to be given to overall fairness, looking at the procedure and substance of the dismissal.

d. If the dismissal was unfair, what remedy was to be awarded by the Tribunal?

Applicable Law

98. Unfair Dismissal

A dismissal is automatically unfair in terms of Section 103 of the Employment Rights Act 1996 ("ERA")

> "*if the reason, (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."*

Unfair dismissal

99. Section 94 of ERA confirms that an employee has the right not to be unfairly dismissed by his employer.

100. In what might be regarded as "normal circumstances", an employer requires to show that the reason, or principal reason for the dismissal is one which is potentially fair. This is in terms of Section 98 of ERA. Conduct is such a potentially fair reason in terms of Section 98(2)9b) of ERA.

101. The position is slightly different where it is alleged that the reason for dismissal is one which results in an automatically unfair dismissal. In such a case there is an initial burden on the claimant to show that there is an issue which warrants investigation and which is capable of establishing that the reason for dismissal was, in this case, that the claimant had made a protected disclosure. If the Tribunal is satisfied that there is such an issue, then it is for the employer to prove, on the balance of probabilities, that a potentially fair reason for dismissal was the reason or principal reason for dismissal, as mentioned above. This confirmed in the case of ***Maund v Penwith District Council [1984] ICR 143 ("Maund").*** The basis of decision in that case was confirmed in ***Kuzel v Roche Products Limited [2008] ICR 799 ("Kuzel").***

102. Whether a dismissal is fair or unfair is to be decided by the Tribunal on the basis set out in Section 98(4) of the ERA. That provision reads:-

> *"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."*

103. The long-established case of ***British Home Stores Limited v Burchell [1978] IRLR 379 ("Burchell")*** confirms that in its application of Section 98(4) of ERA three elements for determination by the Tribunal are involved.

104. Firstly, the employer must establish that it believed the misconduct to have occurred. Secondly, the employer must show that it had in its mind reasonable grounds upon which to sustain that belief. Thirdly, at the stage when that belief was formed by the employer, it must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

105. The requirement is that any investigation carried out must be one which lies within the band of reasonable investigations which would be carried out by a reasonable employer. This is confirmed in the case of ***J Sainsbury's Plc v Hitt [2003] ICR 111.***

106. A Tribunal must not treat the question of whether the dismissal was reasonable as a separate matter from the question of whether the procedure adopted was reasonable. In other words, substance and

procedure must not be treated as two separate and distinct issues. In so far as the matters might be considered separately, they must be drawn together to result in an assessment of whether dismissal has been fair or unfair.

107. Failure to follow a proper procedure may render a dismissal unfair. It will not however automatically render a dismissal unfair. The case of ***Polkey v A E Dayton Services Limited [1998] ICR 142 ("Polkey")*** confirmed this. That case highlighted that there were certain procedural steps which would be regarded in the vast majority of cases as being necessary if a fair dismissal was to have occurred. Those involved (in so far as relevant to a case of conduct or misconduct) investigating fully and fairly and hearing what the employee wished to say by way of explanation or mitigation. Regard should also be had to the ACAS Code of Practice when the Tribunal is considering this area. That would inform fairness and its provisions are also relevant to compensation (if the claim is successful). This is as an uplift or reduction may be appropriate in terms of the ACAS code.

108. In addition to the above, if the decision is to dismiss an employee, then for it to be a fair dismissal, that decision must lie within the band of reasonable responses of a reasonable employer. This confirmed in the cases of ***Iceland Frozen Foods Limited v Jones [1982] IRLR 439 ("Iceland")*** and ***Foley v Post Office and HSBC Bank v Madden [2000] IRLR 827 ("Foley").*** Those cases also confirm that the Tribunal must not substitute its decision for that of the employer. A case before the Tribunal may be one in which the Tribunal has its own view as to what it might have done by way of sanction. The Tribunal must not however find a dismissal to be fair or unfair based upon its own view as to what it would have done or what it believes should have happened. There may therefore be instances where in the particular circumstances of a case one employer might dismiss, acting reasonably, but a different employer might not dismiss, also acting reasonably. If that is so in the view of a Tribunal in the case before it, then the decision to dismiss lies "within the band". The test which the Tribunal

must apply is whether dismissal lies within or outwith the band of reasonable responses of a reasonable employer.

109. In assessing that point, the Tribunal must have regard to such matters as the nature of the "*offence*", whether it was, or ought to have been, clear to the employee before the conduct that such conduct was unacceptable, what material there was before the employer by way of mitigation or explanation and what the employer made of that, including whether it was considered at all. Equally, as part of its assessment of whether dismissal lay within the band of reasonable responses of a reasonable employer, it is relevant to note whether and to what extent the consequences of dismissal were considered by the employer.

Remedy

110. Given the unanimous view of the Tribunal that the claim is unsuccessful, the applicable law in relation to remedy, both in relation to reinstatement and compensation is not set out.

Submissions

Submissions for the Respondents

111. Ms Mannion produced written submissions. She spoke to those and responded very briefly to the claimant's submissions when those had been heard.

112. The key elements in the respondents' submissions are now set out.

113. Ms Mannion said that the reason for dismissal was conduct. It was not that the claimant had made a protected disclosure. She noted that the claim of breach of contract initially made had been withdrawn.

114. Ms Mannion then set out findings in fact which she urged the Tribunal to make. Those are not rehearsed here.

115. In relation to the claim of automatically unfair dismissal advanced by the claimant, Ms Mannion drew attention to the case of ***Maund*** and also to that of ***Kuzel.*** Her position was that there was no evidence to support any link between the making of the protected disclosure by the claimant and his dismissal.

116. The claimant had referred to pressure being placed upon Ms Hawthorn. He had confirmed however in evidence that he was unable to show a link between his disclosure to Mr McKinlay in June and the decision taken by Ms Hawthorn some months later.

117. Further, the claimant had not put his case on this point to Ms Hawthorn or to any of the other witnesses for the respondent. He had not challenged Ms Hawthorn's evidence that she had considered the allegations and the mitigation and had come to her decision. There had been no suggestion to her that in fact there was in reality another reason for her decision, namely pressure from elsewhere or the protected disclosure which he had made. When this had been raised with him in cross-examination he had said he had not expected Ms Hawthorn to give an honest answer had she been asked about this. He did not give any reason however, said Ms Mannion, as to why Ms Hawthorn would not have answered honestly. Ms Hawthorn had explicitly denied in evidence-in-chief that she was pressured in any way to dismiss the claimant, saying that she had come to the decision herself. Her evidence was that the only conversation she had had with Mr McKinlay in relation to the claimant was when Mr McKinlay asked her to undertake the disciplinary hearing. Her evidence had been clear that the reason for dismissal was conduct. That should be accepted.

118. The claimant had, Ms Mannion said, suggested that support for his proposition as to the reason for his dismissal came from the fact that he had not been interviewed in the course of the investigation by Ms McMillan into

the Head Teacher. Ms McMillan had confirmed in evidence, however, that she was aware of the information passed to Mr McKinlay on 8 June, one element of which constituted a protected disclosure upon which the claimant relied in this case. Ms McMillan had said in evidence that she had not interviewed the claimant because he was suspended and also as it was possible to cross reference the information which he had given with information from Ms Smith and Mr McKinlay who were both present at the meeting on 8 June. The claimant was not the only witness not interviewed by her. The points which he had raised at the meeting on 8 June were the subject of questions to and information from other witnesses to whom she had spoken. The investigation into the Headmaster's conduct continued until after the claimant's date of termination of employment.

119. The claimant had failed, Ms Mannion submitted, to challenge evidence produced by the respondents as to the reason for dismissal. He had also failed to produce any evidence to support the assertion made by him as to the reason for dismissal being the protected disclosure. The respondents' evidence that the reason for dismissal was conduct should be accepted. This element of claim should be unsuccessful.

120. Turning to the question of unfair dismissal, Ms Mannion detailed the provisions in Sections 94 and 98 of ERA. She urged the Tribunal to find that the reason for dismissal was conduct and that the dismissal was fair.

121. Ms Mannion highlighted the principles of ***Burchell.*** She also referred to ***Sandwell and West Birmingham NHS Trust v Woodward UKEAT/0032/09***. She said that that case confirmed that if misconduct was admitted, for it to be regarded as being gross misconduct, there required to be deliberate wrongdoing or gross negligence.

122. The three legs of ***Burchell***, belief in the conduct, reasonable grounds for that belief and the carrying out of a reasonable investigation by the respondents had all been met in this case, said Ms Mannion.

