Neutral Citation Number: [2019] EWCA Civ 322

Case No: A2/2017/2469

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr Justice Foskett
[2017] EWHC 2019 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2019

Before :

LORD JUSTICE IRWIN
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE SINGH

- -

Between:

THE MAYOR & BURGESSES OF THE LONDON BOROUGH OF LAMBETH	**Appellant**
- and -	
SIMONE AGOREYO	**Respondent**

- -
- -

Caspar Glyn QC and **Christopher Milsom** (instructed by **Browne Jacobson LLP**) for the **Appellant**
Andrew Allen and **Stephen Butler** (instructed by **Radcliffe Le Brasseur**) for the **Respondent**

Hearing date: 29 January 2019

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Approved Judgment

Lord Justice Singh:

Introduction

1. This is an appeal from Foskett J's judgment of 15 August 2017, in which he allowed an appeal against the order of the County Court at Central London (HHJ Wulwik) made on 12 January 2017. Foskett J, sitting on appeal in the High Court (Queen's Bench Division), reversed HHJ Wulwik's dismissal of the Respondent's claim against the Appellant for damages for breach of her contract of employment.

2. The Respondent, Ms Agoreyo, was employed at Glenbrook Primary School in South London as a Year 2 teacher. In her early weeks of teaching, three incidents took place involving two children (known in the proceedings as O and Z) with particular behavioural issues. These incidents all involved the use of force by the Respondent to remove one of these two children from the classroom. The Respondent expressed her need to receive additional support in the teaching of these children, but, after five weeks of being employed at Glenbrook, she was suspended pending investigation into the incidents. The Respondent resigned that same day, and subsequently commenced proceedings for breach of contract against the Appellant. She claimed that she had been entitled to resign as a response to what was a repudiatory breach of contract by the Appellant. (I will sometimes refer to the Appellant as the Defendant and the Respondent as the Claimant, where it is more convenient to do so for ease of exposition.)

3. At first instance HHJ Wulwik addressed the issue of liability only at this stage. He found in favour of the Appellant. He found that the Appellant had not breached the implied term of trust and confidence between the parties, having considered both the specific act of suspension and the Appellant's conduct in the round. Foskett J allowed the appeal of Ms Agoreyo, finding that her employer had been in repudiatory breach of contract, having breached the implied term of trust and confidence in both respects. He therefore substituted judgment in her favour.

4. Permission to appeal to the Court of Appeal was granted by Underhill LJ on 14 March 2018.

5. We have had the advantage of written and oral submissions from Mr Caspar Glyn QC and Mr Christopher Milsom for the Appellant; and from Mr Andrew Allen and Mr Stephen Butler for the Respondent. We are grateful to them all, in particular to those representing the Respondent, who do so *pro bono*.

Factual Background

6. The Respondent is a teacher. At the time of the material events in November/December 2012, she was aged 43 and had around 15 years' experience of teaching both in the United Kingdom and abroad. She had worked previously with children with special educational needs, but had had no specific training as to how to deal with behavioural difficulties.

7. On 8 November 2012, she entered into a contract with the Appellant to work as a teacher at Glenbrook Primary School, a community school in Clapham Park, South London. The contract was for a fixed term from 9 November 2012 until 31 August 2013, at an annual salary of £36, 387.

8. In the circumstances which are discussed more fully below, the Respondent ceased working in this role on 14 December 2012, some five weeks later. She was suspended that day because of the force she used in three incidents involving two children, O and Z (although there is a dispute about whether Ms Agoreyo was told verbally or by letter about the suspension). The Respondent resigned later that same day.

9. The Respondent, on commencement of her employment, took over from Ms Nancy Wayman to teach one of the two Year 2 classes, dealing with children of the age of 5/6 years. There were 26-29 children in the class, including O and Z, who were aged 6 and 5 respectively at the relevant time. The Respondent's case was that each of these two children had "behavioural, emotional and social difficulties" ("BESD"), an assertion put in issue by the Appellant. The Respondent additionally claimed that she was not told before she accepted the offer of employment that she would "be teaching a class in which there were two pupils with BESD", and further that she was "also not asked … whether or not she had any experience of teaching a class with one or more children on the autistic spectrum within it". This was effectively accepted by the Appellant, on the basis that all teachers are required to be able to teach children with special needs.

10. Foskett J found that, on the evidence, there were clear indications that the two children, O and Z, were indeed difficult to control. The only witness called at the trial before HHJ Wulwik for the Appellant, Ms Tracey Fevrier, noted that "O and Z did … present the most challenging behaviour of all of the pupils in the class", and acknowledged that at one stage the Head Teacher (Ms Alder) had considered separating them.

11. In the "Behaviour Book", parts of which were before HHJ Wulwik and Foskett J, there were three entries in late November 2012 which showed that Z had been swearing a lot, had broken an object that he threw, wiped his spit from a tissue onto another child and swore and screamed at other children, continuing to do so until his parents were called to stop him. The documents that record the "targets" for each of these two children show that "hitting or grabbing" were issues that each had to deal with; and, in Z's case, to use a "talking voice", not one that involved shouting. In another document, O is said to have found it hard "to share and take turns", his behaviour is said to be "challenging" and he can easily become upset. Ms Fevrier also acknowledged in a document prepared at the time that there was a "fraught/physical relationship" between O and Z and that each had "behavioural/learning difficulties".

12. HHJ Wulwik at first instance held that, nonetheless, "Ms Wayman [the Respondent's predecessor] appears to have been able to deal with any behaviour problems of the two children". The Defendant's case involved the assertion that Ms Wayman had managed to control the class with only one year's post-qualification experience, as did the Respondent's successor, a newly qualified teacher.

