Neutral Citation Number: [2025] EWCA Civ 250

Case No: CA-2023-001757

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HH Judge Auerbach, Professor Andrew Rowland and Miss Emma Lenehan
[2023] EAT 109

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/03/2025

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE WARBY
and
SIR LAUNCELOT HENDERSON

- -

Between :

ANDREW HEWSTON	**Claimant/ Respondent**
- and -	
OFSTED (Office for Standards in Education, Children's Services and Skills)	**Respondent /Appellant**

- -
- -

Andrew Allen KC and **Paul Livingston** (instructed by **DAC Beachcroft LLP**) for the **Appellant**
Oliver Segal KC and **Tom Kirk** (instructed by **Unison Legal Services**) for the **Respondent**

Hearing date: 17 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 14 March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Underhill :

INTRODUCTION

1. The Appellant is the Office for Standards in Education, Children's Services and Skills ("OFSTED"). It is the principal independent regulator and inspectorate of schools. The Respondent, who is the Claimant in the proceedings, and to whom I will refer as such, was employed by OFSTED as a Social Care Regulatory Inspector from 2007.

2. On 8 October 2019, in the course of a school inspection, the Claimant brushed water off the head, and touched the shoulder, of a boy aged twelve or thirteen who had been caught in a rainstorm. The incident was reported to OFSTED as a case of inappropriate touching. Disciplinary proceedings were instituted, and on 21 November 2019 he was summarily dismissed for gross misconduct. I give more details about the incident below but it is right to state at the outset that there has never been any suggestion of any improper motivation on the part of the Claimant: what he did was intended as a friendly act of sympathy and assistance.

3. The Claimant brought proceedings against OFSTED in the Employment Tribunal ("the ET") for both unfair and wrongful dismissal. Following a five-day hearing, on 26 November 2021 Employment Judge Dean, sitting in Birmingham, dismissed both claims. Written reasons were requested and were sent to the parties on 3 March 2022.

4. The Claimant appealed to the Employment Appeal Tribunal ("the EAT"). The appeal was heard on 20 June 2023 by a Tribunal consisting of HH Judge Auerbach, Professor Andrew Rowland and Miss Emma Lenehan. By a decision handed down on 4 August the appeal was allowed. As regards the claim of unfair dismissal, the Tribunal found that the Claimant had been unfairly dismissed, and it remitted the claim to the ET for a determination of remedy. As regards wrongful dismissal, it quashed the ET's finding and remitted the claim for determination of liability (and damages if it were upheld).

5. At an oral hearing on 13 March 2024 Lewison and Elisabeth Laing LJJ gave OFSTED permission to appeal against the decision of the EAT as regards the unfair dismissal claim: it did not seek to appeal against its decision on the wrongful dismissal claim. We heard the appeal on 17 October. OFSTED was represented by Mr Andrew Allen KC, leading Mr Paul Livingston, and the Claimant by Mr Oliver Segal KC leading Mr Tom Kirk. Mr Allen and Mr Kirk, but not Mr Segal or Mr Livingston, appeared in the EAT and the ET. The case was very well argued on both sides.

6. At the conclusion of the hearing we informed the parties that the appeal would be dismissed, with reasons to follow. These are my reasons for joining in that decision. I very much regret that it has not been possible to supply them sooner.

THE INCIDENT

7. The incident which led to the Claimant's dismissal occurred during the course of a three-day inspection visit to a school ("the School"), which he made in the company of a lead inspector, Louise Battersby. It is material to note that there was a pre-existing poor relationship between the School and OFSTED.

8. On (it seems) the following day, 9 October 2019, the School contacted Ms Battersby complaining that, when a pupil had come inside from the wet, the Claimant had rubbed his head and back. It also reported the incident to the officer designated by the relevant local authority to deal with safeguarding allegations (the Local Authority Designated Officer, or "LADO"). In an email to OFSTED of that date the Duty LADO described the complaint in this way:

> "Andrew has been observed to rub his hand on a student's head and shoulder. This was after a number of students had come in from outside from heavy rain and they were completely wet. The teacher who observed the incident felt it was inappropriate and uninviting [*sic*] to rub water off a student's head and shoulder without permission. The student looked uncomfortable/embarrassed when this happened and commented he was unhappy to another student. The student completed an incident form stating that he didn't feel comfortable when his head and shoulder was being rubbed by Andrew."

The email concluded:

> "On balance I feel the proportionate response is for the employer to investigate this matter internally with Andrew with consideration to raising awareness of professional boundaries and any training that may be required in support of this. The employer is advised of the duty of care to the employee during the investigation process and Andrew's right to know that he has been referred to the LADO service."

9. I should say something about the term "inappropriate" which appears in that report, and in some of the other documents referred to below. It is sometimes used as a euphemism for touching with a sexual motivation. That usage is unhelpful because it carries the risk of ambiguity when it is used to describe touching which has no such motivation but where the other person would or might find it an unwelcome invasion of their personal space. As I have already said, the Claimant's touching of the child has only ever been said to be "inappropriate" in the latter sense.

10. It will be seen that the LADO's email refers to an "incident form" completed by the pupil. This is handwritten on a standard form and dated 8 October 2019. It reads:

> "The year 8's had p.e. and it was raining heavily so we had to go back into H-Block to go have a shower, and then one of the inspectors rubbed his hand on me on the shoulder and on the head. I didn't really feel that comfortable when he was touching me, and at that time I was all wet because it was raining a lot outside."

Clearly a teacher would have had to be involved in the completion of the form. It is not clear whether a teacher or the pupil himself did the actual writing, though of course in either case it is a record of what the pupil said.

11. Some time later – it is not clear exactly when – the headteacher of the School sent OFSTED an eleven-page letter complaining about what were described as a "bewildering high number of contact and competence related issues experienced relating to the inspection": I will refer to this as "the School's complaint". The tone of

the letter is redolent with hostility against the inspectors and the inspection. Although much of it related to the substance of the inspectors' report, which was said to be unfair and unevidenced, there were several pages of particular complaints about things that Ms Battersby and the Claimant were said to have done wrong during the inspection. These included a complaint about the incident between the Claimant and the pupil with wet hair. The account is not identical to that in the incident form or the LADO's report. It reads:

> "The second inspector (Andy) walked over to a student who was noticeably the shortest in the group and expressed sympathy that he was drenched in water and then unexpectedly, without permission from the student wiped his wet head and shoulder as a sign of affection. The student was noticeably shocked and embarrassed and complained to his teacher once the inspectors and other staff had left the building. The student expressed feelings that his personal space had been invaded and he was extremely uncomfortable being touched by a stranger directly on his skin/hair whilst he was already uncomfortable due to being wet. At best this was a slimey [*sic*] and very precarious situation. It should be noted that the lead inspector was present at the time and did not challenge this behaviour from the second inspector and as such herself fell short in her duty to safeguard children. The lead inspector did not alert the DSL [designated safeguarding lead] of the school or the head teacher of what had happened. However the incident was reported both by the student and the consultant who had witnessed the incident. This incident was immediately referred to the local authority safeguarding team by the school DSL."

It went on to say that the Claimant and Ms Battersby had "put the safety of a student at risk". As will be seen, the account is in highly-charged terms. Quite apart from the reference to his "safety" being put at risk and to a "very precarious situation", the various additional details are calculated to heighten the gravity of the incident as compared with what appears from the pupil's own account.

12. It is convenient to give here, though it is strictly speaking out of sequence, the Claimant's account of the incident as given at the subsequent disciplinary hearing:

> "I was on inspection with Louise Battersby and we were doing a tour of the junior accommodation. It took us about an hour. As we were about to finish in that house it was raining heavily outside. There were a group of people that came in. They were in the foyer area and they were dripping wet. We walked up to them. I said hello and Louise carried on. I think I said something around you look like a drowned rat, they had rain dripping off them. There was a lad that was soaked through. I said, 'look at the state of you, you are soaked through' and then I brushed off a drop of rain off from his forehead. I asked him if he was OK and he said 'yeah'. And then I carried on with the inspection. Before that there was eye contact. He was quite comfortable and positive to be in my presence."