123. She referred to the evidence from Ms Hawthorn and asked the Tribunal to accept it in relation to belief. She referred to the claimant's admission of the allegations and to his acceptance that at the disciplinary hearing that it was not necessary for Mr Gray or the witnesses to remain at the hearing. Nothing had been raised by the claimant in relation to the statements or the investigatory report. He did not challenge those. Rather, he had directed his efforts to providing mitigating evidence.

124. Ms Hawthorn had accepted in evidence that there was no suggestion of lack of commitment to his work by the claimant. She had considered the material and mitigation. Her view was that the claimant's behaviour had been extreme, showed a lack of professional judgment, was completely inappropriate and was very serious. Different decisions could have been made by the claimant on the night in question, she had said. Those would have led to a different outcome. He had not however taken those steps. Whilst consuming alcohol to the point of drunkenness, kissing a pupil and sleeping in a hotel room within a number of pupils in a state of undress were the most serious of the charges, Ms Hawthorn's evidence was that she regarded all the allegations together as constituting gross misconduct. At the appeal, notwithstanding the information presented by the claimant, the appeal panel had upheld the dismissal. Their view was that the conduct or standard of behaviour expected by teachers within the respondents' organisation had not been met. They were of the view that the claimant as a teacher was an exemplar and that his behaviour showed a serious lack of judgment.

125. Gross misconduct had, said Ms Mannion, been established. The claimant had made choices. There was deliberate wrongdoing in that sense. The information before the respondents, including admissions, confirmed that he had chosen to consume alcohol. He had chosen to stay at the hotel, accepting an invitation to sleep in a hotel room with pupils. He had removed his suit. He had kissed a pupil. He had discussed his relationship with his partner when asked by the pupils. He had exhibited poor professional judgment. This was deliberate and wilful wrongdoing. The fact that he may

have had his judgment impaired through consuming alcohol did not mean this was not deliberate wrongdoing. If the Tribunal was of the view that the conduct was not wilful or deliberate due to intake of alcohol or stress, the conduct was grossly negligent and therefore constituted gross misconduct.

126. The investigation had been reasonable, Ms Mannion submitted. The investigation commenced when Mr Gray informed the claimant that he was suspended. Mr Gray had then spoken with the teachers who were made aware of the photographs and the video of the claimant at the prom. He spoke with the five pupils with whom the claimant shared a hotel room. He spoke with three other pupils who had knowledge of the photographs or made comments upon the claimant's actions in social media. He spoke with the pupil whom the claimant kissed. He met with the claimant and put the allegations to him. The claimant was accompanied at that meeting by Mr Fella, his trade union representative. The claimant had confirmed at this meeting that he was drunk and that he slept in a hotel room with pupils at their invitation. He also confirmed he had removed his suit to sleep. His memory was hazy in relation to the detail of the night. Elements of the evidence could not be reviewed by Mr Gray as postings on Snapchat had disappeared. Mr Gray had looked at the Tweets which had been sent. In assessing this point, Ms Mannion highlighted that the claimant had not disputed that the investigation had been other than a reasonable one.

127. In considering the decision to dismiss, Ms Mannion referred to ***Iceland*** and ***Foley.*** She highlighted that the Tribunal must not substitute its own decision. She also referred to ***Whitbread Plc v Hall [2001] EWCA Civ 268.*** That case confirmed that the band of reasonable responses test applied both to the substantive decision and also to the procedural steps taken by an employer.

128. The terms of JNC14 went beyond the ACAS Code of Practice. There had been no breach of the ACAS Code of practice by the respondents.

129. In relation to JNC14 and the alleged breaches of the procedure, the disciplinary proceedings had commenced at the time of the investigation. In so far as there might be any requirement in the period prior to that, Ms Mannion highlighted Mr McKinlay's evidence that he had spoken with Mr Fella about the claimant's suspension and subsequent disciplinary investigation on or around 16 June 2015. Ms Mullin had said that the first stage in the disciplinary procedure was the decision to suspend. Mr Sturgeon and Mr Gilbert, who had given evidence for the claimant, said that the meeting they had with him on 16 June lay outwith the disciplinary procedure. Ms Mullin had advised that there was no right to be represented or accompanied when an employee was being advised of a suspension and that there was no requirement to give notice of any right to be accompanied at any meeting where suspension was to be imposed. This was as a decision to suspend required to be implemented relatively quickly after it had been taken.

130. Statements had been taken from individuals during the course of the investigation. The claimant had been given a copy of those statements. That was appropriate. It was not appropriate to omit any expressions of opinion from those.

131. There had been communication with the claimant as to his suspension. It required to be borne in mind that school holidays intervened. There was no set time frame within which an appeal required to be heard.

132. The claimant had been accompanied at the investigatory meeting, the disciplinary hearing and the appeal hearing. He had received a full pack of the papers prior to the disciplinary hearing. He himself had submitted papers for consideration at the disciplinary hearing. It had been confirmed to that hearing that the pupils who shared a hotel room with the claimant did not indicate that they were uncomfortable with this, that the claimant had not referred to pleasing a woman in a rude or derogatory way and that the kiss from the claimant was a joke with the term "gaffing" being slang for pretend kissing. The claimant had made no challenge during the course of the

internal proceedings by the respondents to the fact that the allegations referred to pupils. He did not state at the disciplinary hearing that there were others in attendance at the prom who were not pupils.

133. The disciplinary hearing had been fair, Ms Mannion said. Likewise the appeal hearing had been fair. The claimant had every opportunity to present information and documentation to both hearings.

134. The evidence of Ms Hawthorn should be accepted. She had given a cogent account of her evidence. She had kept in mind the claimant's admission of guilt in respect of all five allegations. She had considered all the information before her. Although she was aware that the pupils were comfortable with the claimant's behaviour, her view was that it was not for them to decide if his behaviour was appropriate or professional. She did not find that the claimant slept in a bath with one of the pupils. She noted the circumstances of the kiss. She made no finding that there was a sexual element to the kiss but had found and stated in evidence that the fact of the kiss in and of itself was inappropriate. She noted the claimant's admission of poor judgment and as to the effect of the level of alcohol taken which had resulted in parts of the night being ones which he could not remember. She noted that the claimant accepted that his actions potentially brought the Council into disrepute. She noted the comments upon the claimant's behaviour on social media. All information or documentation which he produced and matters to which he spoke in mitigation were also noted and considered by her. These extended to his medical history and high levels of stress experienced by him at home and at work. She had regard to his length of service and to his experience and to his efforts within the school.

135. Ms Mannion emphasised that although the claimant was of the view that Ms Hawthorn had concluded that there was a sexual element to his behaviour on the night in question, that was not her evidence. This could not be an "underlying fact" in her decision. Her testimony at Tribunal was that there was no evidence to suggest that this was so.

136. Ms Hawthorn had considered alternatives to dismissal but had decided that this was the only proper route which she could take. Similarly, the appeal panel had concluded that the misdemeanour was too serious for any other sanction.

137. The appeal panel had properly considered all matters before it at the appeal stage. It had concluded that the claimant's behaviour showed a serious lack of judgment and brought the respondents into disrepute. Its view was that the working relationship between the parties had broken down.

138. ***Polkey*** confirmed that a Tribunal was not bound to hold that any procedural failure rendered a dismissal unfair. It was a factor to be considered by the Tribunal in deciding whether or not the dismissal was reasonable in terms of Section 98(4) of ERA. What was known to the employer at the time of dismissal regarding the failure was key, rather than the actual consequences of the failure.

139. There had been no meeting between the Head of HR and the EIS to discuss the claimant's suspension. That had not however been raised with the disciplinary officer. Other breaches of procedure alleged were disputed. Any breaches which did occur did not impact upon the reasonableness of the respondents' actions, Ms Mannion submitted. Further, they were not known to Ms Hawthorn at the time she made her decision.

140. The claim of unfair dismissal should be rejected.

141. Ms Mannion also addressed the Tribunal in relation to remedy, the submissions in respect of reinstatement, compensation, contribution and mitigation. Those submissions are not rehearsed given the decision reached by the Tribunal in the case.

Submissions for the Claimant

142. The claimant gave evidence on the penultimate day of the Hearing. He submitted a written statement and read that.

143. When the claimant was giving his evidence by way of this written statement, the Tribunal highlighted to him that substantial parts of his written statement were in fact more appropriately viewed as being submissions. He set out his view, for example, as to why the Tribunal should conclude that the protected disclosure had in fact formed the basis of the decision to dismiss. By way of one further example, he explained in evidence why, in his view, the Tribunal should conclude that Ms Hawthorn should not be believed when she said that she did not decide as she did on the basis of there having been sexual impropriety on the part of the claimant in his actings.