13. There were three separate incidents involving O and Z in which the Respondent considered that it was necessary to use a degree of force to secure behavioural compliance, taking place on 19 November, 3 December and 5 December 2012. The incidents were alleged to involve the following:

    (1) On 19 November 2012, a child, Z, was dragged on the floor out of the classroom door by Ms Agoreyo in the presence of another member of staff and the rest of the children, and that child was heard to cry "help me". This incident was reported to Ms Alder by Ms Fevrier, but no action was taken at that time.

    (2) On 3 December 2012, Ms Agoreyo was seen to drag a child, O, "very aggressively" a few feet down the corridor whilst shouting at him. This incident was reported to Ms Alder via email by Ms Messenger, another member of staff (who was an administrative officer).

    (3) On 5 December 2012, O was told to leave the classroom after being unable to follow instructions. When he refused, Ms Agoreyo was heard to shout "if you don't walk then I will carry you out!", after which she proceeded to pick up the child, who kicked and screamed in the presence of all the class children. Ms Fevrier considered this to be the most serious of the incidents she witnessed, describing it as "heavy handed", "very disappointing" and "totally unacceptable" in her email report to Ms Alder.

14. Prior to the occurrence of the incidents, some correspondence took place between Ms Agoreyo and other members of staff in which she sought help with controlling O and Z. Ms Agoreyo's case is that she spoke to Ms Alder on several occasions about the difficulties she was having and told her that she had received no training about how to deal with children such as O and Z. A feature of the case which is not in dispute is that on 20 November, the day after the first incident, the Appellant sent to Ms Alder a text message saying that she wanted to speak to her about O and Z (and one other child).

15. On the weekend prior to the second incident, which took place on Monday 3 December 2012, there was an email exchange between the Appellant and Ms Alder. One particularly important paragraph of that exchange reads:

> "Funmi [Alder], I know you are encouraging us the best you can but you know Joanna and I are having some challenging times with those children so please when you can could you speak to other members of staff to be hands-on ready to help us as a team rather than point hands or whisper behind our backs that we are not controlling the children enough? The situation I explained to you at Friday assembly was quite disappointing… In a nutshell we need members of staff to be more hands-on and helpful."

16. Ms Alder replied to this and acknowledged the difficulties the Appellant was facing. She said:

> "I will and am ensuring the most effective support is in place. We need year two to be a great success. You have made a positive start and I see [no] reason we should not be able to iron out current difficulties. Much is part of the transition process."

17. After the incident on 3 December took place, Ms Alder spoke again to Ms Agoreyo, providing guidance as to how to deal with such incidents. She encouraged her to seek out a member of the Senior Team for assistance in order to avoid the risk of allegations of the use of excessive force on pupils in her care.

18. On Saturday 8 December, after all three incidents had occurred, Ms Alder sent the Respondent the following message:

> "I hope you will be getting plenty of rest this weekend. I know the last few weeks have been a challenge. For next week and the week after, you and Joan will be released each afternoon on Tuesday to Friday to give us time to properly induct you both as new staff. I will be speaking to Rachel about getting individualised programs in place for [O and Z] ASAP. I am also going to look into arranging for additional adult support in both classrooms by the end of next week. I will also give in class support and guidance …. Have a relaxing weekend, and I look forward to seeing you on Monday. We shall overcome!"

19. She added in a further message on Sunday 9 December that she had decided "to appoint an additional TA [teaching assistant]" for the class, who was provided from this point onwards.

20. It was on Thursday, 14 December, that Ms Mulholland, the Executive Head Teacher, told the Respondent that she was suspended, in light of the three reported incidents. There is a dispute, to which I will return later, as to whether the Respondent was informed of the suspension decision verbally, or by both verbal and written communication.

21. The letter from Ms Mulholland, confirming the Respondent's suspension, stated:

> "I must write to inform you of a decision taken today to suspend you from duty on your normal rate of pay with immediate effect.
>
> This is a precautionary suspension, in line with the disciplinary procedure, pending a full investigation into allegations:
>
> That on 3rd December 2012 you were seen to 'drag a child, very aggressively, a few feet down the corridor whilst shouting at him'.

> That on 19th November 2012 a child was dragged on the floor, out of the classroom door by yourself in the presence of another member of staff and the rest of the children and was heard to cry 'help me'.
>
> That on 5th December 2012 a child with special educational needs was told to leave a classroom, as he was unable to follow your instruction. When he refused, you were heard to state "If you don't walk then I will carry you out!" You then proceeded to pick up the child who kicked and screamed in the presence of all the class children … ."

22. It continued:

> "The suspension is a neutral action and is not a disciplinary sanction. The purpose of the suspension is to allow the investigation to be conducted fairly.
>
> Every effort will be made to complete the investigation as quickly as possible. You will be informed immediately if at any stage during the investigation or if applicable at any stage of the disciplinary process it is considered appropriate that your suspension should be lifted.
>
> During the period of your suspension, information on the allegations will be thoroughly investigated. As part of these investigations, you will be invited to an investigation meeting where you will be given full opportunity to provide your account of the alleged events.
>
> Following the investigation, a decision will be made as to whether or not there is a case for you to answer and you will be informed accordingly.
>
> I assure you that the confidentiality of the process will be strictly maintained by management and would ask that you maintain the same confidentiality. You should not discuss the details of the allegations or your suspension with any person except those named in this letter or your chosen representative."

23. As stated above, the Appellant tendered her resignation later that day, before commencing these proceedings.

The judgment of HHJ Wulwik

24. At para. 14 of his judgment HHJ Wulwik recorded the list of issues which had been agreed by the parties. The first five issues, concerning liability, were as follows:

(1) Did the Defendant fail to comply with any aspect of the guidance to which reference is made in paras. 24 and 25 of the Particulars of Claim, whether issued by the Secretary of State or otherwise, and if so which part or parts?

(2) Did such a failure or did such failures amount to a breach of the implied term of trust and confidence by the Defendant?

(3) Was there reasonable and proper cause for suspending the Claimant from her employment on 14 December 2012?

(4) If there was no such reasonable and proper cause, was the Claimant's suspension a breach of the implied term of trust and confidence?