(I should say that he had also given an account of the incident in the initial investigation and that he referred to particular aspects in response to questions in the course of the hearing; but the substance was the same.)

THE BACKGROUND LAW

13. Section 94 of the Employment Rights Act 1996 gives employees the right not to be unfairly dismissed. The substance of that right is defined in section 98, which reads, so far as material:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) …
>
> (b) relates to the conduct of the employee,
>
> (c)-(d) …
>
> (3)…
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

14. At the risk of spelling out what is trite law, section 98 provides for a two-stage process. First, the employer must identify a reason for the dismissal falling within subsection (2): in the present case we are concerned with a reason of type (b), "conduct". If it does so, the determinative issue is whether it was reasonable for it to treat the conduct in question as a sufficient reason for the dismissal.

15. It is very well-recognised that a decision to dismiss may be reasonable even where another employer, or the tribunal itself, might have taken the view that a lesser sanction was sufficient; and it follows from the statutory language that in such a case the tribunal must find the dismissal to have been fair. This is generally referred to as "the range [or

band] of reasonable responses" approach[1]. After some confusion in the EAT authorities, arising from a concern that that formulation encouraged tribunals to apply a lesser level of scrutiny than the statute requires, this Court gave authoritative guidance as to the correct approach in *Foley v The Post Office* [2000] ICR 1283: see the judgment of Mummery LJ at pp. 1291-3. It endorsed the range of reasonable responses approach, but it is important to note that Mummery LJ emphasised that that did not mean that a tribunal can only find unfairness where the employer's decision has been "perverse" (see p. 1292 D-E); he also observed that in many cases reference to the range of reasonable responses is an unnecessary gloss (see p. 1292 F-G). It is important to be alert to the possibility that the tribunal has failed to heed that message and has been deflected by the invocation of "the range of reasonable responses test" from its statutory responsibility to decide for itself whether the employer "acted reasonably or unreasonably" in deciding to dismiss the employee (for the identified reason).

16. It is a common sense proposition that it will not normally be fair to dismiss an employee for an act which they could not reasonably expect the employer to regard as serious misconduct[2]. For that reason the ACAS Code of Practice on Disciplinary and Grievance Procedures recommends that employers should in their published disciplinary procedures give examples of acts which the employer regards as acts of gross misconduct. But it is well recognised that such examples cannot be comprehensive, and there will be cases where the question whether the employee should have appreciated that the employer would regard what they were doing as serious misconduct has to be determined as a matter of judgment having regard to the nature of the act and the surrounding circumstances. We were referred to three decisions of the EAT – *W Brooks & Son v Skinner* [1984] IRLR 379, *Lock v Cardiff Railway Company Ltd* [1988] IRLR 358 and *West v Percy Community Centre* UKEAT/0101/15 – but they do no more than consider the application of this principle (if it can be called that) on the facts of the particular cases.

THE DISCIPLINARY PROCEEDINGS AND THE DISMISSAL

THE INVESTIGATION

17. On 11 October 2019 the Claimant was suspended and an OFSTED manager called Lynn Radley was appointed to conduct an investigation. She interviewed Lisa Pascoe, Deputy Director of Social Care, Ms Battersby, and Wendy Ghaffar, whose job title is given as "HMI Specialist Adviser, Cross Remit Safeguarding in Social Care Policy". I need not set out here what transpired in those interviews (though I refer at para. 23 below to something said by Ms Ghaffar). But I should make clear that the Claimant's case from the start was that he had not believed that he was doing anything inappropriate: wiping the rain from the boy's head was a "caring" act which he had no reason to believe would make the child feel uncomfortable, nor did he observe any reaction which made him think that it had.

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[1] The label is rather inapt because there are relevantly only two options – to dismiss or not to dismiss. But the phrase has become too embedded in the jurisprudence to try to reformulate it.

[2] I use this term to mean conduct of a kind which might render the employee liable to dismissal. This is sometimes referred to as "gross misconduct", but in some contexts that phrase has technical connotations and I accordingly eschew it here.

18. Ms Radley recommended that the Claimant face disciplinary charges in the following terms.

> "(1) That on 8 October 2019 whilst you were on inspection you without consent or invitation touched a child on the head and shoulder;
>
> (2) That your actions were inappropriate and were contrary to Ofsted core values, professional standards and the Civil Service Code;
>
> (3) That your actions have caused a breach in our trust and confidence in your role as an Ofsted inspector;
>
> (4) That your actions have damaged Ofsted's reputation."

19. It is important to appreciate that the standards referred in (2) do not contain any explicit reference to the circumstances in which inspectors should make physical contact with a child, still less a blanket prohibition (referred to before us as a "no touch" rule). They are of an entirely general nature. The least unspecific "standard" is a statement in OFSTED's Social Care Common Inspection Framework ("the SCCIF") that inspectors are obliged:

> "… to uphold and demonstrate Ofsted values at all times, carry out their work with integrity treating all those they meet with courtesy, respect and sensitivity; take all reasonable steps to prevent undue anxiety and to minimise stress for those being inspected; to act in the best interests and wellbeing of service users, prioritising the safeguarding of children at all times."

THE HEARING

20. The disciplinary hearing took place on 21 November 2019 before a Regional Director, Lorna Fitzjohn. The Claimant was accompanied by his trade union representative, Carolyn Thompson. A full note was taken. The substantive part of the hearing lasted about an hour and a quarter. Ms Fitzjohn took the Claimant through each of the four allegations and asked for his and Ms Thompson's response. He mostly gave his response by reference to a prepared statement, but he also at some points spoke *ex tempore*. I have already quoted his account of the incident. Paras. 46-48 of the ET's Reasons summarise his evidence and his representative's submissions as follows:

> "46. The claimant expressed the view that the complaint had been blown out of proportion and that the complaint from the school had not been shared with him. He expressed the view that the school was looking for a reason to pick on an inspector. The claimant at the hearing read his prepared notes and sought to assert that he respected the child and his was a caring gesture 'to show that you were trying to care for a child and engage with him'. The claimant suggested that the touch was not excessive and he had not hugged the child.
>
> 47. Ms Thompson on the claimant's behalf questioned what he had done in breach of the Code, and it was plain that it was the fact that the

> claimant, without invitation or consent, had touched the child on the head and shoulder. What was not in dispute was that the touch was uninvited – it was a touch on the head and forehead and on the face of the child[3].
>
> 48. During the disciplinary hearing the claimant on occasion became upset, and while he acknowledged the impact of events on Ofsted he suggested in mitigation that there were ways to address the issues like this and he did not feel it fell within the disciplinary procedures. The claimant in particular said
>
> > 'To say I would not do it again would suggest I'm guilty of acting inappropriately. I feel that the gesture of care for a child and engagement, I still feel that it was not a crime and needed to come to this point. It does not fall within the definition of gross misconduct. Having gone through all this and the stress I can say that I would not do it again. That is not suggesting I'm guilty. Does that make sense?'"

That is a useful summary, but I should refer to some other passages from the notes of the hearing to which we were referred.

21. First, with regard to the Judge's reference to the Claimant having said that the School "was looking for a reason to pick on an inspector", I should set out his exact words:

> "I feel the school is looking to blame the inspector on something. It's been a difficult school. I've been there three times. I know an array of complaints have been made about previous inspectors from that school. … I think the school is looking for a reason to pick on an inspector. I might be wrong."

22. Second, Ms Thompson asked whether there had been a complaint from the child. Ms Fitzjohn replied that there had been a complaint from "the provider" (i.e. the School). Ms Thompson said that that was not the same thing but noted that they had not seen that complaint either. It is important to record that Ms Fitzjohn in fact had both the incident form recording the pupil's complaint and the School's subsequent complaint. Neither were shown to the Claimant and his representative; nor were they shown the LADO's report.

23. Third, the Claimant drew attention to the fact that OFSTED had never had a "no touch" policy and that professional opinions differed about whether any such blanket rule would be right. He had seen Ms Radley's note of her interview with Ms Ghaffar, in which she had said that inspectors should never have any physical contact with children. He described that as "a huge change from what we have been practising". He referred

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[3] The reference to touching the child's "face" as something distinct from touching the forehead, appears at various places in the documents, but it is potentially misleading. The complaint had never been that the Claimant had touched any part of the child's head except the forehead. The point is not of great significance, but it is worth making because touching the face below the forehead would evidently be more intrusive.

to advice given to inspectors on previous occasions about the value of "engagement through touch".