144. This point is not mentioned by way of criticism of Mr Hutchison. The Tribunal recognised that he was inexperienced in this forum and was not legally qualified. It is mentioned simply as it led to submissions for the claimant being shorter than would otherwise have been the case and also to reassure the claimant that account was taken by the Tribunal of the points which he made in his statement in evidence.

145. The Tribunal said to Mr Hutchison that it would regard as evidence his statement in relation to factual matters. It said it would regard elements more properly labelled as being points of submission as being matters which it would consider when deciding the case. This it did. The claimant co-operated in avoiding going over the same ground as covered in his statement in evidence when it came to the point of making submissions.

146. What follows is a summary of the submissions of the claimant made both in course of his statement to the Tribunal at the time of giving his evidence-in-chief and when the opportunity came for him to make submissions at conclusion of the evidence.

147. The Tribunal required to remind the claimant in course of many points made by way of submission that it could only consider submissions upon evidence which it had heard. Submissions made therefore after the closing of the evidence could not of themselves seek to introduce evidence. Equally in course of submissions made as part of the claimant's statement of evidence, and indeed in relation to the evidence given by the claimant, it was also highlighted to the claimant that in so far as any statements made presented a different picture to that set out by the respondents' witnesses in their evidence, the Tribunal was in difficulty in its assessment of the statement made by the claimant. This was as the respondents had not had the opportunity to comment upon that given that the claimant had not in those instances raised those points with the respondents' witnesses in cross-examination.

Automatically Unfair Dismissal

148. The claimant highlighted the protected disclosure he had made to Mr McKinlay. That had occurred on 8 June when Ms Smith and the claimant had attended a meeting with Mr McKinlay. The protected disclosure related to processing the PERV forms.

149. It was of significance, he said, that he had not been interviewed in course of the investigation by Ms McMillan into the conduct of Mr Hayburn as Head Teacher and his management of Johnstone High School. It was unacceptable that he had not been interviewed, he said. Not interviewing him was said to have occurred due to the fact that he was suspended from school at that time. He would, however, have co-operated and indeed would have been obliged to attend for interview if instructed. The claimant said he accepted that two other individuals on the list of key players referred to by Ms McMillan had not been interviewed by her.

150. The claimant said that in his view the objective of the respondents in relation to the Headmaster had been not to make a genuine attempt to get to the truth of what had happened, to learn lessons from that and to take

action where appropriate against the Head Teacher. What he referred to as "*the stupidity of my actions"* presented the respondents with the ideal opportunity to remove, he said, the one person who knew more about the problems at the school and how they unfolded and the failure of the Council to deal with them. The respondents had grasped that opportunity with both hands. He said that this required that some pressure had been placed on Ms Hawthorn to find that summary dismissal was the sanction she should apply. The claimant accepted that Ms Hawthorn had denied any such pressure existed. He said that he would not suggest that Ms Hawthorn did not tell the truth when giving evidence, but said that he perhaps did not ask the right questions.

151. For these reasons the claimant said that the Tribunal should find that there was a link between his protected disclosure and his dismissal.

Unfair Dismissal

152. Turning to the unfair dismissal, the claimant said that the respondents had failed to consider the context of the events of 12 June.

153. At the prom, young people were consuming alcohol. That was a unique situation. The vast majority of those attending were not 18. The respondents apparently regarded the prom as an extension of the workplace with its code of conduct and the teaching professions' code of professionalism and conduct applying just as rigorously to the prom as would be the case if the event had been held in school time and on school premises.

154. With that in mind, and in order to assess this approach, it was noteworthy that there was no system in place to ensure that those under 18 were not able to purchase alcohol. There was no staff rota of supervision. The school had not, for instance, supplied any information to the hotel as to who was over 18 and who was not. There was a breach of duty of care by the respondents to their pupils if they were still pupils.

155. Further, members of staff other than the claimant consumed alcohol. The ticket price included wine. Pupils smoked openly at the event if they wished so to do.

156. The claimant said that as far as he was aware there had not at any time been action taken by the respondents against any teacher who had consumed alcohol either at this or at any other prom. It was quite likely that teachers had been under the influence of alcohol at a prom over the years. This suggested, said the claimant, that the respondents had not shown the slightest interest in the conduct of teachers at proms as they knew that that event was entirely unique. The code of conduct required to be seen in the very particular context of this event.

157. Further, if this was part of a school activity then an overnight stay would see staff involved in organising and approving sleeping arrangements with permission forms being signed by parents. Staff would require to be aware of medical conditions/allergies and to have parental contact details. None of these elements were present in relation to the overnight stay at the prom event. In short, this was not a school event.

158. The Tweet regarding sleeping in a bath was factually incorrect and was accepted by Mr Gray as being factually incorrect. The claimant said that he considered the Tweet to be defamatory. The respondents had taken no action against the person who tweeted the comment. This was, the claimant said, because they knew that they could not do so as the person who tweeted had left school at that point.

159. It had been suggested by the respondents that the normal pupil/teacher relationship applied at the prom. All the above information argued that it did not.

160. The claimant's evidence was that those attending were not pupils at that point. There were no classes for them to attend and no register was taken at school. Exams had finished.

161. The claimant submitted that it was of significance that Ms Hawthorn accepted that there would come a point in time where in her view the claimant's conduct on the night in question, taking it that those involved had at one time been pupils and that the conduct involved drinking to excess, would not have constituted gross misconduct. She had not given any opinion as to when that point might come.

162. The claimant said that his conduct had been "*stupid, irresponsible and unprofessional"*. He asked the Tribunal to take into account the context and status of those attending the prom as, what he referred to as, ex pupils and members of the public.

Procedural Issues

163. The claimant referred to the JNC14 provisions and to breaches of those which he said had occurred.

164. He said that suspensions should be reviewed at agreed intervals with suspension being for a maximum of 10 working days. Review was to occur at least every 10 working days thereafter. Ms Mullin had accepted that 23 working days passed between August 11th and the date of the disciplinary hearing on September 14th. This demonstrated, he said, the apparent inability of the respondents, or perhaps their unwillingness, to adhere to the terms of their own disciplinary procedures.

165. The right to be represented "*at all stages of the disciplinary procedures"* had not been met. In terms of paragraph 4.7 of JNC14 a teacher has the right to be accompanied "*at all stages of the process including the point at which he/she is informed of any allegation made. The teacher should be informed of this when arrangements are made to meet to inform them of the allegations."*

166. This had not occurred. This had been confirmed by the claimant's own evidence and by the evidence from Mr Gilbert and Ms Sturgeon as to what happened on the morning of 16 June. This was a breach of the provision just mentioned.

167. The respondents' position was that there had been no breach as the right to be accompanied only commenced at the time of the investigation. This was not so given the clear position in terms of the JNC14.

168. The Tribunal should not accept the evidence of Mr McKinlay that he had spoken to Mr Fella to inform him of the proposed action against the claimant. Mr McKinlay had been unable to clarify when that conversation took place. Ms Mullin had referred to a telephone conversation but had also referred to an e-mail being sent by Mr McKinlay to Mr Fella, as she understood it. Mr McKinlay had not however referred to any such e-mail. No such e-mail had been produced. The claimant referred to his own evidence that Mr Fella had not received either a telephone call or e-mail. He said that this was a further breach by the respondents of the procedure in JNC14.

169. These breaches were significant, the claimant submitted. He had been asked initially by Ms Sturgeon and Mr Gilbert whether he had slept in a room with pupils after the prom. He had confirmed that this was so. Had he been accompanied, he would not have accepted that those with whom he had stayed were pupils. This would, he said, have placed the status of these young persons at the very centre of the issue. The Tribunal should accept that these people were not pupils. That put the actings of Renfrewshire Council in dismissing him into context and supported his attack on that decision, he submitted.

170. Further, the investigation conducted by Mr Gray had not involved Mr Hayburn as Head Teacher being asked as to what he had witnessed at the prom. This reinforced the view that the young people involved were not pupils.

171. In addition, statements gathered by Mr Gray included opinions and judgments. Witnesses had not been advised, as required by JNC14, paragraph 2.6, that their statement should not include opinions or judgments. The statement should not have included anything other than facts. That was confirmed in paragraph 3.2 of JNC14. Despite that however the statements from witnesses did include such elements.

172. Further, a screen shot of the Tweet regarding sleeping in the bath was included within the papers. It appeared at full page size. Confirmation however that the author was lying when he made the statement was *"tucked away*" the claimant said.

173. The evidence from Ms Hawthorn was that she had taken all the witness statements into account. She had therefore been influenced, the claimant said, by statements which contained materials which ought not to have been present there. They were therefore partly inadmissible in that they included opinions, judgments and assumptions rather than simply facts. In addition, whilst Ms Hawthorn said that she had not taken the content of the Tweet containing false information into account, that was hard to imagine, said the claimant.