(5) Was there in any event a breach of the implied term of trust and confidence in the form of such failure or failures as have been determined by the Court to have occurred in answer to question 1 above taken together with the suspension of the Claimant?

25. The reference in question 1 to the Particulars of Claim was to paras. 24 and 25, which stated:

> "24. At all material times (1) the head teacher of the School, (2) the Governing Body of the School and (3) the Defendant were under a public law duty to take into account any guidance given by the Secretary of State in relation to the education of children with SEN (including for the avoidance of doubt children with BESD and/or who were on the autistic spectrum). Such guidance included the relevant guidance in the following document:
>
> 24.1 The Special Educational Needs Code of Practice issued by the Secretary of State in 2001 under section 313 of the [Education Act] 1996 ("the SEN Code");
>
> 24.2 'The Education of Children and Young People with Behavioural, Emotional and Social Difficulties as a Special Educational Need', published by the Secretary of State in 2008;
>
> 24.3 'Guidance on the Use of Restrictive Physical Interventions for Staff Working with Children and Adults who Display Extreme Behaviour in Association with Learning Disability and/or Autistic Spectrum Disorders', issued by the Secretary of State in July 2002 (LEA/0242/2002);

> 24.4 'Guidance on the Use of Restrictive Physical Interventions for Pupils with Severe Behavioural Difficulties', issued by the Secretary of State in September 2003 (LEA/0264/2003);
>
> 24.5 'School Discipline – your powers and rights as a teacher' issued jointly by the NASUWT and the Secretary of State in 2009;
>
> 24.6 'the use of force to control or restrain pupils', issued by the Secretary of State in 2010 (DCSF-00369-2010); and
>
> 24.7 'Dealing with allegations of abuse against teachers and other staff' issued by the Secretary of State in 2012 under section 175 of the EA 2002.
>
> 25. Without prejudice to the generality of the preceding paragraph above, paragraph 1:121 of the SEN Code required the Governing [Body] of the School to do these things:
>
> - do its best to ensure that the necessary provision is made for any pupil who has special educational needs
>
> - ensure that, where the "responsible person" – head teacher or the appropriate governor – has been informed by the LEA that a pupil has special educational needs, those needs are made known to all who are likely to teach them."

26. The Trial Judge addressed the first issue before him at paras. 16-22. The first difficulty he identified with the Claimant's case on the first issue was that, although paragraphs 24 and 25 of the Particulars of Claim had referred to voluminous guidance, there were no sufficient particulars pleaded: see para. 17 of the judgment. However, it is important to observe that that was not the only reason why the Judge found against the Claimant on the first issue. He went on to consider the evidence before him in some detail at paras. 19-21. This led to his overall conclusion at para. 22 as follows:

> "The Claimant's allegation that the Defendant failed to comply with aspects of the guidance documents listed in paragraphs 24 and 25 of the particulars of claim fails on both pleading grounds and on the evidence."

27. The Trial Judge found that the Defendant had not failed to comply with the guidance issued by the Secretary of State in relation to the education of children with special educational needs, in particular para. 25. This was founded on the basis that Ms Agoreyo was an experienced teacher with 15 years of experience, including previous work with children with special educational needs, and on the conclusion that Ms Wayman had been able to deal with Z and O with only one year of post-qualification experience. The Claimant had been given an induction, and was supported at various stages by three teaching assistants, with access to a SENCO assistant and an educational psychologist, and therefore the Defendant had complied with the standards outlined in the guidance. At the hearing before us it was fairly pointed out by Mr Glyn that there were three teaching assistants only towards the end of Ms Agoreyo's period of employment but, that said, he observes that there were two teaching assistants during the whole of that period. Ms Agoreyo's evidence before HHJ Wulwik was that there were two teaching assistants, Ms Fevrier and Mr Gayle, who was not there all of the time.

28. In the light of his finding on the first issue, the second issue did not arise. Nevertheless, the Trial Judge went on to address that issue at paras. 23-24. The Judge was of the view that the Claimant was "simply unable" to show that there had been a breach of the implied term of trust and confidence by reason of the alleged failures under the first issue.

29. He noted, at para. 23(3), that the Claimant accepted in her evidence that the allegations of inappropriate force "were serious allegations which required investigation."

30. At para. 23(4) the Trial Judge said that the Defendant "was entitled and indeed bound to suspend the Claimant after receiving reports of the allegations from colleagues, namely Ms Fevrier and Ms Donna Messenger …"

31. At para. 24 the Judge said that:

> "The Defendant had to consider its duty to protect the children first and foremost. The belated suggestion by the Claimant in her evidence that there should have been a full investigation before she was suspended would have been putting the cart before the horse."

32. In addressing the second issue, the Trial Judge was of the view that any such argument would have been undermined by the words in the Claimant's resignation letter thanking Ms Alder for the support and guidance given to her. The Claimant also accepted in her evidence that the allegations of inappropriate force were serious allegations which required investigation, an acceptance that was reinforced by the reports made by Ms Fevrier and Ms Messenger.

33. The Judge addressed the third issue at paras. 25-30. At para. 29 he again observed that the Claimant accepted that a full investigation was not only reasonable but necessary.

34. At para. 30 the Judge expressed his conclusion that the Defendant "clearly had reasonable and proper cause to suspend the Claimant." He continued:

> "It has an overriding duty to protect the children pending a full investigation of the allegations. That could only be achieved by the suspension of the Claimant until the allegations were fully investigated, regardless of any other considerations."

35. The Judge addressed the fourth issue very briefly, in the light of his conclusion on the third issue. At para. 31 he said that, since there was reasonable and proper cause to suspend the Respondent, the suspension was not a breach of the implied term of trust and confidence.

36. The Judge addressed the fifth issue at paras. 32-34. He concluded that there was no breach of the implied term of trust and confidence. The Respondent had resigned in response to being told that she was going to be suspended and that there would be a full investigation of the allegations.