24. After a twenty-minute adjournment Ms Fitzjohn informed the Claimant that her decision was to dismiss him. He was extremely distressed. She told him that her reasons would be set out in a letter.

THE DISMISSAL LETTER

25. The dismissal letter is dated 27 November 2019. It begins:

> "Following the disciplinary hearing held on 21 November 2019, I am writing to confirm the outcome, and the reasons for my decision to dismiss you without notice for gross misconduct, in line with Ofsted's disciplinary policy and procedure."

It goes on to consider the four charges in turn. This involves a fair amount of repetition, since the allegations overlap; but the key parts can be summarised as follows.

26. As regards charge (1), Ms Fitzjohn found, though this was not in dispute, that the Claimant had brushed rain from the pupil's forehead and touched his shoulder. She also found that the pupil had done nothing to imply consent, and that "initiating physical contact with a student when it was not invited or expected" was a "fail[ure] to exercise good inspection judgement". She added:

> "Whilst I understand you may have been trying to convey a feeling of trust and openness, your act in touching the smallest boy in the group, without being absolutely certain that this was acceptable to them, was a grave error of judgement on your part."

27. As regards charge (2), the letter begins by identifying various provisions of the Civil Service Code and "the Ofsted Inspector Code of Conduct"[4] referring to the need to act "professionally". It then goes on to record an interchange between the Claimant and Ms Fitzjohn at the hearing about whether his conduct had been professional. In summary the Claimant's position was that it had been professional because it was caring. Apparently in that context, she referred to what she characterised as an allegation that the School had "fabricated" the complaint (which appears to be rather an over-statement of his position) and described it as showing a "lack of self-awareness, failure to reflect and a lack of contrition on your part".

28. As regards charge (3), Ms Fitzjohn said that OFSTED had to have trust and confidence in the Claimant's willingness to abide by its standards. She said:

> "I asked you during the hearing whether you would do this again. You stated you would not, because of how stressful the investigation and discipline process had been for you, but you were firm in your view that you felt your actions were appropriate. I therefore have no confidence that you recognise your error, or that you are able to maintain the professional boundaries between yourself and the student."

[4] It is not clear if this is the same as the SSCIF referred to above, but nothing turns on this.

She went on to "stress that I do not believe that you are a risk to children" or that what the Claimant had done amounted to "harm" or constituted "a safeguarding breach". But she said she had nevertheless concluded

> "… that you have brought Ofsted into disrepute through this grave error of judgement and have shown no remorse, or conviction, that you will not repeat this error."

Something has gone wrong with the wording in that passage, but the gist of it is clear: because the Claimant had shown no "remorse" she could not be satisfied that he would not do something similar again.

29. As regards charge (4), the letter makes essentially the same point as under charge (3).

30. Finally, the letter acknowledges that the Claimant had advanced various arguments in mitigation, but it says that this cannot affect the outcome because of his "concerning lack of contrition and reflection on your actions, other than a wish to avoid unpleasant processes": the latter phrase is clearly a reference to his statement that he would not do the same thing again "having gone through all this and the stress" (see para. 20 above). It concludes:

> "The grave error of judgement you displayed in this case, and your lack of contrition or recognition of any wrongdoing, has led me to regretfully conclude that your actions, and response to the challenge, have destroyed the relationship of trust and confidence I require in you to continue as an SCRI. I have no option but to dismiss you from your role with immediate effect."

31. There was some debate before us as to how the reason for the Claimant's dismissal, as stated in the letter, should be characterised. Mr Segal contended that it was, straightforwardly, his conduct – that is, touching the child in the way that he did. That, after all, is the conduct which he had been charged with in charge (1), and the other charges were simply alleged consequences of those "actions". Mr Allen said that it is clear from the letter that the reason was the combination of the conduct itself and the Claimant's attitude to it as displayed in the hearing. In my view which is right depends on the purpose for which the question is asked. Plainly the touching of the child is the "conduct" which constitutes the admissible reason for dismissal under section 98 (2) of the 1996 Act. But it is clear that his attitude to that conduct was part of Ms Fitzjohn's reason for deciding to dismiss him for that conduct, and it is therefore potentially relevant to the assessment of the reasonableness of the dismissal under section 98 (4).

THE APPEAL

32. The claimant appealed. The officer responsible for the appeal was another Regional Director, Bradley Simmons.

33. The Claimant's appeal document incorporated a supporting statement from his trade union, UNISON. Among other things Unison complained of a lack of clear guidance from OFSTED on physical contact with children. It also said that OFSTED had failed to take into account the claimant's "exemplary past record and the absence of any previous concerns on his professional conduct". It submitted that he had shown

contrition and a clear willingness to abide by guidance if reinstated. He could be trusted to conduct himself appropriately and professionally in the future. UNISON submitted that OFSTED should "urgently seek to produce clear and unambiguous guidance to inspectors on physical contact with children" and training.

34. I should note three points about the appeal hearing:

(1) Mr Simmons confirmed that OFSTED did not have, and was not intending to introduce[5], a "no touch" policy.

(2) During the hearing the Claimant indicated that he was happy to be involved in any necessary training in terms of physical contact with children and that he hoped to be allowed to return to work as an inspector.

(3) For the purposes of the appeal hearing the Claimant was supplied with the School's complaint and the LADO report but not the pupil's complaint.

35. The appeal decision was sent to the claimant by email on 23 December 2019. Mr Simmons' essential conclusion was:

> "The decision maker was correct to rule that you cannot be relied upon to exercise clear sighted professional judgment in the future. You have not convinced me that your professional judgment is sufficiently consistent. Your lack of professional judgment has led you to touch a student in an untoward manner which, as reported, made the student feel uncomfortable. This is in my view a very grave misdemeanour."

THE ET's REASONS

36. Paras.1-20 of the Reasons set out various uncontentious matters. Paras. 21-69 are headed "Findings of Fact". They include not only the Judge's findings of primary fact, most of which were uncontentious, but some findings about aspects of procedural fairness to one of which I will have to return.

37. The Judge's dispositive reasoning starts at para. 70, under the heading "Argument and conclusions". After para. 83 the numbering re-starts with a second para. 69: I will denote the paragraphs in question with an asterisk. I need to examine these in some detail.

38. I start by setting out in full paras. 71-76 of the Reasons (subject only to the omission of one irrelevant passage):

> "71. I am conscious that this is a case in respect of which Mr Kirk has suggested that in cases relating to safeguarding children it is important to examine with care whether the allegations of inappropriate physical contact with children have been properly covered in disciplinary rules. In this case there is no 'no touch' policy, and the respondent does not consider that a policy was required.

[5] It appears that there were discussions between OFSTED and UNISON about introducing such a policy; but no agreement was reached.

72. It is accepted that there was no harm intended to the child. The case of *West v Percy Community Centre* UKEAT0101/15 to which Mr Kirk refers is one in relation to a teacher and the policy that was applied in that case. I am reminded also that great scrutiny is required of alleged misconduct where an employee might, as a consequence of an adverse decision, be prevented from working in his chosen field ever again.

73. This case, however, is not a safeguarding case, it is one in which the respondent who were responsible for ensuring standards within regulated environments are well maintained. The inspector is expected to exemplify the highest standards. Mr Kirk asked me to consider what 'the man on the Clapham omnibus' might think of events when, as a result of an adult touching a child in a caring manner, that person was dismissed for gross misconduct. Were the man or indeed a woman on the Clapham omnibus to view the scene that occurred in 2019, I conclude that such an uninvited and unnecessary touch by an unknown adult to wipe away water from a child's forehead would cause any reasonable person who saw such an interaction to feel unease. The unbidden touch by an adult of an adolescent and young child by a stranger in this day and age would be seen as not appropriate and might be considered to be a misuse of power which violates the child's right to be treated with dignity. To show 'care', as the claimant suggests, he may more appropriately have simply explained, to the child that he looked like a drowned rat, and perhaps to have gone on to commend the child to get out of the cold and to dry off, such a limited nonphysical engagement which would not in those circumstances be inappropriate. However, that was not the case. The claimant touched the child and did not see his actions as inappropriate, when outside a social work context on an inspection and this was the reason that caused the respondent to conclude that there was a fundamental loss of trust and confidence.

