Appeal No. UKEAT/0065/13/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal
On 18 July 2013

Before

HIS HONOUR JUDGE SHANKS

MRS R CHAPMAN

MR D NORMAN

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(1) GOVERNING BODY OF LIMINGTON HOUSE SCHOOL
(2) HAMPSHIRE COUNTY COUNCIL APPELLANTS

MS M SMITH RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR GARY SELF (of Counsel) Instructed by: Hampshire County Council Legal Services The Castle Winchester Hants SO23 8UJ
For the Respondent	MR MICHAEL GRIFFITHS (of Counsel) Instructed by: National Association of Head Teachers Legal Department The Nook Maynestone Road Chinley High Peak SK23 6AH

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

The Appellants dismissed the Claimant for gross misconduct in relation to two incidents following a disciplinary hearing. There was no dispute that they had an honest belief that the Claimant had committed gross misconduct nor that they had carried out a reasonable investigation. The Employment Tribunal made findings about what had happened in the two incidents and on the basis of those findings found that there was in fact no misconduct and that there was no way that any employer could reasonably come to the view that there was. The appeal was allowed because the ET had not referred to the very full decision letter, had not expressly asked themselves whether there were reasonable grounds for the belief the Appellants had reached and appeared to have substituted their own findings for those of the Appellants. The matter remitted to be reheard by a fresh ET.

HIS HONOUR JUDGE SHANKS

1. This is an appeal by employers against a decision of the Employment Tribunal sent to the parties on 19 December 2012. The Tribunal, sitting at Havant, decided that the Claimant employee had been both unfairly and wrongfully dismissed.

2. The Claimant was a deputy head of the primary section of the Limington House School, which is a school with severe learning disabilities. She worked there for 1 September 1996 until she was summarily dismissed on 12 September 2011. The dismissal arose out of two incidents involving children that took place on 10 May 2011 and 11 May 2011. The Claimant was suspended on 8 July 2011, and there was a governors' disciplinary committee hearing on 12 September followed by a nine-page decision letter dated 14 September. The letter at pages 34 to 43 of our bundle is on its face a careful document, making full findings and coming to the view that she should be dismissed for gross misconduct. There was also a very full appeal hearing, which took the form of a complete rehearing, on 14 and 17 November 2011, and that in turn resulted in an 11-page letter that upheld the decision to summarily dismiss. That letter we have not really looked at; it is at pages 44 and following.

3. There is no dispute, at least for the purposes of this appeal, that the governors who made the decision honestly believed that the Claimant was guilty of gross misconduct, and there is no dispute that they carried out a reasonable investigation, although the Tribunal makes some reference to being troubled by the fact that the main investigator was the headmistress, who apparently had a difficult relationship with the Claimant, but at least for today's purposes there is no dispute raised about that. The key question before the Employment Tribunal and before

this Tribunal was whether the governors who took the decision to dismiss had reasonable grounds for their belief that the Claimant was guilty of gross misconduct.

4. The Appellant employers say that on this issue the Employment Tribunal failed to consider the position from the point of view of the employers but instead looked at their own findings of fact about the two incidents and allowed those findings to seep into the decision so that they substituted their own views for those of the employer, and on that rather depressingly familiar basis they appealed to this Tribunal.

5. The Employment Tribunal heard evidence from the Claimant herself, from the headmistress who had carried out the investigation and from the two governors who had respectively chaired the disciplinary and appeal hearings. They also had a bundle running to 445 pages. It is worth noting at the outset that the only evidence they heard that directly bore upon what had taken place on 10 and 11 May 2011 was of course the Claimant's evidence.

6. The Tribunal start their reasons, after introductory matters, by going straight to the two incidents, 10 and 11 May 2011, and making findings of fact about them. The first incident related to an occasion when the Claimant had left a child unattended in the playground for a short period of time, that child having soiled himself and there being a need to deal with all the other children who were coming in from the playground. The Tribunal made a number of findings of fact, which it is worth referring to at this point. At paragraph 11 they say this:

> **"The claimant's evidence is that she could see where E [the child] was sitting and knew that he was alright and safe in that position whereas other evidence suggests that she could not have actually seen where he was. However what is important is that the evidence does clearly show that if E had moved across the playground, or attempted to leave by either gates he would clearly have been seen by the claimant and probably by several other staff. It is suggested that E had a history of absconding. That appears to be something of an exaggeration in that there had just been one incident a couple of years before when doors and gates had been left open or insecure and he had simply wandered out. There were no evidence [sic] of any problems since**

> **then. How long he was alone on the playground is not clear but the best estimate appears to be that it would be around three minutes."**

At paragraph 13 the Tribunal said this:

> **"It is suggested by the respondents that E was left in a dangerous situation where he could have absconded from the play area. The Tribunal accepts the claimant's evidence that the gates would have been closed and that he could not have opened them. She had checked them before the break time and although she did not check them at the end they looked closed and indeed the most crucial gate has a mechanism whereby it closes itself and catches itself so if it was not properly closed it would have been open and that would have been seen quite clearly by the claimant [sic]."**