37. The Judge found on a balance of probabilities that the suspension letter was given by Ms Mulholland to the Claimant on 14 December 2012: see para. 34.

38. Accordingly, at para. 35 of his judgment, the Judge concluded that the claim would be dismissed.

The judgment of Foskett J

39. At para. 21 of his judgment Foskett J noted that, whilst the Respondent strongly refuted any suggestion of wrongdoing on her part, it is not (and was not) suggested on her behalf that allegations such as these (certainly expressed in the way they were) should not have been investigated by the school. However, Foskett J continued: "The central issue is whether it was reasonable and/or necessary for the [Respondent] to be suspended pending that investigation. …"

40. On behalf of the Appellant before us Mr Glyn QC submits that, in formulating the question in that way, Foskett J fell into error as a matter of law (this is the subject of the original Ground 2 in this appeal, to which I will return later). First, submits Mr Glyn, the phrase "and/or" leaves it unclear whether Foskett J was applying a test of reasonableness or a test of necessity or both. Secondly, there is no test of necessity in this context. The question is whether there was reasonable and proper cause for suspension.

41. At para. 24 Foskett J referred to the decision (on a permission application) of the Court of Appeal in *Mezey v South West London and St George's Mental Health NHS Trust* [2007] EWCA Civ 106, in particular at paras. 11-13 in the judgment of Sedley LJ, with whom Dyson LJ and Sir Peter Gibson agreed. Foskett J adopted the view of suspension expressed in that judgment, namely that it is not a neutral act preserving the employment relationship.

42. At para. 27 of his judgment Foskett J observed that it is well-established that suspension is not to be considered a routine response to the need for an investigation. At para. 28 he cited authority in support of that proposition if it were required, namely the decision of the Court of Appeal in *Gogay v Hertfordshire County Council* [2000] IRLR 703, in particular at paras. 55-58 in the judgment of Hale LJ.

43. At para. 29 of his judgment Foskett J acknowledged that the facts were different from the present case but he emphasised the need to avoid a "knee-jerk" reaction, with suspension as the default position without consideration of the alternatives.

44. At para. 32 Foskett J again noted that it has never been disputed by the Respondent that the allegations required investigation. But, he continued, what is not accepted is that the Appellant had no alternative but to suspend her.

45. At para. 36 of his judgment Foskett J said that he was "very hesitant about expressing reservations about assessments of the evidence made by Judge Wulwik who had such witnesses as there were before him …".

46. At para. 49 Foskett J observed that the events culminating in the weekend of 8/9 December suggested that Ms Alder was understanding of the issues which the Appellant was facing and supportive to the extent that she could be. He expressed the view that it was also clear that not everything that she wished to put in place to assist resolution of the problem of O and Z had been put in place by that weekend. However, he noted that the Trial Judge was of the view that nothing more could or should have been done for the Appellant and set out the material part of his judgment.

47. At para. 50 Foskett J recorded the submission made by counsel for the local authority (Mr Milsom) that this was a finding which was not just open to the Trial Judge but inevitable on the facts. Foskett J said:

> "… I do not agree. I would respectfully think that that conclusion might well have been entirely justified a little further down the line if the problems continued after all this support had been put in place for a while. However, where the Head teacher had spoken on the previous Saturday/Sunday of putting these arrangements in place and yet the [Respondent] was suspended first thing on the next Thursday morning, the inference is irresistible that insufficient time had been allowed to elapse before any judgment about her capacity to cope with a class containing Z and O took place."

48. At para. 65 of his judgment Foskett J set out the five issues which the parties had agreed should be decided by Judge Wulwik.

49. In relation to the first issue, at para. 74, Foskett J expressed the view that the Trial Judge seemed to have been heavily influenced by the way in which the case had been pleaded. At para. 77 he continued that pleadings are, of course, important, "but pure pleading points should rarely stand in the way of doing justice …". In my view, as I have mentioned above, the Trial Judge did not in fact base his decision on the first

issue before him only the deficiency of the pleading but also based it on the evidence: see para. 22 of the judgment of HHJ Wulwik.

50. The essential reasons why Foskett J allowed the appeal before him are set out in paras. 80-85 of his judgment. In particular it is important to set out in their entirety paras. 80-82:

> "80. As will be apparent from my review of the background, I have reservations about some of the important conclusions reached by Judge Wulwik. It seems to me that each of the following conclusions is justified by the evidence he heard and the documentary material (including the 'suspension letter') put before him:
>
> (i) that Z and O were children who exhibited extremely challenging behaviour and had done so prior to the Appellant becoming their class teacher;
>
> (ii) that no clear solution to dealing with that behaviour, when at the same time handling the rest of the class, had been found even prior to the Appellant's arrival, but certainly thereafter;
>
> (iii) that the Appellant expressed to Ms Alder concerns about her ability to deal with Z and O and her lack of training to deal with such issues as soon as she appreciated the problem;
>
> (iv) that the Appellant had told Ms Alder that some members of staff were not being as helpful as they could be when it came to dealing with these problems;
>
> (v) it was not until the weekend of 8/9 December (and thus after all three of the incidents now relied upon had taken place) that Ms Alder formulated a detailed plan for assisting the Appellant;
>
> (vi) by then Ms Alder had inquired about at least the incidents on 19 November and 3 December (and may well have known about the incident on 5 December) and had concluded that no more than reasonable force was used;
>
> (vii) by the time the Appellant was told she had been suspended (on the morning of 14 December), Ms Alder's plan had not been activated fully;
>
> (viii) prior to the decision to suspend the Appellant was made –
>
> (a) there is no evidence that the decision-maker (presumed to be Mrs Mulholland) had spoken to