74. It is clear that the reason for the claimant's dismissal as detailed by Ms Fitzjohn, was the claimant's conduct. The respondent followed their disciplinary process in accordance with their procedure. … The reason for the dismissal was set out in the outcome letter and the suggestion that the dismissal was made for ulterior motives, to placate in some way the school that had raised a number of complaints, or that it was a mask for dealing with performance concerns, does not hold credence.

75. The claimant was aware of his behaviour in respect of which he was being investigated and subsequently disciplined. The claimant was an inspector and a senior member of the respondent's staff, and in the circumstances the claimant should have been aware of the consequences of inappropriate touching. The claimant, a social worker by background, was aware of the appropriate circumstances in which touch might be used. It was not advocated that casual intrusive social touch was appropriate: rather the acceptance of touching is in the context of particular social care events which were not present on 8 October.

> 76. In light of the findings that I have made and having considered the submissions made by both parties' counsel, I conclude that the respondent's reason to dismiss the claimant was misconduct and gross misconduct, and in particular that the claimant's actions undermined the trust and confidence that the respondent was entitled to expect to have in the claimant's ability to perform his job as an inspector."

39. I need to analyse the structure of that reasoning. The primary finding in para. 73 is that the Claimant's conduct in touching the child was unnecessary and "inappropriate", in the sense that it would cause a reasonable person viewing it to feel "unease" (because it "might be" regarded as a misuse of power violating the child's dignity). It also contains a secondary finding that the Claimant's failure to acknowledge that his conduct was inappropriate led Ms Fitzjohn to lose "trust and confidence" in him. Para. 74 finds that the Claimant's conduct was the reason for the dismissal. The effect of para. 75 is that because of his role and social work background he should have appreciated that what he did was inappropriate. The effect of those findings is certainly that the Claimant was guilty of a misjudgement, or an act of insensitivity, but none of them address the question of whether what he did was so wrong that he should have appreciated that such a misjudgement might render him liable to dismissal.

40. I wish also to say something about the Judge's reference to "trust and confidence", though this was not specifically relied on by the EAT. She no doubt used that phrase because it appears in the disciplinary charges. But it can be misleading in the context of a dismissal for misconduct. An employer's loss of trust and confidence in an employee cannot justify dismissal for misconduct unless the employee has been guilty of conduct sufficiently serious to have justifiably had that effect. It should not be treated as a proxy for the test required by the statute. I venture to quote my own observations, sitting in the EAT, in *McFarlane v Relate Avon Ltd* [2009] UKEAT 0106/09, [2010] ICR 507 (see para. 39):

> "[W]e are bound to say that the Tribunal unnecessarily complicated the analysis by referring to 'loss of trust and confidence'. Its doing so is understandable, since that is the way the case was put in the Respondent's pleading and apparently in [counsel's] oral submissions. Nevertheless, we think it unhelpful. Although in almost any case where an employee has acted in such a way that the employer is entitled to dismiss him the employer will have lost confidence in the employee (either generally or in some specific respect), it is more helpful to focus on the specific conduct rather than to resort to general language of this kind. We have noticed a tendency for the terminology of 'trust and confidence' to be used more and more often outside the context of constructive dismissal in which it was first developed (see, classically, *Malik v Bank of Credit and Commerce International SA* [1997] ICR 606): this is a form of mission creep which should be resisted."

I made a similar observation at para. 31 of my judgment in *A v B* [2010] UKEAT 0206/09, [2010] ICR 849, which was approved on the appeal to this Court sub nom *Leach v Office of Communications* [2012] EWCA Civ 959, [2012] ICR 1269: see para. 53 of the judgment of Mummery LJ.

41. Returning to the ET's Reasons, paras. 78-80 address the question of whether it was fair to dismiss the Claimant for the reason identified in para. 76. They read:

> "78. While I, and indeed the LADO, may have considered that a sanction falling short of dismissal may be appropriate and further training might be given, it is not for me as an Employment Judge, or anyone else, to substitute our view for that of a reasonable employer, and one in the exceptional circumstances and remit of the respondent.
>
> 79. The claimant was aware of the rules and guidance issued by the respondent, and the claimant's actions were found to fall short of the standards and expectations of the respondent. The claimant throughout the disciplinary hearing and for much of the appeal hearing maintained that his actions were seeking to show his compassion and care to a child in the school environment, while ignoring the fact that his role on an inspection was not to demonstrate that he, as an inspector, cared. Rather than placing the child at the centre of his care the observations of his employer and the discipline and appeals manager were that he failed to appreciate the standards of behaviour as an inspector in the circumstances.
>
> 80. I conclude that the respondent, having had regard to all of the statutory guidance and ACAS guidance, has acted fairly in reaching the conclusion that they did. The respondent has clearly demonstrated a fair reason to dismiss the claimant. The claimant was dismissed for reasons of gross misconduct and the dismissal decision was fair in all of the circumstances in this case."

42. I note that in para. 78 the Judge makes it tolerably clear that she personally, like the LADO, would have regarded a sanction short of dismissal, coupled with appropriate training, as sufficient. Mr Segal submitted that it could be inferred from these paragraphs that this was a case where she had treated the range of reasonableness responses test as requiring her, in effect, to defer to the judgment of the employer, rather than performing her duty of judging for herself whether the decision to dismiss was reasonable: cf. para. 15 above. I do not think it is fair to draw that conclusion from what she says here, and, as will appear, it is not a matter on which a conclusion is necessary.

43. Paras. 81 and 82 address, respectively, the fairness of the appeal decision and the question whether the Claimant's dismissal was wrongful, but nothing turns on either for our purposes.

44. Paras. 83-74* in substance repeat the conclusions reached by the Judge in the previous paragraphs, without further substantive reasoning, and I need not set them out. Paras. 75*-76* merely state that the claims both of unfair dismissal and of wrongful dismissal are dismissed.

THE DECISION OF THE EAT

45. The Claimant's grounds of appeal to the EAT were under four heads, though we are not concerned with the fourth, which concerns the claim for wrongful dismissal. They

are very elaborately pleaded, but they are sufficiently summarised for our purposes in paras. 26-28 of the EAT's judgment, as follows:

> "26. … Ground 1 contends that the tribunal erred by finding that the sanction of dismissal fell within the band of reasonable responses without having proper regard to the ACAS Code. In particular, it contends that the tribunal had no proper regard to the lack of any disciplinary rules making it reasonably clear to the claimant that a single instance of conduct of this particular type would be treated as likely to lead to dismissal.
>
> 27. Ground 2 contends that the tribunal erred, when considering whether the sanction of dismissal was within the band of reasonable responses, by failing to take account of important factual considerations, being specifically: (a) the fact that the respondent expected employees to refrain from almost any physical touch, but had not informed them of that in any disciplinary rule or training; and (b) failing to examine whether the respondent had considered key points relevant to sanction, including the claimant's length of service and his full and frank apology for his actions.
>
> 28. Ground 3 contends that the tribunal erred when considering the fairness of the procedure in the following respects: (a) failing to consider whether the investigation failed to comply with the ACAS Code, by the claimant not being provided with relevant evidential statements; (b) failing to consider that the respondent had failed to explore potentially exculpatory lines of enquiry despite these being raised by the claimant; (c) failing to consider whether there had been a breach of the ACAS Code or natural justice, by the appeal officer (i) reneging on an assurance that the claimant's previous inspections record would not be considered at the appeal; and (ii) expressly relying on lapses of judgment during previous inspections that were not put to the claimant for a response."