174. All of these failings meant that the dismissal was unfair.

175. The claimant then turned to the dismissal and what he said was the failure by the respondent to give proper weight to the mitigating circumstances.

176. The claimant highlighted that:-

i. There were no complaints about his conduct from any of those at the prom, or from parents, hotel staff or other guests who had been staying at or visiting the hotel. No complaint was made to the police and there was no police involvement.

ii. The claimant had served the school community for 34 years without there being any complaint as to any aspect of his teaching, his management of staff and resources or his professional or personal conduct.

iii. There had been no complaint about the claimant in relation to any other time he had attended proms, some twenty five occasions.

iv. The claimant was head of the largest faculty at Johnstone High School with the largest number of staff. He was union representative for some 80% of staff. There was a very difficult management situation at the school which was deteriorating. He had become involved in trying to support colleagues to cope with that.

v. The claimant had high levels of stress at home and at work at the time of the incident. He had become over-reliant on alcohol as a coping mechanism. His conduct on 12 June at the prom was completely out of character.

vi. There was medical evidence before the respondents as to the claimant's health at the time of the incident.

vii The claimant had an unblemished disciplinary record.

viii There was confusion as to the policy of the respondents in relation to the prom event.

ix. There was confusion as to the status of the young people attending the prom i.e. whether they were pupils or not.

177. In the view of the claimant Ms Hawthorn had not been keen to hear the position in relation to his partner. That information detailed an important mitigating factor. It was doubtful therefore that Ms Hawthorn had taken that

element into account given her reluctance to hear about it, said the claimant.

178. The prom was not a school event. It was not an extension of the workplace.

179. Those who attended the prom had, in the view of the claimant, left school and were members of the public. That was not a position accepted by Ms Hawthorn.

180. Ms Hawthorn ought to have considered the consequences of the dismissal. She said that she did do this, however referred to the consequences as being that the claimant would no longer work for Renfrewshire Council. She did not take into account the consequences in full. Those were:-

- The immediate short term financial effect of losing the job at a salary of £48,000 per annum.

- The long term effect on the claimant of pension loss through losing his job.

- Loss of life cover which existed by virtue of the death in service benefit.

- The psychological effect of dismissal, particularly where the claimant had a life long history of stress, anxiety and depression related illness.

- That the claimant was 56 years old at the time and it would be very difficult therefore for him to find alternative employment.

- That the only qualification which the claimant has and the only training which he had related to his job as a teacher.

- That he would have a dismissal for gross misconduct on his employment record.

- That he had only ever worked for the respondents and that therefore any reference in relation to any future job application would require to come from the respondents.

- That the other potential employers in Scotland in the field of teaching were very small in number.

181. Given the fact that all the mitigating factors mentioned were before Ms Hawthorn and that she had decided to dismiss, this led the claimant to the view that she must have relied on evidence other than had been presented to her when reaching her decision.

182. The claimant also said that he believed that Ms Hawthorn been of the view that there had been a sexual element to his conduct. That view had influenced her decision.

183. He said that the Tribunal could so conclude given the following facts:-

i. He had been suspended. Suspension was only appropriate in more serious circumstances. The events at the prom were outwith school. There had never been any question about his conduct in school. Those attending the prom would not be back in school. Colleagues had not complained. The school session was almost over. No publicity about the case took place until the claimant had been suspended. He concluded that suspension arose because the respondents wrongly saw him as a danger in a sexual sense to young people.

ii. The letter of dismissal on 18 September 2015 at page 319 of the joint bundle contained an acknowledgement by Ms Hawthorn that his submission was that there had been no sexual element to the kiss. It did not go on to say whether or not that was accepted. Ms Hawthorn had not therefore said that she had accepted that there was no sexual element to the claimant's conduct. The claimant said that "*the inescapable conclusion"* was that she believed there was a sexual element to its conduct. That had been the basis of her decision.

iii. At appeal Ms Hawthorn was asked to confirm that she accepted no sexual impropriety had taken place. She would not specifically do that, saying only that there was no mention of sexual impropriety. She therefore sent, the claimant said, a very clear message to the appeal panel.

iv. At Tribunal Ms Hawthorn had again repeated in response to the question as to whether there was any sexual element to the claimant's conduct that "*there was no evidence of this".* That remained her position despite being invited to state her belief on the point in clear terms.

184. All of these factors showed, the claimant submitted, that Ms Hawthorn quite clearly believed that his conduct had been of a sexual nature. The Tribunal should therefore not accept that this did not play a part in her decision. It had. It unduly and unfairly influenced her decision, the claimant said.

185. There was also reference in e-mails at page 417 to 425 of the bundle to what the respondents had referred to "*established inappropriate contact between the claimant and a pupil".* There had been discussion about possible involvement of the Police.

186. The claimant said that it was his view and his submission to the Tribunal that it should accept that Ms Hawthorn and other officers within the respondents' organisation believed that there was a sexual element to his

conduct and that the respondents had taken the decision to dismiss him to "*cover its own back".* This would give them a position of defence if any allegations of a sexual nature emerged in the future, he said. The decision to dismiss him had been "*a knee jerk reaction, a gut reaction, a panic reaction."* Fairness required that the respondents step back and look at the facts of what did and did not happen. That had not occurred.

187. In those circumstances the decision to dismiss lay outwith the band of reasonable responses.

188. The claimant also highlighted in his submission the following cases:-

i. ***Montracon Ltd v Hardcastle UKEAT/0307/12 ("Montracon")***

ii. ***Ramphal v Department for Transport UKEAT/0352/14, ("Ramphal")***

iii. ***Z v A UKEAT/0380/13 ("Z v A")***

iv. ***Liberty Living Plc v Reid UKEATS/0039/10 ("Liberty Living")***

v. ***Arnold Clark Automobiles Ltd v Spoor UKEAT/0170/16 ("Spoor")***

vi. ***Crawford and Another v Suffolk Mental Health Partnership NHS Trust [2012] EWCA Civ 138 ("Crawford")***

vii. ***Salford Royal NHS Foundation Trust v Roldan [2010] EWCA Civ 522 ("Roldan")***

viii. ***West v Percy Community Centre UKEAT/0101/15 ("West")***

189. The principles which the claimant said emerged from those cases and which he asked the Tribunal to weigh in its decision were as follows:-

1. ***Montracon*** - A reduction in compensation was not appropriate. The Tribunal in that case found that the basic award was to be made in recognition of long service. The claimant accepted that at the EAT a 30% reduction in the basic award had been confirmed.

2. ***Ramphal*** looked at the situation where there had been interference by HR in the decision and confirmed that that was inappropriate. The claimant said he believed that there were discussions amongst officials about his case. The balance of probability was that this was so. The claimant accepted that this point had not been raised at Tribunal with Mr McKinlay or with Mr Gray.

3. ***Z v A*** – The claimant pointed to paragraphs 13, 14 and 15 in this Judgment. He said that the position where an allegation had been made and was regarded by an employer as serious and as meaning that they could not run the risk of having the claimant as an employee had been disapproved by the EAT. He said that his situation was similar in that Ms Hawthorn's view, he said, had been, notwithstanding her position in evidence at Tribunal and in the decision letter after the disciplinary hearing and at the appeal hearing, that he had been guilty of sexual impropriety in his conduct and was therefore a danger to children. That had been enough to lead her to the decision to dismiss the claimant. He referred to his earlier submissions.

4. ***Liberty Living*** highlighted that a dismissal was unfair if there was a lack of clarity in the policy of the employer upon issues which had provided the basis for dismissal. In that case the claimant had been unaware of the policy and the policy had been confusing. That was an analogous to his situation, the claimant submitted.

5. ***Spoor*** was a further case in which there was confusion as to the respondents' policy. It also illustrated a failure by the respondents in that case to take account of all the circumstances in the case. That again had occurred here, the claimant submitted. There had been no guidance to staff on their conduct at leaving events. It was not clear what was acceptable and was unacceptable. The code of conduct of the GTC was vague as to teachers and pupils or ex-pupils and what conduct might be viewed as being acceptable or indeed unacceptable.

6. ***Crawford, Roldan*** and ***West*** were all cases which emphasised that the employer making the decision to dismiss should be conscious of the significant consequences of dismissal potentially for an employee. This was particularly so when an employee had lengthy service. There was reference in paragraph 27 of ***Crawford*** to it being particularly important that employers took their responsibility seriously in conducting a fair investigation where the employee's reputation or ability to work in his or her chosen field of employment was likely to be affected by a finding of misconduct. There had been similar references to the consequences for the employee being very significant in ***Roldan*** at paragraphs 10 and 13. In ***West*** the EAT again confirmed that, given the consequences for the future career of the claimant in that case, the investigation should have been thorough, and was not. It appeared in that case that the respondents had been of the view that there was no room for mitigation. The claimant made reference to paragraph 9 of that Judgment.