> Ms Alder about her knowledge of what had occurred;
>
> (b) there is no evidence that Mrs Mulholland asked Ms Alder about the support put in place for the Appellant;
>
> (c) the Appellant was not asked for her response to the allegations;
>
> (d) there is no evidence that consideration was given to any alternative to suspension before the decision to suspend was taken.
>
> 81. So far as the matters referred to under (viii) above are concerned, they add up to the conclusion that suspension was adopted as the default position and as largely a knee-jerk reaction to the strident terms in which Ms Fevrier's report to Ms Alder was phrased.
>
> 82. In my judgment, suspension itself, against that background, would have been sufficient to breach the implied term relating to trust and confidence, particularly when the Appellant's 'line manager' (Ms Alder) had investigated at least two of the incidents and not considered them worthy of disciplinary action. But if I was wrong about that, I would certainly say that suspension within a few days of being told finally (after several weeks of requests for help) of the introduction of a scheme of support and further induction because of the problems with Z and O was a further reason for that term having been broken, particularly when that proposed scheme had not yet been fully implemented. Either or both of these approaches in combination would constitute a repudiatory breach of contract by the Defendant."

51. Foskett J added that he did not consider that the Trial Judge's conclusion that Ms Agoreyo resigned so as to avoid a full investigation taking place was sustainable on the evidence, principally because of his finding that the suspension letter, written by Ms Mulholland, was not even given to Ms Agoreyo on the day of her resignation: para. 83.

52. In his conclusions, Foskett J said, at para. 87, that in his judgment there were "very strong reasons" on the evidence heard by the Trial Judge for finding that the Defendant had been in repudiatory breach of contract and that the Respondent's so-called "resignation" amounted to a constructive dismissal.

53. Accordingly, at para. 88, Foskett J concluded that the appeal should be allowed.

The Appellant's submissions

54. On behalf of the Appellant there were originally two grounds of appeal:-

(1) Foskett J erred in law by impermissibly substituting his own judgment for the Trial Judge's findings of fact.

(2) Foskett J adopted an erroneous approach in law to the question of suspension.

55. Under Ground 1, on behalf of the Appellant Mr Glyn submits that Foskett J's decision amounted to a wholesale substitution of his view of the facts for those found by HHJ Wulwik, rather than a permissible review of that decision. Courts exercising an appellate jurisdiction must not interfere with the lower court's findings of fact unless no reasonable judge could have made those findings. Yet this is precisely what, submits Mr Glyn, Foskett J has done.

56. Under Ground 2 (as was), Mr Glyn further submits that the test used by Foskett J to establish whether the suspension breached the implied term of trust and confidence was not well-founded in law. Foskett J asked whether it was "reasonable *and/or necessary* for the Appellant [now Respondent] to be suspended pending the investigation". He applied this test wrongly by assuming that the mere fact of suspension was sufficient to constitute a breach of the implied term of trust and confidence. Further, his incorporation of "necessity" into the test was wrong in law, and led him to the conclusion that a hypothetical alternative to suspension was available, which led to the claim succeeding.

57. At the hearing before us Mr Glyn turned Ground 2 into Ground 3 and advanced another Ground 2: that Foskett J was wrong to regard the act of suspension as being anything other than a "neutral act."

The Respondent's submissions

58. In response to Ground 1, on behalf of the Respondent Mr Allen submits that Foskett J's decision was permissible in that it was founded upon the correction of HHJ Wulwik's errors of law. In particular, HHJ Wulwik failed to make findings on crucial issues, such as upon the extent to which Z and O were badly behaved, or upon Ms Alder's conclusion that the Respondent had used only reasonable force. The findings of fact that Foskett J made were *required* in that they had not been made adequately by HHJ Wulwik, and the parties before the High Court had agreed that, were Foskett J minded to allow the appeal, he ought to determine the case on the facts to the extent that he was able to do so.

59. On the new Ground 2, Mr Allen submits that Foskett J was right not to regard the act of suspension as a neutral act and was merely following what the Court of Appeal had said to that effect in *Mezey*.

60. On the old Ground 2 (now Ground 3), Mr Allen submits that Foskett J's approach to suspension was not wrong in law. Applying the *Gogay* principle that suspension must not constitute a "knee jerk" reaction to events, Foskett J determined that a "reasonable

and proper" approach would have involved consideration of alternative courses of action.

Ground 1: was the High Court entitled to interfere with the judgment of the County Court on this appeal?

61. The first point to make is that the question whether there has been a repudiatory breach of the implied term of trust and confidence in a contract of employment is both a question of fact and is "highly context-specific": see *Tullett Prebon plc v BGC Brokers LP* [2011] EWCA Civ 131; [2011] IRLR 420, at paras. 19-20 (Maurice Kay LJ).

62. Secondly, it is also clear that a finding on an issue of reasonableness is an issue of fact, not law: see *Dobie v Burns International Security Services (UK) Ltd* [1984] ICR 812, at 818 (Sir John Donaldson MR). As the Master of the Rolls said in that passage, it follows that there must be an error of law before an appellate court or tribunal can interfere with such a finding of fact and that error of law may be on one of two alternative bases. The first basis is that the lower court or tribunal gave itself a wrong direction in law. The alternative basis, "which is almost a *Wednesbury* basis" is that no reasonable court or tribunal could have reached that conclusion on the evidence.

63. In *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642; [2003] 1 WLR 577, the Court of Appeal considered the effect of the Civil Procedure Rules 1998 as compared with the previous Rules of the Supreme Court 1965 in relation to the role of an appellate court. It confirmed that the approach under CPR r.52.11(1) should be the same as that formerly adopted by the Court of Appeal when conducting a "rehearing" pursuant to RSC Order 59, rule 3(1). This is despite the fact that the language of the new rule is slightly different: the appellate court is now required to conduct a "review" of a decision. In the main judgment, Clarke LJ said, at para. 13, that the same approach should be adopted by the Court of Appeal whether the appeal is by way of review or rehearing. I would respectfully agree. If anything, I consider that the language of "review" makes it even clearer than the language of "rehearing" that it is not the function of an appellate court simply to decide a case again but rather to review the judgment of the trial judge to see whether it is "wrong".