46. Paras. 1-68 of the EAT's judgment summarise the facts, the background law, the reasoning of the ET and the submissions of the parties. Its dispositive reasoning, as regards the unfair dismissal claim, is at paras. 69-111. The basis on which it found that the ET should have made a finding of unfair dismissal, and therefore did so itself, is twofold, as follows:

(1) It held that since the Claimant had not been told, and should not otherwise reasonably have understood, that any touching of a pupil without consent might attract the sanction of dismissal, it was not open to the Judge to find that it was reasonable for OFSTED to dismiss him for touching of the kind that occurred in this case: this reflected grounds 1 and 2 (a) of the grounds of appeal. I will refer to it as "the substantive unfairness ground".

(2) The Judge should have found that the dismissal was procedurally unfair because OFSTED had failed to show the Claimant important documents (the LADO report, the statement of complaint received from the school and the pupil's written account of the incident) which had been seen by the dismissing manager: this

reflected "strand 1" of ground 3 of the grounds of appeal. I will refer to it as "the procedural ground".

I will refer to those as "the primary grounds". Of the two, the first is in practical terms the more significant because, as was common ground between counsel, it precludes the possibility of any *Polkey* argument at the remedy stage.

47. The EAT also found two other errors of law on the part of the Employment Judge, both relating to procedural complaints (see paras. 100 and 105-107 of its judgment), but it accepted that these were not of a character that would have justified it in finding unfair dismissal itself as opposed to remitting to the ET.

48. It followed from the EAT's conclusion on the two primary grounds that the claim fell to be remitted to the ET only for the determination of remedy (although, as it recorded at para. 125, OFSTED intended to seek a reduction for "contributory conduct" under section 123 (6) of the Act). However, as already noted, it held that the issue of whether the Claimant had been wrongfully dismissed did need to be remitted. It directed that the two issues should be heard together by a differently-constituted tribunal.

49. I take first the two grounds on which the EAT held that the Claimant had been unfairly dismissed.

THE SUBSTANTIVE UNFAIRNESS GROUND

THE EAT's REASONING

50. The EAT's reasoning on the substantive unfairness ground begins, at paras. 71-76 of its judgment, by considering the relevance of the recommendation in the ACAS Code that employers should give examples of the kinds of conduct which will be regarded as gross misconduct. It was, as already noted, common ground that OFSTED had no published rule or policy that indicated that any touching of pupils would be so regarded. It concluded, at para. 77:

> "Those being the facts, the question for the tribunal was whether the respondent was entitled to take the view that it did not need to be spelled out that what the claimant did was conduct for which he could expect to be dismissed, because it should have been obvious, from its nature, that it was."

51. Mr Allen submitted that that formulation was erroneous inasmuch as it identified only part of what the ET had to decide. The ultimate question was whether it was reasonable for OFSTED to dismiss the Claimant in the light not only of what he had done but also of the attitude that he had shown towards it. That reflects a submission which he had made to the EAT itself. At para. 78 it records the submission and rejects it in the following terms:

> "Mr Allen KC's stance, as we have noted, was that it was in fact *not* the respondent's position that the original incident was in and of itself conduct for which he could expect to be dismissed, but that the claimant had been dismissed because of his subsequent attitude to it. However,

> we do not think that the issue can be simply side-stepped in that way. That is for the following reasons."

52. Before I consider the reasons which the EAT goes on to give, I should say that Mr Allen told us that that he did not believe that that accurately stated his submission. Rather, his case had been, as the EAT had originally recorded it at para. 40, as part of its summary of the parties' submissions, that the Claimant's challenge to the fairness of the dismissal:

> "… failed to engage with the fact that an important part of the respondent's reasons for dismissal related to the *attitude* to his conduct, which the claimant displayed in the course of the disciplinary process, and which undermined the ability of the respondent to place trust in him in the future. This was reflected in the tribunal's conclusion at [76] that the claimant had been dismissed because his actions – in the plural, noted Mr Allen KC – undermined trust. It was the claimant's lack of professionalism, in accordance with the standards to which the disciplinary charges referred, in displaying that attitude, that led to his dismissal."

I am bound to say that I am not persuaded that there is a real difference between the two formulations; but in any event I think the EAT must be taken to have had in mind in para. 78 its earlier, somewhat fuller, summary at para. 40 to which it expressly refers ("as we have noted"). The real question is the relevance of the undoubted fact that in making her decision to dismiss Ms Fitzjohn had in mind both the conduct itself and the attitude to it which the Claimant displayed in the course of the disciplinary proceedings. As to that, the EAT's reasoning can be summarised as follows.

53. It begins, at paras. 79-80, by pointing out that the actual charge against the Claimant was, fairly and squarely, his conduct in touching the pupil. That was charge (1), and charges (2)-(4) were merely articulations of why that is said to constitute misconduct. It goes on, at para. 81, to acknowledge that

> "… the employee's attitude to his admitted or found conduct - whether he shows insight or remorse, a willingness to learn, and so forth - are liable to be pertinent considerations. In particular, if the deciding manager is satisfied that the employee has shown insight, remorse, and/or a willingness to learn, they may take the view that, in light of this, the sanction should be less than it otherwise might have been. Conversely, where these features are not present, they may feel unable or unwilling to reduce the sanction on that account, within the range of sanction that might in principle be appropriate."

But, it says, at the start of para. 82:

> "… [I]f it would not, in the given case, be open to the employer, within the band of reasonable responses, to dismiss for the substantive conduct, then the absence of such features cannot render that sanction fair."

It goes on to acknowledge that there may be cases where the employee's conduct during the dismissal process constitutes misconduct in its own right, but I need not reproduce its observations in that regard.

54. Before us, Mr Allen submitted that that approach was wrong. As already noted at para. 31 above, he said that there was no reason in principle why the reason for the dismissal should not comprise both the substantive conduct and the attitude which he subsequently displayed to it. That reflected the reality of the decision which the employer had to make, and there would be many situations in which it was reasonable for an employer to dismiss an employee who had done something which was not in itself seriously wrong but where their lack of insight into what they had done showed that there was a risk of their committing much more serious misconduct in the future. I return to that submission below.

55. The EAT continued, at paras. 83-86:

> "83. In the present case the substantive conduct with which the claimant was charged was the touching incident itself. From its findings, accepting Ms Fitzjohn's account in the dismissal letter, the tribunal found that this was also the conduct for which the claimant was dismissed. As the tribunal summarised, at [53]: 'It was concluded that the claimant had failed to exercise good inspection judgment by initiating physical contact with a student when it was not invited or expected.' In so finding it drew on the statement in the dismissal letter that: 'your act of touching the smallest boy in a group, without being certain that this was acceptable to them, was a grave error of judgment on your part'. The discussion at [74] of the conduct for which he was dismissed is of the conduct in the incident. The reference at [77] to 'actions' is to the 'conduct about which complaint had been made.'
>
> 84. True it is that Ms Fitzjohn also, as was found, considered that the claimant *continued* to demonstrate a lack of insight, in the course of the disciplinary process, such that she could not safely impose a sanction short of dismissal. But her starting point (as recorded at [54]) was that he 'had no awareness' - that is, at the time of the conduct - of how serious it was; and similarly (at [57]) she considered that the damage done by the referral to LADO and the complaint from the school 'could have been avoided had you shown better judgment' - that is, by not engaging in the conduct itself.
>
> 85. It is clear from these passages that the tribunal's factual findings as to the reason why Ms Fitzjohn dismissed the claimant, was because she considered that the claimant's conduct was so serious as to warrant dismissal, and that he ought to have appreciated that. The tribunal's findings accepting Mr Simmons' reasons stated in the appeal outcome letter, convey that these were, at least in part, because he shared that view. They included, in the passage cited by the tribunal at [68]: 'Your lack of professional judgment has led you to touch a student in an untoward manner which, as reported, made the student feel uncomfortable. This is in my view a very grave misdemeanour.' That is plainly a view of the gravity of the conduct itself.

> 86. As found by the tribunal, what Ms Fitzjohn considered to be the significance of the claimant's continuing poor attitude, was linked to her view of the seriousness of the substantive conduct. It was because she considered that it was inherently so very serious, that she was concerned not only that the claimant did it at all, but also that he had failed to acknowledge that, even in the course of the ensuing disciplinary process. He could not be trusted, in her view, to have learned his lesson, and so to refrain from a repeat of what she considered to be such inherently serious conduct."