190. The claimant addressed the Tribunal in relation to reinstatement and compensation in line with a Schedule of Loss which he lodged with the Tribunal. His submissions in those areas are not set out due to the decision reached by the Tribunal.

Discussion and Decision

General comment

191. The events which had led to this case were extremely sad in character. The claimant had been a popular and well respected teacher employed by the respondents for a considerable length of time. He had clearly given a lot to the school. Had the events of 12 June 2015 not occurred he would have continued that service for a few more years. It seems likely that he would have retired with there being great appreciation of his services and best wishes for his future in retirement being expressed.

192. That is not however the situation which occurred.

193. This Tribunal heard the case following upon dismissal of the claimant by the respondents. It had to decide whether that dismissal was unfair In terms of The Employment Rights Act 1996 ("ERA").

194. The claimant maintained that it was automatically unfair as the reason or principal reason for dismissal was that he had made a protected disclosure. In the alternative, he brought a claim alleging unfair dismissal. The dismissal was said to be unfair due to procedural failings and also as the sanction of dismissal was said to be outwith the band of reasonable responses of a reasonable employer i.e. that no reasonable employer acting reasonably would have dismissed the claimant. It was said that some elements of mitigation had not been taken into account and that others, if considered, had not weighed heavily enough with the respondents. It was also said that the decision to dismiss was unfair as it was based upon a view which the dismissing officer was said to hold (although there was no direct evidence to support this this as being her view), that the claimant had been guilty of sexual impropriety in his conduct on 12 June 2015.

Was the dismissal automatically unfair?

195. The claimant maintained that the protected disclosure, which it was accepted he had made to the respondents on 8 June 2015, was the reason or principal reason for his dismissal. That decision was taken on 14 September 2015.

196. The Tribunal did not regard there as being anything by way of evidence to support the view that the protected disclosure made by the claimant on 8 June had played any part in the decision of the respondents to dismiss him.

197. There simply was no such evidence before the Tribunal nor any facts and circumstances from which the Tribunal could deduce that the claimant was correct in his assertion.

198. The Tribunal accepted evidence from Mr McKinlay and Ms Hawthorn when each said that there had been no contact between them in relation to the claimant other than when Mr McKinlay asked Ms Hawthorn to become the disciplining officer. Ms Hawthorn was regarded by the Tribunal as being a credible and reliable witness. She was quite clear in her evidence that she was unaware of any protected disclosure made by the claimant and specifically that Mr McKinlay, to whom that disclosure had been made, had not mentioned anything of that type to her. Mr McKinlay was equally clear that he had not mentioned anything which arose from the meeting with the claimant on 8 June when the protected disclosure was made to Mr McKinlay to Ms Hawthorn. The Tribunal accepted that evidence from each of them. There was no evidence whatsoever of Ms Hawthorn gaining knowledge of the protected disclosure from any other source.

199. The claimant did not pursue this matter in cross-examination either of Mr McKinlay or Ms Hawthorn. The Tribunal was conscious that the claimant was not legally qualified and represented himself. Nevertheless, given that this was a critical element in his case, it is surprising that he did not challenge Ms Hawthorn or Mr McKinlay on this point. He did say, when

asked in cross-examination, that he did not believe that Ms Hawthorn would tell the truth if asked whether the protected disclosure was the real reason for his dismissal. She might well have denied that it played a part in her decision making given her answer to his earlier question, which was that she was unaware of the protected disclosure. The claimant was, however, certainly prepared to raise with her the question of whether she believed there was sexual impropriety in his conduct. He persisted with his questioning, pressing her, notwithstanding her answers. It is hard to think therefore that he was deterred from challenging her in relation to the protected disclosure lying behind her decision to dismiss by a concern that she would simply deny that. The fact is therefore that ultimately the claimant had nothing other than a suspicion as to the protected disclosure being something which had been key to Ms Hawthorn's decision. He did not challenge her evidence that this was not the case.

200. Further, Ms Smith had been at the meeting with the claimant. She had, with him, presented the information to Mr McKinlay and therefore been a party to the making of the protected disclosure. There was no evidence from the claimant or from any other witness that any detriment had befallen Ms Smith following the meeting on 8 June when the protected disclosure was made. When asked about this in cross-examination the claimant was not in a position to provide any details of any action taken against Ms Smith or detriment suffered by her. He said that he had more knowledge than Ms Smith about the matter which was the subject of the protected disclosure thereby, in his view, rendering it more likely that retribution by way of disciplinary action, amounting to dismissal in his case, would be taken against him rather than Ms Smith. It might have been expected however that if the respondents had taken the disclosure made at the meeting on 8 June as being something which warranted dismissal of the claimant, there would have been some repercussions for Ms Smith due to her support for the position of the claimant at that meeting. There was no evidence at all of that having been the case.

201. The claimant also did not raise this point at the disciplinary hearing. He did not refer to it at the appeal meeting. Had he done so there might have been a reaction to that stance. There might have been an investigation by the respondents or a refusal so to investigate. If something of that nature had occurred then it would have underlined the early stage at which the claimant took the view he expressed to the Tribunal as to the real reason for his dismissal. It might also have given the Tribunal some evidence, from the reaction of the respondents, to enable it better to assess whether there was something in the allegation made by the claimant.

202. As it was, the Tribunal simply had no evidence whatsoever to support the claimant's position that the protected disclosure he had made was the reason or principal reason for dismissal. It had in fact no evidence from which such an inference could be drawn. All the tribunal had was a simple assertion on the part of the claimant that the protected disclosure he made was the real reason i.e. the reason or the principal reason for his dismissal.

203. Indeed at one point in his submission the claimant himself accepted he had given the respondents reason to take disciplinary action against him due to his conduct on 12 June.

204. This claim advanced by the claimant was unsuccessful.

Unfair Dismissal

205. There was in reality no attack by the claimant challenging the fact that the respondents genuinely believed that he was guilty of misconduct.

206. The investigation carried out was regarded by the Tribunal as lying within the band of reasonable investigations which would be carried out by a reasonable employer. It required to be seen in the context of the claimant, to his credit in many ways, accepting the allegations put to him during the course of the investigation and at time of the disciplinary and appeal hearings. He did not allege in the process or at tribunal that avenues of

investigation which ought to have been undertaken were not explored. He did allege some procedural failings which are commented upon below.

207. There was no attack by the claimant upon the investigation carried out by the respondents, other than in relation to the procedural elements mentioned. He did say that his view was that Ms Hawthorn believed that he was guilty of sexual impropriety on 12 June. He was correct in his submission to the Tribunal that Ms Hawthorn did not specifically say in terms, either in course of the internal proceedings or in course of the Tribunal Hearing, that her view was that there was no sexual impropriety. She said however that there was no evidence before her of that and that she had not made the decision to dismiss on the footing that there had been sexual impropriety.

208. The Tribunal accepted her evidence that she had made the decision on the basis of the materials before her and that there were no allegations in front of her of there being sexual impropriety. She was able to recount in evidence the different elements which she weighed in her decision, including mitigation, and to set out her view on the individual allegations and also on the overall picture. She was aware of the leavers not being uncomfortable with the claimant's behaviour. She accepted that this was something for her to consider. She did consider that point. Her approach to it was, however, that this was not however an end to the matter given that it was ultimately for the teacher, the person in the claimant's position, to make the decision as to what was appropriate in his actings.

209. The Tribunal accepted that the view she had come to, that dismissal was the appropriate sanction, was taken on the basis of the charges and admission made by the claimant and was not based upon any other consideration.

210. It is appreciated that it was frustrating for the claimant that Ms Hawthorn did not specifically confirm that, in her view, there had been no sexual impropriety. On the other hand, her evidence was very much focused upon

the decision she took and why she took it. Her position was that the decision was not based upon there having been an allegation of, or evidence of, sexual impropriety. The Tribunal did not accept that, on her evidence, what it viewed as being the leap which the claimant urged it to make, could be made. That leap seemed to the Tribunal to involve it concluding that Ms Hawthorn had privately been of the view that sexual impropriety had been involved and had made the decision to dismiss based on that privately held view rather than upon the evidence and material before her. That simply did not ring true to the Tribunal on the evidence it heard from Ms Hawthorn and the manner in which that evidence was given. She explained clearly what elements she had considered and how she had come to the view that dismissal was an appropriate sanction. She was able in a cogent and plain manner to explain why in her view the conduct was such as to warrant dismissal. There was simply nothing credible in view of the Tribunal to support the proposition which the claimant advanced.