64. In *Assicurazioni*, at para. 14 Clarke LJ noted that the approach of an appellate court to any particular case will depend upon the nature of the issues determined by the trial judge. In some cases, the trial judge will have reached conclusions of primary fact based almost entirely upon the view which he formed of the oral evidence of the witnesses. In most cases, however, the position is more complex. In many cases the judge will have reached his conclusions of primary fact as a result partly of the view he formed of the oral evidence and partly from an analysis of the documents. In other cases, the judge will have made findings of primary fact based entirely or almost entirely on the documents. Some findings of primary fact will be the result of direct evidence whereas others will depend upon inference from the direct evidence.

65. At para. 15 Clarke LJ continued that, in appeals against conclusions of primary fact, the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which the judge

has an advantage over the appellate court. The greater that advantage the more reluctant the appellate court should be to interfere.

66. At para. 16, Clarke LJ noted, however, that some conclusions of fact are not conclusions of primary fact. Rather they:

> "involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way."

67. In my view, an assessment of whether there was reasonable and proper cause for a suspension, like other issues of reasonableness, is classically such a question of assessment. Although it is not a question of primary fact, it is a question which calls for an evaluation of the facts and is a matter of degree upon which different judges can legitimately differ.

68. That approach is similar to the approach recommended by Lord Hoffmann in a patent case, *Biogen Inc. v Medeva plc* [1997] RPC 1, at 45:

> "… The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (*as Renan said, la vérité est dans une nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation. It would in my view be wrong to treat *Benmax* as authorising or requiring an appellate court to undertake a *de novo* evaluation of the facts in all cases in which no question of the credibility of witnesses is involved. Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation."

69. I did not understand any of the above principles to be disputed by Mr Allen on behalf of the Respondent. However, what he does submit is that the concept of an error of law is a broad one and should not be narrowly construed. In support of that proposition our attention was drawn to the decision of the Court of Appeal in

Railtrack plc v Guinness Ltd [2003] EWCA Civ 188, at para. 51 (Carnwath LJ, with whom Sir Denis Henry and Aldous LJ agreed).

70. Furthermore, Mr Allen submits on behalf of the Respondent that a judgment which fails to make findings about important issues is fundamentally flawed. He submits that a court is under a duty to resolve every issue which is central to the issues in dispute in the case. He cites in support of that proposition *Lloyds TSB Bank plc v Norman Hayward* [2002] EWCA Civ 1813, at para. 66 (Parker LJ) and para. 84 (Dame Elizabeth Butler-Sloss P). He submits that a court must consider all of the evidence and explain its findings of fact on crucial issues: see *Baird v Thurrock Borough Council* [2005] EWCA Civ 1499, at para. 17, where Gage LJ (with whom Ward and Keene LJJ agreed) said:

> "… I would wish to say nothing which would discourage a judge from expressing the reasons for his decision briefly but it is equally clear that the reasons for his or her decision must be sufficient to explain why he reached that decision."

71. Mr Allen also submits that, in addition to the failure to determine key issues, a judgment which does not set out the reasons for a determination in relation to key issues is fundamentally flawed: see *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605; [2002] 1 WLR 2409, at para. 19 (Lord Phillips MR, with whom Latham and Arden LJJ agreed). However, at the hearing before us, Mr Allen made clear that this is not a reasons challenge to the judgment of HHJ Wulwik.

72. On the facts of the present case, Mr Allen submits that the Trial Judge failed to make findings on a number of key issues, as set out in para. 25 of the Respondent's skeleton argument:

(a) HHJ Wulwik failed to reach any conclusion on the issue of the extent to which the children O and Z were badly behaved, which formed the essential and fundamental context and circumstances of the Respondent's alleged misconduct.

(b) He failed to reach any decision on how or to what extent the conclusion of Ms Alder recorded in the contemporaneous investigation notes that it appeared that reasonable force was used in the incident of 3 December impacted upon the lawfulness of the decision to suspend the Respondent after that date.

(c) He failed to reach any decision on the reliability of Ms Fevrier or to set out why a particular version of her evidence was accepted, despite the lack of consistency between her evidence and the documentary evidence and despite internal inconsistencies in her evidence.

(d) He explicitly refused to consider, let alone make any determination, whether the Respondent should have been interviewed or any other step short of suspension should have been implemented prior to or as an alternative to suspension.

(e) He failed to make any or any adequate finding about alleged breaches of relevant guidance particularly the Special Educational Needs Code of Practice.

(f) He failed to make any finding about the relevance or significance of Department of Education guideline 'dealing with allegations of abuse against teachers or other staff', which stipulates that it is mandatory for schools to have regard to it and that, in response to an allegation, staff suspension should not be the default option. An individual should only be suspended if there is no reasonable alternative.

73. Moreover, submits Mr Allen, the impact of the Judge's failure to make findings in relation to those key issues was that he could not possibly have adequately or properly answered the question of whether the suspension was reasonable and proper.

74. I am acutely conscious that the appeal before the High Court was heard by a very experienced judge. However, it is said that even Homer nodded on occasion. With great respect to Foskett J I have come to the conclusion that Mr Glyn is right and that the High Court was not entitled to interfere with the findings of fact which had been made by HHJ Wulwik in the County Court, since it was considering an appeal and was not sitting at first instance.

75. There are several indicators that Foskett J fell into error in this respect. Nowhere in his judgment does he give himself a direction as to the criteria by which such an appeal should be determined. Nowhere in his judgment does he identify any misdirection of law or other error of principle by the trial judge. Nowhere in his judgment does he say that he has concluded that the Trial Judge was "wrong" or that he had reached a conclusion on a matter of fact which was not open to him on the evidence.

76. What Foskett J did say was that he was "very hesitant about expressing reservations about assessments of the evidence made by Judge Wulwik who had such witnesses as there were before him" (para. 36). In the same paragraph Foskett J said that he was "a little concerned about some aspects of the foregoing."