56. In summary, although Ms Fitzjohn, and Mr Simmons on the appeal, had in reaching their respective decisions taken into account what they viewed as the Claimant's continuing lack of insight, the premise of their thinking was that the act itself, judged in the context of what the Claimant should have known at the time, constituted a "grave" professional misjudgement – or, in Mr Simmons' words, "a very grave misdemeanour".

57. Having thus explained why the issue identified at para. 77 could not be "side-stepped" in the way contended for by Mr Allen, at para. 87 the EAT defined the essential issue for the ET as follows:

> "It was therefore, in our judgment, incumbent on the tribunal to consider whether it was open to the dismissing and appeal officers, within the band of reasonable responses, to take the view that the claimant's conduct was of such a kind that he did not need to be specifically forewarned that it would be regarded as so serious as to warrant dismissal. Plainly there are some kinds of physical touch, the inherent and/or unambiguous nature of which is such that the employer could unhesitatingly so conclude, and a tribunal would unhesitatingly find that to be fair. The task for the tribunal was to decide, in light of all its findings of fact, whether this incident fell into that category."

58. At paras. 88-89 the EAT directed itself, by reference to the decision of this Court in *Tayeh v Barchester Healthcare Ltd* [2013] EWCA Civ 29, [2013] IRLR 387, as to the limits of its power to interfere with the assessment of the decision of the ET. Having done so, it turned to an analysis of the ET's reasoning. At para. 90 it makes the introductory observation that that reasoning was difficult to follow because of ET's failure "clearly [to] work through the distinct issues to which the unfair dismissal claim gave rise, each in turn, finishing one before moving on to the next". The substance of the reasoning is then addressed at paras. 91-95. I can pass over para. 91 because it is concerned with a criticism of the ET made by Mr Kirk which the EAT did not accept. Paras. 92-95 read as follows:

> "92. Secondly, however, there is, respectfully, not a clear through line of reasoning on that question [i.e. the question defined in para. 87], and specifically as to whether it was within the band of reasonable responses for the dismissing and appeal officers to consider that, notwithstanding that there was no guidance document on the question of physical contact or touch, the claimant should have appreciated at the time of the incident, that his particular conduct was as grave as they both considered it to be.

> 93. At [71] the tribunal referred to the need, in safeguarding cases, to consider whether the allegations have been properly covered in disciplinary rules. It noted that in this case there was no 'no touch' policy, and observed that 'the respondent does not consider that a policy was required'. It referred to the need for great scrutiny in a case where an adverse decision may prevent the employee from working in their chosen field again. It then continued, at [73]: 'This case, however, is not a safeguarding case.' It is unclear to us from this passage whether the tribunal's thought process was that, because this particular incident was *not* said to raise a safeguarding issue, *therefore* the consequences of dismissal would be less serious for the claimant, and so *therefore* the employer's decision did not need to be subjected to the same high degree of scrutiny as it would have been in such a case. If so, that was not a sound basis on which to conclude that it was fair to dismiss the claimant for this particular conduct, without him having been forewarned of that possible sanction.
>
> 94. Apart from that, it appears, in light in particular of the discussion in the middle section of [73], that the tribunal did consider that the respondent properly considered this conduct to be of such a nature that the claimant should have appreciated that he could expect to be dismissed for it. It appears from [75] that the tribunal considered that was so, in light of his experience and background. It also appears from [79] that the tribunal considered that was so in view of the 'rules and guidance issued by the respondent' – which can only refer to the materials referred to at [42] and [43].
>
> 95. On the last point, in light of the facts which the tribunal found: that this particular incident was not regarded as giving rise to a safeguarding issue; that there was no written policy on touch; that it was *not* the case that the respondent had a 'no touch' policy; and as to the generalised content of the materials referred to in the disciplinary charges, it appears to us that it was not open to the tribunal, in light of those facts, to conclude that the claimant had been placed on express fair notice that this particular conduct in this incident would attract the sanction of dismissal."

59. At para. 96 the EAT noted that, though Mr Allen had argued that the Claimant should have appreciated that his conduct was inappropriate, he made clear that it was not his case that he should have appreciated that it was liable to result in dismissal. The EAT's conclusion, at para. 97, was that;

> "… [T]he … criticism of substance raised under the umbrella of grounds 1 and 2 (a), that the tribunal failed to engage with whether the dismissal was unfair, because the claimant was not fairly on notice that he might be dismissed for this specific conduct, and it was not inherently obvious that no such notice was needed, is well founded. Given that this specific incident was not found to have raised a safeguarding issue, that the respondent did not claim, and was not found, to have a no-touch policy, and that it was not disputed that there was no policy or guidance given in training specifically on the subject of touch, had the tribunal applied

> the law to the particular facts found in this case, it would have been bound to conclude that it was not fair to dismiss the claimant when he was not on fair notice that this conduct might attract that sanction."

60. In summary, the EAT found that the Claimant succeeded on the substantive unfairness ground because if the Judge had addressed the right question – namely whether it should have been obvious to him that what he did in brushing water from the child's head was conduct for which he could expect to be dismissed – the only possible answer was no, given that, as stated in both para. 95 and para. 97, (a) the incident did not raise a safeguarding issue; (b) OFSTED did not have a "no-touch policy"; and (c) there was no policy or guidance given in training on the subject of touching students.

THE APPEAL

61. The EAT's conclusion on the substantive unfairness ground is challenged by ground 1 of OFSTED's grounds of appeal. This comprises three sub-grounds:

    1.1 "that the EAT considered the wrong question at EAT para. 77 and failed to adequately articulate its reasoning for finding an error of law on the part of the ET";

    1.2 "that the EAT erred in its approach to whether the lack of specificity in disciplinary rules made the dismissal unfair";

    1.3 "that the EAT erred in its consideration of the relevance of the Claimant's attitude to his conduct to his dismissal".

62. As developed in the skeleton argument and in Mr Allen's oral submissions, there is considerable overlap between those sub-grounds, but I take them in turn.

63. As to ground 1.1, as appears from para. 51 above the reason why Mr Allen challenged the formulation in para. 77 of the EAT's judgment is that it omitted any reference to the Claimant's attitude to his own misconduct in the course of the disciplinary process. That is the same point as raised by ground 1.3, and I will address it in that context. As I understand it, the contention that the EAT failed adequately to identify an error of law on the part of the ET is simply another aspect of the same point. In any event, I believe that the EAT makes it perfectly clear what error of law it found on the part of the Judge, namely that she did not directly address the question whether the Claimant should have appreciated that acting in the way he did might render him liable for dismissal.

64. As to ground 1.2, the focus of Mr Allen's challenge is on para. 92 of the EAT's judgment, which he submitted concentrated far too specifically on the absence of any published "guidance … on the question of physical contact or touch". OFSTED's decision was based not on any specific rule but on its belief that, as a senior and experienced inspector, the Claimant should have appreciated that it was gravely unprofessional conduct on his part to touch a pupil in the way that he did. In my view, however, the EAT clearly understood the position. It was the necessary starting-point for its reasoning that OFSTED had no "no touch" rule. But it did not treat that as dispositive. On the contrary, in paras. 77 and 87 as well as para. 92 it formulated the issue as being whether, in the absence of any such policy, it was reasonable for Ms Fitzjohn and Mr Simmons to take the view that the Claimant's conduct was of a kind

which he should have realised would be regarded as warranting dismissal. That was the right question.

65. I turn to ground 1.3. Mr Allen's submission was that the Judge had rightly characterised OFSTED's reason for dismissing the Claimant as being both the substantive misconduct and his insistence during the disciplinary process that he had done nothing wrong, which showed a lack of insight that undermined its trust in his professional judgment; and she had rightly held that it was within the range of reasonable responses for it to dismiss him for that composite reason. As indicated above, he submitted that the EAT had been wrong to say at para. 82 of its judgment that, if it would not in any given case be open to the employer to dismiss for the substantive conduct, then it could not be fair to do so because they had not shown contrition or remorse.