211. The Tribunal understood that the claimant wished Ms Hawthorn to confirm that there was no sexual impropriety involved in her own view. That however was not specifically of relevance to the Tribunal. Had the Tribunal gained any sense that she had based her decision not on the evidence but on a view that there had been sexual impropriety or based to any degree upon such a view being held by her, that would have been an entirely different set of circumstances. The Tribunal found no such indication in the evidence of Ms Hawthorn. It could not conclude from her answers to being asked whether she believed that there had been sexual impropriety, the answer being that there was nothing to suggest that there was any sexual element involved and that there was no evidence of that, that she held any such view or that it influenced her decision.

212. The claimant also argued that the leavers were not pupils. He maintained that they were members of the public.

213. On the evidence, the Tribunal regarded there as being a very close connection between the prom and the school. The reason the event was

held was that pupils were leaving the school. Teachers were invited to the event by virtue of being teachers. They were not invited as "friends" or as part of the group. This was not a school event in the sense that it was not organised by the school. It was however held in term time. Some of these attending were still attending school. That is illustrated by the fact that they were present at school the following day for the dress rehearsal of the school show. On the evidence, the claimant was referred to by pupils in relation to some of the events of 12 June by use of the term "sir". The tweets saw him being referred to as "Mr Hutchison"

214. In the claimant's submission there was a either a lack of clarity or uncertainty as to the policies of the respondents and indeed of the Teaching Council for Scotland.

215. The Tribunal was satisfied that the respondents were able to take the position that they did in relation to the claimant's conduct on the basis either that the attendees at the prom were pupils, in which event the position was very clear, or that they were former pupils. If they were former pupils they had been in that category for a week or so at most. The GTC code of conduct reminds teachers of the need for appropriate professional boundaries, that they are role models and, importantly, that professional boundaries can extend beyond the leaving date of a pupil. It reminds teachers that they should exercise "*great care and professional judgment, taking into account the factors involved"* in the scenario of interaction with someone who has just left school.

216. It is no doubt correct, as the claimant argued and as Ms Hawthorn accepted, that there comes a point where it would be difficult to raise an eyebrow if a teacher and a former pupil met for one, or perhaps several, drinks together. The Tribunal accepted Ms Hawthorn's evidence that it was difficult to pinpoint exactly when that would occur, with any such occurrence then being acceptable, or certainly not objectionable. It would be unlikely that there would be any issue raised if that situation arose 20, 10 or perhaps 5 years after a pupil had left school. Where a pupil has however left school

only for a matter of days at the time of such an occurrence, and where the event arises because of, and is related to, school attendance, and where some of those there remain pupils, then there is a legitimate basis of concern. The behaviour of someone in the position of the claimant as a teacher is, in that scenario, far more open to scrutiny with appropriate consideration being given to whether professional boundaries have been respected or not.

217. The Tribunal did not accept that this was a situation where there was a lack of clarity as to the required standard of behaviour of someone in the claimant's position. He himself described his actings as *"stupid, irresponsible and unprofessional".* He said that his conduct was serious. He also said in cross-examination that he had never disputed that he had been highly unprofessional and highly stupid. He said that his judgment had been impaired through drink and that he had made poor choices. In re-examination he said that he "*crossed the line*" in attending the night out making a fool of himself and had exercised bad judgment. He accepted that it was probably fair to say that he had crossed the teacher/pupil line by "pretend kissing" the pupil. He also accepted that there was an onus on the teacher to put boundaries in place and that it was not for the child or pupil to define what was proper conduct.

218. The tribunal did not see that the respondents could be said to have acted unreasonably in taking the view that the event was closely associated with the school and that the conduct of the claimant required to be viewed in the context of his being a teacher attending this event. The facts supported that position, notwithstanding the claimant's evidence and submissions as to the technical definition of a pupil.

219. Also, although the claimant advanced the proposition at Tribunal that those attending were not in the category of pupils, this was not a position adopted by him in course of the investigation or the disciplinary meetings. There was ample opportunity for him to make that point at both those meetings. At the investigatory meeting the claimant was said by Mr Fella to have been under

the "misapprehension" that those at the event were not pupils. That is a different proposition to a positive statement that they **were not** pupils. The claimant said at Tribunal that he had been prejudiced through not being informed of the right to have a companion at the brief meeting which took place with Ms Sturgeon and Mr Gilbert, when he was asked whether he had spent the night in a hotel room with pupils. He said that although he had confirmed readily and openly that this was so, having the right to be accompanied would have offered him the chance to receive advice and not to admit to those involved being pupils. This point will be addressed shortly in relation to procedural failings. At the moment, it is worthy of note from the Tribunal's point of view that there are two relevant factors to be highlighted. Firstly, any concession by the claimant that those involved were pupils was not something critical to the respondents' decision making given the provision stating that professional boundaries are clearly stated as being capable of being perceived to extend beyond a pupil's educational establishment leaving date. Secondly, the claimant was not prevented by the respondents from advancing any proposition as to those involved not being pupils. The respondents did not, for example, say that this point had already been conceded by him and could not therefore be argued at any later stage. When the point was (to an extent) taken by the claimant or on his behalf at appeal, what was maintained was that this was a "grey area". It was not a main point made by the claimant.

Alleged procedural failings

220. As just mentioned, the claimant said that the terms of paragraph 4.7 of JNC14 (page 155 of the bundle) were such that he had the right to be accompanied when Ms Sturgeon and Mr Gilbert met with him.

221. At that meeting he was asked whether he had spent the night in the hotel room after the prom with pupils. He was candid and open and saw no reason not to be. He confirmed that he had.

222. This meeting with Ms Sturgeon and Mr Gilbert was not part of the disciplinary process in the sense that it was not part of an investigatory meeting, that being later held with Mr Gray. It was not part of the disciplinary hearing or, for completeness, of any appeal. It was a somewhat odd encounter. In the Tribunal's view it would have been better had it not occurred and had the first meeting been one at which, if that was considered appropriate to the respondents, as it was in this case, suspension could have taken place enabling investigation to occur.

223. This meeting between the claimant, Mrs Sturgeon and MR Gilbert took place a matter of hours before suspension. JNC14 does not provide any right on the part of the person who may be suspended to be accompanied at the meeting where suspension is confirmed. That is understandable in that providing such a right to be accompanied might lead to a delay in communicating suspension when a swift move to suspend would normally be appropriate if suspension is to take place.

224. This meeting was not one at which the claimant was informed of an allegation made in any formal sense. A question was asked and answered. It was a meeting with his Line Manager, Ms Sturgeon, and a peer, Mr Gilbert. Absence of intimation of the right to be accompanied at this meeting was not in the view of the Tribunal a breach of the internal procedure.

225. The Tribunal was conscious that ***Polkey*** states that a failure to comply with procedural safeguards will not automatically render a dismissal unfair. A dismissal cannot however be fair simply as any procedural failing would have made no difference. The Tribunal reminded itself of that and also reminded itself that there is one question to be asked, namely whether the dismissal was fair or unfair. Its view was that there was no procedural failing. If however it was wrong in that, it concluded that any breach of the respondents' internal provisions by not informing the claimant of his right to be accompanied at the meeting where Ms Sturgeon and Mr Gilbert asked him whether he had spent the night following the prom in a hotel room with

pupils was breach of a very minor nature which did not render the dismissal unfair.

226. The claimant said that JNC14 had also been departed from by reason of statements which contained material other than facts, i.e. opinions assessments or judgments, being prepared. The provisions the claimant said had been breached appear in paragraphs 2.6 and 3.2, pages 161 and 162 of the bundle. Those paragraphs are contained within Appendix A to JNC14 and within the section which sets out guidance notes for investigating officers. They provide guidance and do not specify procedural requirements. Further, in the view of the Tribunal, it is appropriate that statements are obtained from any witness which reflect what that witness has to say about events. It may very well be of significance and of importance to both the investigating officer and to the person potentially subject to disciplinary proceedings to have the full statement from a witness, including any comments made by way of assumptions or judgments or opinions. Those elements may cast light upon the facts and indeed may be helpful in assisting evaluation of information from the witness. It would be more objectionable, as the Tribunal saw it, if the statements were redacted in some respects. If that occurred it would not give the person potentially subject to disciplinary action the opportunity to understand the approach of the witness and to see his or her statement in proper context.

227. Inclusion therefore of any assumptions, opinions or judgment in the witness statements, all of which were passed to the claimant prior to the disciplinary hearing, was not something which made the dismissal unfair.