77. Further, at para. 80 of his judgment, Foskett J simply said that he had "reservations about some of the important conclusions reached by Judge Wulwik." He continued:

> "It seems to me that each of the following conclusions is justified by the evidence he heard and the documentary material … put before him …"

With great respect to Foskett J, that passage reads as if he was simply entitled to set out his own conclusions about what the evidence before the Trial Judge amounted to. What Foskett J then went on to say at paras. 81-82 again reads as if he were simply setting out his own conclusions as though he were the trial judge.

78. Finally, at para. 87, Foskett J said that:

> "… In my judgement, there were very strong reasons on the evidence he heard for finding that the Defendant had been in repudiatory breach of contract …"

Again with respect to Foskett J, that paragraph does not set out the correct legal test which would justify an appellate court interfering with the findings of fact of a trial

Court. "Very strong reasons on the evidence" is not a sufficient basis for an appellate court to do that.

79. I am conscious that in this case, unlike some, the Trial Judge only heard evidence from a small number of live witnesses. The Respondent gave evidence. On behalf of the Appellant the Judge heard from Ms Fevrier but no-one else was called. In particular, Foskett J was clearly concerned that Ms Mulholland was not called for the employer. That said, the Trial Judge did have the advantage which the High Court did not of hearing the live evidence of some witnesses. But, in any event, the answer is provided by what Lord Hoffmann said in *Biogen*, which I have quoted earlier. The reason why an appellate court is not entitled simply to substitute its own view for that of a trial court does not rest only on the point that the trial court will have had the benefit of assessing live witnesses. As Lord Hoffmann observed in *Biogen*, there may be cases where there are no such witnesses but where nevertheless it is not open to an appellate court simply to differ from a trial judge's evaluation of the facts.

80. I have come to the conclusion with respect that the High Court was not entitled in this case to interfere with the findings of fact which had been made by the County Court. Those findings were, in my view, open to the Trial Judge on the evidence before him. He did not misdirect himself in law.

81. With respect to the arguments advanced by Mr Allen on behalf of the Respondent, it seems to me that they do not on analysis amount to errors of approach by the Trial Judge. Other judges could have approached the issues of fact differently but that does not mean that HHJ Wulwik erred in law. He chose to approach it in a straightforward manner. In particular, on the first issue which was before him, he reached the view that, on the facts, there were other teachers who had been able to cope with the behaviour of O and Z, both the Respondent's predecessor and her successor. For that reason, he was not required as a matter of law to make findings of fact as to how bad their behaviour actually was.

82. Nor was the Trial Judge required to make an assessment of the reliability of Ms Fevrier. It is important to keep in mind that it was not the function of the trial court to make findings of fact about the underlying issues as if it were conducting an investigation into the alleged misconduct itself: that would have been a matter for the employer, not the court.

83. In my view, it is important not to over-complicate cases such as this one. In this case, it was obvious (and indeed accepted by the Respondent) that the allegations of misconduct were serious and needed to be investigated. In essence the question for the court was to assess whether the way in which the employer had responded to reports received of possible misconduct by the Respondent was reasonable and proper, so that matters could be investigated. If that response was reasonable and proper it could not be said that the employer had breached the implied term of mutual trust and confidence. Bearing in mind that the context was one in which the employer had to safeguard the interests of very young children, it seems to me that the Trial Judge was entitled to reach the conclusion that the employer had reasonable and proper cause for the suspension in this case. It follows that the High Court was not entitled to interfere with that conclusion of fact on the appeal before it.

84. Accordingly, I would allow this appeal on Ground 1 because this appeal should not have been allowed by the High Court.

Ground 2: Is the act of suspension a neutral act?

85. At one time it was common ground between the parties that the act of suspension by an employer is not a "neutral act." However, at the oral hearing before us Mr Glyn sought to resile from that concession. He submits that it is a neutral act. He submits that is how it is viewed by those who operate in the employment context and that this Court should clarify the matter. This is particularly because, he submits, misunderstanding has crept into this field of law as a consequence of the judgment of Sedley LJ in *Mezey v South West London and St George's Mental Health NHS Trust* [2007] EWCA Civ 106; [2007] IRLR 244, at paras. 11-13.

86. In that case counsel had submitted that suspension was merely "a neutral act preserving the employment relationship." Sedley LJ disagreed, at least in relation to the employment of a qualified professional in a function which is as much a vocation as a job. He said, at para. 12:

> "… Suspension changes the *status quo* from work to no work, and it inevitably casts a shadow over the employee's competence. Of course this does not mean that it cannot be done, but it is not a neutral act. …"

87. The decision of the Court of Appeal in *Mezey* was one refusing an application for permission to appeal. Normally therefore it could not be cited in other cases.

88. In this regard our attention was drawn to the *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001, at para. 6.1:

> "A judgment falling into one of the categories referred to in paragraph 6.2 below may not in future be cited before any court unless it clearly indicates that it purports to establish a new principle or to extend the present law. In respect of judgments delivered after the date of this direction, that indication must take the form of an express statement to that effect. …"

89. Para. 6.2 states that para. 6.1 applies to the categories of judgments which are there listed, which include applications for permission to appeal.

90. I would not accept the submission that the decision in *Mezey* may not be cited. The fact that it is reported in the Industrial Relations Law Reports and is referred to in a number of works on employment law indicates that it is regarded in the field as being of some general importance.

91. The next submission that Mr Glynn makes about *Mezey* is that it is inconsistent with the well understood practice in the employment field, as reflected in the ACAS Code of Practice on disciplinary and grievance procedures (2015), in particular at p. 9, para. 8, where it is said:

> "In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action."

92. I can see nothing in the terms of the ACAS Code of Practice which says that suspension is a "neutral act." It does not say that. What it does say is that it should not be considered a disciplinary action and this should be made clear to the employee.

