

Appeal No. UKEAT/0085/14/BA

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 17 October 2014

**Before**

**HIS HONOUR JUDGE PETER CLARK**

**(SITTING ALONE)**

---

MRS J OLD

APPELLANT

PALACE FIELDS PRIMARY ACADEMY

RESPONDENT

---

Transcript of Proceedings

JUDGMENT

---

## **APPEARANCES**

For the Appellant

MR STEVEN FLYNN  
(of Counsel)  
Direct Access

For the Respondent

MS SHAHIN ISMAIL  
(of Counsel)  
Instructed by:  
Judicium Consulting Limited  
3700 Parkway  
Solent Business Park  
Whiteley  
PO15 7AL

## **SUMMARY**

### **UNFAIR DISMISSAL - Reasonableness of dismissal**

Conduct unfair dismissal. Claim dismissed by the Employment Tribunal. Proper approach to two areas of potential procedural irregularity; disclosure to the Claimant of witness statements obtained during investigation and disciplinary panel reliance on minutes of meetings between the Claimant and Head Teacher which she was told would not form part of panel's deliberations. Appeal allowed and case remitted.

Application by Appellant for court fees of £400 and £1200. The Respondent ordered to pay £600, based on Appellant's degree of success in appeal and the Respondent's opportunity to compromise it.

## **HIS HONOUR JUDGE PETER CLARK**

### **Introduction**

1. This is a conduct unfair dismissal case. The parties are Mrs Old, Claimant, and Palace Fields Primary Academy, Respondent. Employment Judge Reed, sitting at the Liverpool Employment Tribunal, dismissed the claim. This is the full hearing of the Claimant's appeal against the Tribunal Judgment and Reasons dated 17 September 2013.

### **The Facts**

2. The Claimant was employed as a teacher at the school. She had given 21 years service when, on 2 July 2012, her attention was drawn to an incident of apparent bullying. Another pupil had written "fat bitch" on an image of a special needs pupil (AC) who was in the Claimant's class. It emerged in the subsequent disciplinary process that there was a conflict in the account of what the Claimant did about that matter between Mrs Thorpe, a teaching assistant, and the Claimant. It was Mrs Thorpe's account that the Claimant had expanded the image and called a number of pupils over to see it (see paragraph 31 of the Reasons). That account was refuted by the Claimant. Following investigation a disciplinary panel accepted Mrs Thorpe's account and upheld the disciplinary charges against the Claimant summarised at paragraph 29. She was dismissed for gross misconduct. The Judge found that dismissal for that reason was fair. There were no procedural shortcomings such as to render the dismissal unfair and dismissal fell within the range of reasonable responses.

### **The Law**

3. There are now three grounds of appeal, Ground 2 having been withdrawn. I confess to initial scepticism about this appeal, notwithstanding that HHJ Eady QC directed a Preliminary

Hearing on the paper sift and Singh J then allowed the appeal to proceed on those three grounds to this Full Hearing. I bear in mind that it is not for the EAT to substitute its judgment for that of the ET: see **Bowater v NW London Hospitals NHS Trust** [2011] IRLR 331, at paragraph 19, per Longmore LJ; nor to indulge in pernicky critiques of the Tribunal's Reasons (see **Fuller v Brent Council** [2011] IRLR 414; paragraph 30 per Mummery LJ). Indeed, I myself fell into that trap, it would appear, in **Graham v DWP** [2012] IRLR 759.

4. However, Mr Flynn has won me round by reference to the Judge's approach to the reasonable investigation limb of the **Burchell** test, with which I have no doubt, this very experienced Judge is more than familiar.

5. Mr Flynn takes three points on the application of the reasonable investigation question or, perhaps more broadly, the procedural fairness question examined by Mummery LJ in **Sainsburys plc v Hitt** [2003] IRLR 23. First, by reference to paragraphs 19 and 20 of the Reasons, he submits that, having found that two witness statements taken from year 6 children (i.e. 10-11 years old) were of potential assistance to the Claimant, they were not disclosed to her during the disciplinary process. The Judge thought that because they were not shown to the disciplinary or, I infer, appeal panels, it was reasonable for those panels to believe that they had all the relevant information before them. That is true. However, it does not address the obligation on the Respondent to disclose material which may support her case to the Claimant once it has been generated in the course of the investigation. That is a question of fairness of procedure; identified for example in **A v B** [2003] IRLR 405: see particularly paragraphs 83, 86 and 88, per Elias J as he then was. Non-disclosure will not necessarily render the dismissal unfair, as Ms Ismail submitted to me, but it must be considered as part of the section 98(4) question and I am satisfied that it was not approached correctly by the Judge.

6. Secondly, on the facts the Claimant was interviewed twice by the Head Teacher, Mrs Moran. Minutes were taken of those minutes but were not shown to the Claimant, who instead was told that they would not form part of the disciplinary panel's deliberations (see paragraphs 7-9). In the event they were considered by the panel and contributed to their conclusion that the Claimant had given previous inconsistent accounts in preferring the account given by Mrs Thorpe. The Judge deals with that potential procedural defect by concluding (paragraph 36) that the panel could have preferred the account given by Mrs Thorpe without reference to those minutes. That again is true. However, the question is whether there was a material procedural irregularity in relying on material on which the Claimant was not permitted to comment in coming to the conclusion which the panel did. That question does not appear to have been addressed by the Judge.

7. The third point centres on paragraphs 10 and 24. Mrs Lloyd's report to the governors contained allegations falling outside the charges which the Claimant was asked to meet. However, the Judge accepted Mr Appleton, the disciplinary panel chair's evidence that no account was taken of those allegations by the panel in arriving at their conclusions (see paragraph 24). That, it seems to me, is an end to the point. Unlike the second point relating to the Moran meeting minutes, the panel put those matters out of their minds. No procedural unfairness arises.

### **Conclusion**

8. It follows, in my judgment, that this appeal must be allowed. The proper course, following discussion with Counsel, is for the two questions of procedural irregularity, identified above, to be remitted, if practicable to Employment Judge Reed, to reconsider his determination that the dismissal was procedurally unfair. Having asked himself and answered the two

questions posed above, it will be for him to make a judgment as to whether overall dismissal was fair in all the circumstances, including the fact that after 21 years service, the Claimant now faces a career-destroying outcome: see A v B and Salford Royal v Roldan [2010] IRLR 721.

### Fees

9. Following my judgment on this appeal Mr Flynn applies on behalf of the Claimant for recovery from the Respondent of the total fees paid in respect of the appeal: that is the initial £400 lodgement fee and the further £1,200 hearing fee for today's hearing.

10. The fees regime is not the same as the ordinary costs regime in this Tribunal and it seems to me that I have a wide discretion as to whether or not to order some or all of the fees paid. True it is that the Claimant had to pay the fees in order to achieve ultimately a partially successful outcome. I say partially successful because although the appeal has been allowed, the matter has been remitted back to the same Employment Judge for further consideration. I have not reversed his finding.

11. Ms Ismail opposes the application on the basis that, as Respondent, it had no alternative but to go along with the process. I do not entirely accept that. It is always open to a Respondent to make an offer which may dispose of at least the need for a Full Hearing of the appeal. No such offer seems to have been made.

12. Thus, doing the best I can and attempting to do justice between the parties, I shall not award anything in respect of the initial lodgement fee. However, I shall direct the Respondent to pay one-half of the hearing fee, that is the sum of £600, to the Appellant.