228. The claimant said that there was a breach of procedure as he was asked to attend the meeting with Mr Gray, where he was suspended, without being informed of any right to be accompanied. There is however, as mentioned above, no provision in terms of which any meeting at which suspension is going to be intimated to a party is one which requires to be preceded by intimation to the party that there is the right to be accompanied. The

claimant confirmed in course of his evidence that this was also his view. There is also no provision to that effect in the ACAS code.

229. The Tribunal accepted the evidence of Mr McKinlay that he had contacted Mr Fella by telephone to inform him that the claimant was subject to a disciplinary process. This is required in terms of Clause 4.4 of JNC14, a copy of that appearing at page 155 of the bundle. Mr McKinlay was accepted as being a credible and reliable witness. He gave his evidence both in chief and under cross-examination in a clear and straightforward manner. Although Ms Mullin had understood there to be an e-mail between Mr McKinlay and Mr Fella, the fact that Mr McKinlay could not specifically recall any such e-mail and that no such e-mail had been produced despite a request to the respondents, did not undermine or disprove Mr McKinlay's key evidence which was that he had telephoned Mr Fella to inform him of the disciplinary process involving the claimant. Clearly if there is written communication that is very helpful. It can then be produced to confirm a communication as having occurred. There was no email produced relative to any such communication between Mr McKinlay and Mr Fella. The only person however who had mentioned a view that there may have been such an email was Ms Mullin. The Tribunal was therefore left with Mr McKinlay's evidence. It was challenged, but uncontradicted. The Tribunal accepted Mr McKinlay's evidence on this point.

230. Clause 3.5 of JNC14, a copy of which appears at page 153 of the bundle, requires that a meeting take place at the earliest opportunity between the trade union secretary and the personnel services manager. The purpose of that meeting is to discuss the likely duration of the suspension and any possible alternatives. No such meeting took place.

231. The claimant was informed of his suspension by letter of 16 June (page 197 of the bundle). It was confirmed that the suspension would be subject of review within 10 working days. The school term then ended. The letter which appeared at page 281 sent by the respondents to the claimant on 30 July 2015 confirmed that the period between 27 June to 10 August was

categorised as school holiday and therefore did not constitute working days. On that basis, suspension was confirmed as being due to be reviewed on 12 August 2015. By letter of 4 August 2015 at pages 283 and 284 of the bundle, the holding of the disciplinary hearing on Friday 4 September was intimated to the claimant. That letter does not refer to suspension. The proposed date of the disciplinary hearing was re-arranged at the request of the claimant. That was confirmed by letter of 12 August to the claimant. In the interim a letter was sent by the respondents to the claimant on 11 August 2015 confirming continuation of suspension from 12 August until the date of the re-scheduled disciplinary hearing. A copy of that letter appeared at page 285 of the bundle.

232. The Tribunal was satisfied that there had been no procedural breach in relation to the requirements as to review and intimation of continuation of suspension. The timetable had been met.

233. In so far as there were any breaches of procedure, those related to breaches of the respondents' internal procedures. Any such breach can of course be of significance in assessing the fairness of a dismissal. The breaches in this particular case however were not such that the dismissal was rendered unfair. That was the unanimous view of the Tribunal. There was no breach of the ACAS Code.

234. The claimant was fully aware of the allegations and indeed admitted them. There was no suggestion of him being pressured into so doing or of him being unclear as to the allegations made. He was not precluded from taking any points, including a point as to the status of the leavers as pupils or otherwise, at any later stage. The disciplinary and appeal hearings took place within a relatively short time frame having regard to the 6 weeks or so when school summer holidays were in place.

Alleged lack of clarity in the policy

235. The claimant referred to ***Liberty Living*** and to ***Spoor*** to support his view that where the policy is unclear dismissal as a result of breach of it is unfair.

236. The view of the Tribunal is that those cases are distinguishable from this case. In ***Spoor***, the position of the respondents at Tribunal was that there was a zero tolerance towards physical violence. That was the reason that the claimant had been dismissed. The disciplinary policy however expressly stated to the contrary. It stated that the respondents had discretion in the event of physical violence. The concern in that case was therefore as to the policy saying one thing and the respondents adopting a different approach when they came to consider the actings of the claimant in a disciplinary context.

237. It did not relate in reality to a confusing or unclear policy.

238. In ***Liberty Living*** the claimant was dismissed. The dismissal was regarded as being unfair as he was unaware of the policy prohibiting consumption of alcohol or being under the influence of alcohol whilst on company business. It was also said that the policy was confusing. Paragraphs 19, 26, 27, 28 and 30 of the Judgment of the EAT are of significance in the view of the Tribunal.

239. Those paragraphs in that case highlight that the claimant thought summary dismissal applied when he was under the influence of alcohol. The respondents' General Manager at the time was aware that the claimant drank shandy when on his break. One of the incidents which led to his dismissal had occurred when he drank alcohol during a break late in the day when there was no chance he would be using company equipment again. The respondents had therefore been aware of, and had not objected to, what might be viewed as breaches of the policy.

240. The confusion in the policy terms in that case arose because the policy referred to "*being under the influence of alcohol… during working hours."* If that occurred summary dismissal might result, the policy said. A different policy intimated that consumption of alcohol *"while performing Company business or in the work place"* was prohibited. It was not stated that this was gross misconduct. It was stated that it could result in disciplinary action, *"up to and including discharge".* There was also said to have been a lack of awareness on the part of the claimant as to the policies.

241. There was therefore in the case of ***Liberty Living*** a contradiction between the two policies. One of the policies did not prohibit all drinking during working hours. The claimant had thought that whilst being under the influence of alcohol would potentially constitute misconduct, there was no policy prohibiting all and any consumption of alcohol. In those circumstances the dismissal was regarded as unfair.

242. In this case however, the claimant as a teacher would be expected to be aware of the GTC code of conduct. He was aware that there was likely to be a code of conduct affecting employees of the respondents. At no time did he express surprise at any of the terms of the codes of conduct of the GTC or of the respondents when those were put to him. He was familiar with the terms of JNC14. The prom may have been far more relaxed as an event than if it had been an event held at or organised by the school. Nevertheless, it was attended by teachers and leavers. Some of the leavers were pupils in that they were still involved with school, specifically the end of term school show. Others may have left, however had left very recently. The provisions in the GTC code of conduct highlight to teachers that boundaries should not be regarded as disappearing when a pupil leaves school. The provisions of the respondents as to personal conduct set out in their code of conduct also apply to their employees when not within the work setting.

243. The claimant said that there was no guidance issued to staff regarding their conduct at an event such as the prom. He said that the GTC code of conduct was vague as to the position with teachers and pupils or ex-pupils.

244. Whilst it is true that there is no specific guidance issued to teachers in relation to end of term proms, that does not, in the view of the Tribunal, support a finding of an unfair dismissal due to a lack of clarity in the policies of the respondents.

245. The Tribunal's view was that there was no confusion in the policies or procedures which applied to the claimant, notwithstanding there being no guidance in relation to senior proms. He recognised and accepted that his behaviour warranted disciplinary action.

246. In the view of the Tribunal, had to keep in mind the admitted behaviour of the claimant in its assessment.

247. The absence of any guidance might have been a valid point if the behaviour of the claimant was not as it actually was that night. Had he, for example, been "taken to task" for consuming alcohol, he might well have been able to point to the event being one at which drink was to be provided as part of the ticket price and indeed to previous years where teachers had attended and had consumed alcohol.

248. The admitted behaviour of the claimant and his reaction to it when it was made fully known to him, was however such that the Tribunal did not see that the claimant could credibly say that he had no appreciation that this behaviour was likely to cause any difficulty or to lead to any disciplinary action. He referred himself in evidence to his behaviour being "*stupid, irresponsible and unprofessional.*" He said that he had "*crossed the line*" in particular by kissing a pupil, albeit this was a pretend kiss and part of a prank. He confirmed that he expected disciplinary sanctions to follow. He referred to making various errors of judgment and acknowledged that the respondents might be brought into disrepute by his actions. This was not a

case therefore where there was a surprise of any sort to the claimant when disciplinary action was considered appropriate. Whilst therefore the policy did not spell out exactly what was or what was not acceptable, the claimant himself knew that his behaviour had not adhered to appropriate standards.

249. Ms Hawthorn, as narrated in the submissions for the respondents, said at Tribunal that there was no evidence before her of any sexual impropriety on the part of the claimant. The tribunal accepted her evidence that she did not base her decision on anything other than the material in front of her at time of the disciplinary hearing as detailed above.

The Burchell test

250. This, in reality, was a classic case to which the principles of ***Burchell*** apply. There was not a great deal of dispute as to the facts.

251. Looking to the issues, the Tribunal did not view the reason for dismissal or principal reason for dismissal as being the fact that the claimant had made a protected disclosure. It was clear in its view that the reason for dismissal was conduct.