93. That said, it seems to me that the question whether suspension is to be viewed as a neutral act is ultimately not a relevant question nor a particularly helpful one. The crucial question in a case of this type is whether there has been a breach of the implied term of trust and confidence. In the context of suspension that in turn requires consideration to be given to the question whether there was reasonable and proper cause for that suspension. This is a highly fact-specific question. It is not a question of law. Whether or not suspension is described as a "neutral act" is unlikely to assist in resolving what is the crucial question.

94. I would therefore reject Ground 2 as it now is on this appeal.

Ground 3: was the approach of Foskett J to the act of suspension wrong in law?

95. The relevant principles of law are not in dispute between the parties.

96. Lord Steyn's judgment in *Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)* [1998] AC 20 recognised the implied term of mutual trust and confidence, which is implied into every contract of employment. At p.45 Lord Steyn said that an employer shall not "without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee". Breaches of such terms constitute repudiatory breaches of contract which employees are entitled to accept by resigning.

97. An act of suspension can constitute a breach of the implied term where it, by itself or in combination with other acts or omissions, meets the test imposed by Lord Steyn, that is to say there has been conduct by the employer which:

    (1) destroys or seriously damages the relationship of trust and confidence; and

    (2) is without reasonable and proper cause.

98. There is no test of "necessity". Mr Allen accepts that as a matter of law but he valiantly sought to defend the approach of Foskett J on the basis that, in the circumstances of this particular case, there would have been no reasonable and proper

basis for suspension unless it were necessary to suspend the Respondent. I am unable to accept that submission. In my respectful view, Foskett J did fall into error in the ways suggested by Mr Glyn. First, he introduced a test of necessity where the only test is whether there was reasonable and proper cause to suspend an employee. Secondly, the test he formulated at para. 21 of his judgment, which he described as setting out the "central issue" in the appeal before him, was confusing and erroneous because it used the formula "and/or".

99. There can be no doubt that, in some cases, the act of suspension will not be reasonable and so may amount to a breach of contract. The court may consider the wider circumstances beyond the fact and manner of suspension, including events preceding the suspension and the extent to which the suspension was a "knee-jerk" reaction: see Hale LJ in *Gogay v Hertfordshire County Council* [2000] EWCA Civ 228; [2000] IRLR 703, at paras. 53-58.

100. In *Gogay*, the issue was whether the defendant local authority acted reasonably in suspending the claimant from her post as a residential care worker in a residential children's home while they investigated the circumstances surrounding a child living in that home. The allegation was of sexual abuse. The source of the relevant information was a very troubled child whose story, it was said at a strategy meeting, was "difficult to evaluate". It was against this background that a decision was made to suspend the claimant pending an investigation. This decision was criticised by Hale LJ, with whom Peter Gibson and May LJJ agreed: having referred to the contractual obligation "not, without reasonable and proper cause, to conduct oneself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee", she said:

> "[55] Did the authority's conduct in this case amount to a breach of this implied term? The test is a severe one. The conduct must be such as to destroy or seriously damage the relationship. The conduct in this case was not only to suspend the claimant, but to do so by means of a letter which stated that 'the issue to be investigated is an allegation of sexual abuse made by a young person in our care.' Sexual abuse is a very serious matter, doing untold damage to those who suffer it. To be accused of it is also a serious matter. To be told by one's employer that one has been so accused is clearly calculated seriously to damage the relationship between employer and employee. The question is therefore whether there was 'reasonable and proper cause' to do this.
>
> [56] In my judgment there clearly was not. The information considered [at the] strategy meeting was indeed 'difficult to evaluate'. The difficulty was in determining what, if anything, [the alleged victim] was trying to convey. It warranted further investigation. But to describe it as an 'allegation of sexual abuse' is putting it far too high. A close reading of the records coupled with further inquiries of the therapist were needed before it could be characterised as such.

> [57] Furthermore there was then a need to consider carefully what to do about the member of staff concerned. Was there indeed any reason to suppose that she had broken the guidelines for working with [the alleged victim]? How easy would it be to check? If there was some reason, however slight, it might indeed be right to separate her from [the alleged victim] for a short time. But how should this be done? … It is difficult to accept that there is no other useful work to which the claimant might not have been transferred for the very short time that it ought to have taken to make the further inquiries needed. It is equally difficult to accept that some other step might not have been contemplated, such as a short period of leave. In any event, given the timescale involved, what was the rush?
>
> [58] The authority's own guidelines point out that 'child sexual abuse rarely needs to be responded to as a crisis, but calls for a cool, clear and structured response'… Instead what happened here was an immediate 'knee jerk' reaction…"

101. However, it is important not to treat *Gogay* as laying down a general principle of law. At the end of the day, each case must turn on its own facts. On the facts of *Gogay*, as Mr Glyn has reminded this Court, the only source of the complaint of sexual abuse was a person who was said to be the victim of that alleged abuse; that person was a troubled child; and her account was at times contradictory.

102. By way of contrast, in the present case, complaints were made by two members of staff (Ms Fevrier and Ms Messenger). They related to three separate incidents involving two different children. Although Ms Alder took a certain view of matters, and it seems would have been prepared to see how things developed, the Executive Head Teacher, Ms Mulholland, took a different view once she learnt of the allegations. In those circumstances, in my view, the Trial Judge was entitled to reach the conclusion that Ms Mulholland had reasonable and proper cause to suspend the Respondent pending investigation. The act of suspension was not, on the facts of this case, a breach of the implied term of mutual trust and confidence – or, at least, which is the crucial point, that conclusion was one which was open to the Trial Judge. I respectfully consider that, in interfering with that conclusion, Foskett J himself fell into error in the approach which he took.

103. I would therefore allow this appeal on Ground 3 also.

Conclusion

104. For the reasons I have given I would allow this appeal and restore the judgment of the County Court.

Lord Justice Peter Jackson:

105. I agree.

Lord Justice Irwin:

106. I also agree.