66. It is important in addressing that submission to bear in mind that the issue arises only where, as the EAT found to be the case here, the misconduct in itself is not of a kind which would justify dismissal. As a general proposition, I find it hard to see how in such a case it could be reasonable for the employer to bump up the seriousness of the conduct only because the employee fails during the disciplinary process to show proper contrition or insight.[6] I take this to be the point being made by the EAT at para. 82 of its judgment. It is reinforced by the fact that how employees react to an allegation of misconduct is likely to vary greatly according to individual temperament and the dynamics of the particular situation. The stressful circumstances of a disciplinary hearing or interview are unlikely to be conducive to calm self-reflection, and it is inevitable that some employees will be overly defensive. In some cases also, where the issue is whether what was done constituted misconduct, an employee who genuinely believes that it did not faces the dilemma that if they say that they would not do the same thing again they may be taken to be accepting guilt. The Claimant articulated this point very clearly in his answer to Ms Fitzjohn recorded at para. 48 of the Judge's Reasons (see para. 20 above).

67. I have said "as a general proposition" because I recognise that this is an area in which it is prudent not to be too prescriptive. There may be particular cases where a neat distinction between the seriousness of the substantive conduct and the employee's subsequent attitude is difficult to draw. There is obvious force in Mr Allen's point that there may be cases of less serious misconduct where a persistent failure on the part of the employee to recognise that they have done anything wrong means that there is a real risk that they will commit more serious misconduct in the future; and that that risk should in principle, depending on the particular circumstances, be capable of justifying dismissal.

68. However, the present case is plainly not of that kind. OFSTED may have been entitled to find that it was a misjudgement for the Claimant to act in the way that he did, but it was not a misjudgement of a kind which implied a real risk of serious misconduct in the future. Ms Fitzjohn said in terms in the dismissal letter that she did not believe that the Claimant was a risk to children: as the EAT put at the forefront of its reasons in para. 97, the incident raised no safeguarding issue. Nor did his failure to acknowledge such misjudgement as he may have made justify his dismissal. The worst that might in

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[6] It is worth noting that, although Ms Fitzjohn referred both to lack of remorse/contrition and to lack of insight, they are not quite the same thing: an employee can be remorseful about an act of misconduct without showing insight into what they had done wrong.

theory be feared was that on some future occasion he might as a result of a similar misjudgement make some unwelcome physical contact with a pupil. But even that risk would appear remote. He told Ms Fitzjohn in terms that he would not do anything of the kind again: see para. 48 of the Judge's Reasons. That is entirely plausible: once bitten twice shy. He also told Mr Simmons that he would be willing to undergo training. His statement to Ms Fitzjohn was discounted by her because he had said that it was because of the trouble that it had got him into rather than because he thought he had done anything wrong; but the motivation should not matter as long as the result is achieved.[7]

69. I should say that Mr Allen referred us to the decisions of this Court in *Paul v East Surrey Health Authority* [1995] IRLR 305 and of the EAT in *Hodgson v Menzies Aviation (UK) Ltd* [2018] UKEAT 10165/18, but in each of those it was accepted or found that the employee had been guilty of misconduct which potentially justified dismissal, and the relevance of their subsequent attitude was for the purpose of a very different issue. I would also note for completeness that at paras. 165-166 of my recent judgment in *Higgs v Farmor's School* [2025] EWCA Civ 109 there are some observations about the relevance of "lack of insight" in the context of justifying a dismissal which are to broadly the same effect as my reasoning above.

70. For those reasons I see no error in the way that the EAT addressed the relevance of the Claimant's "attitude".

71. It is worth stepping back from the details of OFSTED's challenge and identifying in summary terms why the EAT made a finding of (substantive) unfair dismissal. Its fundamental point was that, in the absence of a "no-touch" rule or other explicit guidance covering a situation of the relevant kind, the Claimant had no reason to believe that he was doing anything so seriously wrong as to justify dismissal; and it did not believe that his subsequent attitude made any difference. In my view that conclusion is plainly right. It is worth noting that the EAT panel for this hearing comprised not only the judge but two lay members. It is also of at least some interest that both the LADO and the Employment Judge herself would, if the decision had been theirs, have regarded the proper response to be by way of training rather than disciplinary action. (As regards the LADO, Mr Allen made the point that she based her view only on the School's report of what happened; but for the reasons already given I do not believe that the Claimant's response in the disciplinary process justified any different view of the gravity of the case.)

THE PROCEDURAL GROUND

72. My conclusion on the substantive unfairness ground means that it is strictly unnecessary to consider the procedural ground. Nevertheless I will address it briefly.

73. The factual basis is that, as noted above, when she took the decision to dismiss the Claimant Ms Fitzjohn had before her the pupil's statement, the School's complaint, and the record of the LADO's view, but they were not provided to him. The Claimant's case in the ET was that he should have been provided with all three because he should

[7] I do not wish to be misunderstood here. If we were dealing with an employee who had a sexual compulsion to touch children, an assurance of the kind given by the Claimant would be highly unreliable. But of course this is not that kind of case.

have seen anything that was likely to feed into the making of the decision. The School's complaint and the LADO's report were provided to him for the appeal, but not the pupil's statement.

74. The Judge addressed that complaint, at least as regards the pupil's statement and the LADO report, at paras. 36-37 of her Reasons. She records that OFSTED took the view that they should not be shared "because they belonged to the LADO" and that fairness did not require their disclosure because the Claimant "was aware of the factual matrix" of the complaint and the LADO's views that the matter was one that could be dealt with by training was reached without the benefit of the full investigation which OFSTED had carried out.

75. The EAT dealt with this issue at paras. 102-104 of its judgment, which read:

> "102. In our view, as a starting point, the tribunal should have considered that the failure to provide the claimant with the statement of complaint about him by the school and the written account of the pupil, both of which were seen by the dismissing manager, was liable to render the dismissal unfair.
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> 103. It would have been open to the tribunal, applying the guidance in *Taylor v OCS Group Limited* [2006] EWCA Civ 702; [2006] ICR 1602 (to which it referred[8]), to take the view that omission of the school's complaint was repaired by the provision of a copy at the appeal stage. But it was not sufficient to say, as it did at [36], that the claimant was 'aware of the factual matrix' of that complaint and the concerns raised by the child. Having been shown both documents, it is also apparent to us that how the school described the child's account glossed the child's own words to a degree. Had the claimant been provided with a copy of the actual text of the child's statement, he would have had a fair chance to make direct submissions as to what Ms Fitzjohn, who had a copy, should make of it. As we have noted, he was not, in fact, properly made aware of its existence, prior to the tribunal litigation. The application of basic principles of natural justice should have led the tribunal to the conclusion that this omission was unfair. In this case that was reinforced by the fact that Ms Fitzjohn, in her decision, criticised the claimant for questioning the school's bona fides in raising the student's concerns, at a time when he had seen neither document.
>
> 104. We also take the view that the tribunal's approach to the LADO report was unsatisfactory. The point that the employer had to make its own decision, which might properly differ from the view of the LADO, was not wrongly made, as such. But Ms Fitzjohn was made aware of the LADO's view, and she referred more than once in her dismissal letter to the reference to the LADO, which she considered to be the route by which the claimant's conduct had damaged the respondent's reputation. Had the claimant had sight, at least, of the email from the LADO to Ms Moss, he would have been enabled to make a submission

[8] The reference is in the Judge's self-direction on the law at the start of the Reasons: the case was not deployed by her in this context.

> about that to Ms Fitzjohn by reference to its contents. Any sensitive personal information could have been redacted. Again, we consider it was an error on the tribunal's part, not to find the handling of this aspect to have been axiomatically unfair."

76. That conclusion is challenged in ground 2.2 of the grounds of appeal. Mr Allen submitted that the EAT did not identify why it was "axiomatically unfair" that the documents in question were not provided to the Claimant and that fairness did not require that they should be. As regards the facts of the incident itself, these were not in issue. The only point of potential dispute was whether the child had in truth been upset by what had occurred. As to that, the Claimant was told the substance of what appeared in the pupil's statement, namely that he did not feel "comfortable", and the Claimant had been able to give his answer. He had been asked at the hearing in the ET what more he might have been able to say if he had seen the statement, or the other documents, and he had been unable to suggest anything.