252. Looking at the ***Burchell*** principles, the Tribunal accepted that the respondents had a genuine belief in the "guilt" of the claimant. It would be hard for that not to be so given the admission by the claimant of all allegations.

253. The Tribunal was also of the view that there were reasonable grounds for the respondents to hold that view. Again the admission of the claimant to all allegations largely dealt with that element.

254. The investigation was in the view of the Tribunal reasonable in the circumstances of the case, again looking to the claimant's admissions being one important element in that assessment. As mentioned above, there was no suggestion by the claimant that the investigation was not reasonable.

He did raise the procedural points which are mentioned and dealt with above. Any attack mounted by the claimant did not render the investigation outwith the band of reasonable investigations carried out by a reasonable employer.

Sanction

255. This was where the vast majority of the claimant's case both before the respondents and at Tribunal was focused.

256. As set out above, a claim before an Employment Tribunal is not a rung in the appeal ladder in the sense that the Tribunal does not assess the information available and decide whether dismissal is to be confirmed or not as a sanction. A dismissal is fair if it lies within the band of reasonable responses of a reasonable employer. The tribunal must not substitute its own view for that of the employer.

257. Comments are made above as to the Tribunal's view of the evidence of Ms Hawthorn. In summary, she was able to articulate in a cogent and coherent manner her assessment of the information before her and the consideration she had undertaken in coming to the view that dismissal was appropriate.

258. Ms Hawthorn took account of the admitted conduct of the claimant. She kept in mind the length of service of the claimant and the good employment record which he had. The Tribunal accepted that she paid attention to the information before her and all mitigating factors advanced. She had regard to the workplace and personal stresses by which the claimant was affected and the extent of those. She was aware of and considered his partner's unfortunate difficulties with illness. Further she was aware of and had regard to the health issues affecting the claimant. She was also conscious that there had been no complaint by anyone, whether leavers, other teachers or parents. There had been no police involvement and no criminality. She was aware of the setting of the events. She accepted that the leavers were not perturbed. She knew that the consequences would be

serious for the claimant in that he would lose his job. Her conclusion was however that the factors put forward in mitigation did not outweigh the seriousness of the conduct and that dismissal was the appropriate sanction. She considered alternatives to dismissal before coming to the view that the facts of the matter warranted dismissal, notwithstanding the points advanced by the claimant and his representative in mitigation.

259. The claimant argued in submission that there were extremely serious consequences of any finding of misconduct as far as he was concerned. He referred to the cases of ***Crawford, Roldan*** and ***West.*** He said that those showed that Ms Hawthorn ought to have considered the full range of consequences as far as he was concerned. He set out those consequences in his submission.

260. He did not cross-examine Ms Hawthorn asking whether she had been conscious of each one of those elements when making her decision. He did ask her whether she had regard to consequences as far as he was concerned. She confirmed that she did. She said that she had taken a few days to consider the position and had not taken the decision to dismiss lightly. When asked what the consequences were, she replied that the claimant would no longer be in employment with Renfrewshire Council. That line of questioning ceased there.

261. Ms Hawthorn was not therefore given the chance to comment upon whether she understood or appreciated that the consequences would extend to the elements the claimant mentioned. He also did not place all of those consequences before her at the disciplinary hearing. Many of the consequences which the claimant referred to in his submissions were, however, apparent as being inextricably linked to him losing his job. Elements such as loss of pension and income were examples of those.

262. The Tribunal accepted Ms Hawthorn's evidence that she had considered the position carefully. The cases to which the claimant referred the Tribunal emphasised the need for an employer to consider the gravity of the charge

and the potential effect upon the employee. ***Roldan*** at paragraph 13, whilst referring to the need for an employer to act reasonably in all the circumstances said:-

> ***"****So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of that case, the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite."*

263. The case to which the Employment Appeal Tribunal was referring was that of ***A v B [2003] IRLR 405.*** That case confirmed the need for "*a careful and conscientious investigation of the facts"* as being necessary with the investigator requiring to "*focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him."*

264. ***Crawford***, at paragraph 27 to which the Tribunal was referred by the claimant saw the Court of Appeal endorse the approach in ***Roldan*** saying:- *"it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as is the case here, the employee's reputation or ability to work in his chosen field of employment is likely to be affected by a finding of misconduct."* That case concerned nurses where the police were notified of potential criminal offences by the employer.

265. The case of ***West*** involved an allegation of inappropriate and excessive physical contact by a teacher with young children. The Employment Appeal Tribunal held that given the consequences of the decision for the future career of the claimant the investigation should have been thorough and was not. It held that the employer erroneously appeared to declare that if there was a breach there was no room for mitigation. This had not been examined by the Employment Tribunal in that case. It had also held that if it was not uncommon for such events (i.e. events similar to those which were alleged to have occurred in the case of the claimant in that case) to happen then

there would be good grounds for thinking a sanction short of dismissal might have been the most that a reasonable employer could have imposed.

266. The claimant highlighted paragraph 9 of that Judgment to the Tribunal. That paragraph referred to the undoubted seriousness of a teacher being dismissed on grounds of misconduct relating to child safeguarding issues. It said that it was likely that this would severely blight his prospects of re-employment in his chosen field. The Employment Appeal Tribunal went on to say:-

> *"For that reason, we accept that it was incumbent upon the employer in considering the allegation that we have summarised to bear in mind the words of Elias J, as he then was, in the case of A v B [2003] IRLR 405; he called for particular care to be taken in cases where the consequence of a dismissal could be of the nature we have described. It is incumbent upon an employer to take greater steps the more serious the consequences are for an employee and, it follows, to examine with great scrutiny the circumstances of alleged misconduct where an employee might as a consequence of an adverse decision be prevented from working in his chosen field ever again."*

267. Whilst the Tribunal understood the point which the claimant was making, it did not see any valid ground of criticism of the actions of the respondents in this area such that the dismissal would properly be regarded as unfair.

268. The respondents had carried out a full investigation, particularly judging that against the admissions of the claimant in relation to all five allegations. They had obtained relevant information from the claimant as to mitigation. Ms Hawthorn had properly considered that. There was essentially no dispute as to what had happened. The explanation from the claimant as to his medical position, his work and home pressures, his unblemished disciplinary record and length of service and contribution to the school were all matters before Ms Hawthorn which were properly considered by her.

269. Equally when it came to appeal, the appeal panel had before it a further medical report which was again considered. The claimant was given every opportunity to set out his position to the appeal panel and did so. It took account of all matters before it. It did not uphold the appeal.

270. In the view of the Tribunal there was no procedural breach in relation to the appeal which meant that the dismissal was unfair. There was no evidence of the appeals panel doing anything other than considering all matters before it and properly taking a view upon the appeal presented to it.

271. The Tribunal did not therefore see that the claimant's submissions on this point validly led to the dismissal being unfair when it came to the Hearing before the Employment Tribunal.

Gross Misconduct

272. Gross misconduct has been viewed as involving deliberate wrongdoing or gross negligence. The respondents referred to the case of ***Sandwell and West Birmingham NHS Trust v Woodward UKEAT/0032/09.***

273. The Tribunal accepted that the claimant had not arrived at the senior prom intent on behaving as he did. He did not however, as events unfolded, take the opportunity to step back from the situation. Rather he made decisions to continue drinking and to drink to the point of drunkenness putting himself into a condition where he could not remember events. He decided to go along with the fun/joke in gaffing the leaver. He decided to take up the offer of staying in the hotel room with the leavers. He decided to remove his suit to sleep. He put himself in a position where photographs could be taken when he was in a state of undress and urinating. He entered into the discussion in relation to pleasing a woman, it being accepted that he was not being derogatory, sexual or rude in course of that discussion. He did all this against the backdrop of the close association with the school which the event carried with it. He was present at the senior prom due to being a teacher.

274. In the view of the Tribunal reasonable grounds existed for the respondents to determine that the claimant's conduct amounted to gross misconduct. The decision to dismiss lay within the band of reasonable responses of a reasonable employer in respect of that gross misconduct, taking account of the circumstances before the respondents as employer and the mitigation in particular put forward to them by the claimant.

Conclusion

275. This was a very unfortunate case. It involved someone who was, and no doubt still is, a very good teacher, by any account the Tribunal heard or papers which were before it. He has suffered hugely due to the events of one evening and the awareness of his behaviour which came about. It is to be hoped that the claimant is able somehow to make the most of his talents over the remainder of his working life.

276. For the reasons set out above, however, the Tribunal unanimously concluded that the claim presented to it was unsuccessful.

Employment Judge: Robert Gall
Date of Judgment: 12 September 2017
Entered in register: 13 September 2017
and copied to parties

5