77. I do not believe that those submissions undermine the EAT's conclusion. The starting-point is that in any case where an employee is accused of misconduct against another person it is obvious good practice to show him any contemporary record of that person's complaint unless there is some good reason not to. I accept that a failure to do so may not render the subsequent decision unfair if the terms of the complaint are clearly irrelevant to anything in dispute; and I accept also that there was in this case no dispute as to the broad outlines of what had occurred. But that is not the whole picture. The Claimant made clear at the disciplinary hearing that he believed that there was a possibility that the impetus behind the complaint was not any real distress suffered by the pupil but the School's animosity against OFSTED; and in that context Ms Thompson asked in terms whether there had been a complaint from the pupil and pointed out that they had not seen the complaint from the School. The concern was not a fanciful one: there were reasonable grounds to believe that the School was hostile to the inspectors. The School's complaint letter, both on its own and when read alongside the pupil's own complaint, would have supplied ammunition in support of that case. It is not simply the hostile tone of the letter overall. It is also the way in which its account of the incident heightens the apparent seriousness of what the Claimant is said to have done, and the child's distress, compared with what he himself had said: see para. 11 above. The Claimant and his representative should have been given the chance to make those points to Ms Fitzjohn in support of a case, not that the complaint was fabricated but that it had been blown up out of all proportion and could not fairly be described as "grave" or as constituting gross misconduct. Ms Fitzjohn might or might not have accepted that case, but the point is that fairness required that the Claimant should have had the opportunity to deploy evidence in support of a case that he wished to make. I also agree with the EAT's observation at the end of para. 103 that the unfairness is compounded by the fact that Ms Fitzjohn criticised the Claimant for questioning the School's *bona fides* and treated it as evidence of his lack of contrition, at a time when he had seen neither document.

78. Mr Allen made the point that the Claimant was shown the School's complaint and the LADO's report for the purpose of the appeal and in fact made no reference to them. But that does not meet the point made by the EAT at para. 103: without sight of the pupil's complaint he could not know that the account in the School's complaint went beyond what the pupil had said in his own statement. The discrepancies might or might

not in the end have been judged to be significant; but, again, the point is that he was deprived of the chance to make the argument.

OTHER MATTERS

79. In view of my conclusion on the primary grounds, it is unnecessary to consider the two other procedural grounds on which the EAT allowed the appeal, which are the subject of grounds 2.1 and 2.3 of OFSTED's grounds.

80. Ground 3 of OFSTED's grounds contends that if the EAT was right to find that the Employment Judge had made an error of law it was wrong for it to have proceeded to make its own finding of unfair dismissal rather than remitting the claim to the ET. Mr Livingston, who argued this part of the appeal, referred to the principles enunciated in *Jafri v Lincoln College* [2014] EWCA Civ 449, [2014] ICR 920. However, it is clear from para. 97 of its judgment that the EAT concluded that if the ET had addressed the correct question it would have been bound to find that the Claimant's dismissal was unfair. For the reasons already given that conclusion was in my view correct. In those circumstances the EAT was right to make the finding of unfair dismissal itself.

CONCLUSION

81. Those are my reasons for concluding that this appeal should be dismissed. I should also say that I agree with Warby LJ's judgment.

Lord Justice Warby:

82. I agree with the reasons which Underhill LJ has given for dismissing this appeal. I add a few observations of my own.

83. As the EAT held, the Claimant's dismissal was substantively unfair because OFSTED had failed to make it clear to him in advance that he would or might be dismissed for behaving in the way that he did. I think the root cause may be that OFSTED had not clearly identified in its own mind what was wrong about the Claimant's behaviour. Indeed, I do not think it has ever done so. It has certainly not made it plain to me.

84. The School had accused the Claimant of "rubbing" or "wiping" the child on the skin/hair "as a sign of affection" in a way that placed the child's safety at risk and left them shocked, embarrassed, and extremely uncomfortable. OFSTED's disciplinary charge did not adopt any of this. The allegation in paragraph (1) was of touching without any elaboration. As OFSTED had never announced, indeed it did not have, a "no touch" policy it was necessary to explain why the touching in this case was wrong. It was to paragraphs (2), (3) and (4) of the charge that the Claimant had to look for such an explanation.

85. Paragraph (2) alleged that the touching was "inappropriate". That was an unfortunate word to use because of the sexual connotations to which Underhill LJ has referred at [9] which is not what OFSTED was suggesting. Stripped of such insinuations the word "inappropriate" in the charge signified only that OFSTED thought the touching was not something that the Claimant should have done, that it was something of which OFSTED disapproved. It did not explain why. Paragraph (2) went on to state that the touching was contrary to "Ofsted core values [and] professional standards". But the values and

standards alleged to have been contravened were not identified in the charge. In my opinion, no satisfactory attempt has been made to do so since. The ET decision made some reference to written standards but the only passage it cited was the one which Underhill LJ has quoted at [19]. That contains a long list of laudable aims and corresponding obligations. At the end of the hearing in this court it remained obscure which of these the Claimant was said to have broken. We were shown nothing in the Civil Service Code, and it is still unclear to me in what way it was thought that the Code had been contravened.

86. Paragraph (3) of the charge alleged that the Claimant's actions had caused a breach of trust and confidence. Underhill LJ has explained how that adds nothing of substance to the charge. In my opinion similar points may be made about paragraph (4), which alleged that the Claimant's actions had "damaged OFSTED's reputation". I can see that reputational harm may be a relevant factor in reaching a disciplinary decision. But it cannot be a stand-alone basis for such a decision; there must at least be some misconduct. Nor, in my view, can the mere fact of an adverse impact on reputation be enough. It would be logical to take account of damage to reputation which is caused by and foreseeable as a natural consequence of misconduct. It might well be unfair to hold third party reactions against an employee if these were based on a misrepresentation or misunderstanding of what the employee had done or involved an unjustifiable view about the gravity of the employee's conduct. Here, the School took a very dim view of the Claimant's behaviour and referred the matter to the LADO. But OFSTED did not tell the Claimant that this was the basis for the allegation of reputational damage. Indeed, OFSTED's factual case about what the Claimant had done wrong did not adopt or rely on the School's account of things, or what the LADO had said. These were not even disclosed to him at the initial stage. It is hard to see, therefore, how the allegation of reputational harm added clarity or indeed anything of significance to the charge.

87. For these reasons it seems to me that the charge failed adequately to identify the gist of OFSTED's criticism of the Claimant's conduct. The dismissal letter did not assist, either, nor did the appeal decision. Both referred to an "error of judgment". The appeal decision referred to the touching as "untoward". But these are further uninformative forms of words. They make clear that the decision-maker thought the Claimant did something wrong but beg the question of why. To describe the Claimant's error as "grave" or "very grave" adds emphasis but does no more. For OFSTED to count it against the Claimant that he had failed to recognise the gravity of his wrongdoing was to compound these flaws in OFSTED's own approach.

88. It may be that the key to OFSTED's strong disapproval of the Claimant's conduct lies in the emphasis which the dismissal letter and the appeal decision both placed on the reaction of the child. If so, I think they were wrong. What matters is the quality of the conduct, which did not merit dismissal even if it made the child uncomfortable. Moreover, if that was the critical factor reliance on it was procedurally unfair. The impact on the child was not an element of the charge; at the initial stage OFSTED had withheld all the documentary evidence on this point from the Claimant; and at no stage in the disciplinary process did OFSTED disclose the child's own first-hand account, which was a good deal less dramatic than the headteacher's version and tended to

undermine the reliability of that version and to support the Claimant's case that the impetus behind the complaint was the School's animosity to OFSTED.

Sir Launcelot Henderson:

89. I agree with both judgments. Standing back from the detail, it seems to me deeply regrettable that the Claimant, who was an experienced inspector with an unblemished disciplinary record on safeguarding issues, should have been summarily dismissed for conduct which, on any reasonable appraisal, amounted to no more than a momentary and well-meaning lapse of professional judgment of a kind which he was most unlikely ever to repeat.