And in paragraph 14 they said this:

> **"It has been suggested to the claimant that there were various alternatives open to her to get another member of staff to attend to the needs to E immediately. The Tribunal do not accept that there was any significant shortcoming in that respect."**

And then at the bottom of that paragraph the Tribunal said:

> **"[…] the actions the claimant took that day appear to be a sensible decision and not one that could be described in any as misconduct [sic]. The class teacher gave a statement saying if she had been on duty she would probably have taken the same decision."**

7. And then on the incident the following day, on 11 May, which related to an allegation in any event that the Claimant had forced a child to eat an apple unpeeled and uncut by way of some kind of punishment knowing that he did not like apples in that form, the Tribunal made findings of fact at paragraphs 21 and 23. At paragraph 21 the Tribunal recited that the case the employer was running was that imposing an apple on the child was an inappropriate punishment and that he should have been given a choice of what fruit he wanted. The Tribunal went on to say:

> **"The Tribunal accepts the claimant's evidence that she did not intend it as a punishment but she simply thought apple was an appropriate thing to say because she knew he did not like apple."**

And then the Tribunal say a bit later on:

> **"Regardless of exactly what was said what is important is that the claimant knew there was no reason why the child should not eat apple. She knew he just disliked eating apple."**

And at paragraph 23 the Tribunal say:

> **"The Tribunal accept the claimant's evidence that she had said to [the child] that he should have an apple because that was the first fruit that came into her mind and that it was not a deliberate punishment."**

8. Before turning to the appeal, we note that the matter was raised because the headteacher received a complaint from a parent governor relating to the two incidents, and apparently that parent governor had overheard conversations between various members of staff about the two incidents; that simply fills the gap as to how the matters came to be dealt with at the disciplinary hearing at all.

9. There was in addition to a claim for unfair dismissal a claim for wrongful dismissal, and it is therefore permissible and indeed logical that the Tribunal set out the findings as to what had actually happened at the beginning of their Judgment. That process is understandable and logical, as we say, but it does always introduce the danger that an Employment Tribunal, when it turns to deal with unfair dismissal, will allow its own view of the facts to influence their decision on whether an employee had reasonable grounds for any conclusions they have reached.

10. The Tribunal dealt with the question of unfair dismissal really at paragraphs 31 to 34, possibly 35, of the Judgment. At paragraph 31 they say that they had taken a full note of all the evidence and all of the submissions, and then they say:

> **"We are very aware of the importance that we must not substitute our own views for those adopted by the respondents' [sic]. What we need to focus on is whether the respondents in deciding to dismiss the claimant came to a decision that falls within the band of appropriate responses open to an employer acting reasonably."**

They then say at paragraph 32 that so far as procedures are concerned they make no criticism, and then at 33 they say this:

> **"We have noted the decision that the Governors came to initially at the disciplinary hearing and then at the appeal hearing and fully accept that the Governors were trying to do the best job possible. Nevertheless the evidence is such that there is no basis upon which they could possibly have concluded that either of the incidents amounted to gross misconduct. Indeed, the more evidence we have heard over the last few days, the more it has become clear to us that there was nothing that could even be described as misconduct."**

At paragraph 34:

> **"The evidence shows that there is nothing that could even amount to misconduct certainly not gross misconduct."**

And then the final sentence of that paragraph says:

> **"We are therefore quite satisfied that there is no way that any respondent could reasonably have come to the conclusion that what occurred amounted to misconduct justifying dismissal."**

11. At paragraph 35 the Tribunal speculate as to why or how the Governors could have come to a decision that in the Tribunal's eyes was so very wrong, and the suggestion is that it may have been because the headteacher's representations on behalf of the employers were so forceful, and there is mention elsewhere of a governor in question being inexperienced in holding such hearings.

12. Looking at those paragraphs, it seems clear to us that in this case the Tribunal have indeed allowed their findings of fact about what happened to influence and seep into their decision about whether there were reasonable grounds for the belief that the governors came to

that there had been gross misconduct. It is notable that the Tribunal do not anywhere expressly ask themselves the question that **British Home Stores Ltd v Burchell** [1978] IRLR 379 invites them to as to whether there were indeed reasonable grounds for their belief, and it is notable that in two places they refer to evidence in the present tense that can only in our view be a reference to the evidence that they, the Tribunal, had heard about the incidents and there does not appear to be any reference to the evidence that was before the disciplinary committee. It is noticeable also that the Tribunal do not refer at all to the letter mentioned earlier running to nine pages, apparently on its face anyway a careful and full job by the disciplinary committee hearing.

13. It seemed to me, at any rate, that the high point of the Claimant's case so far as resisting the appeal in relation to unfair dismissal may be the last sentence of paragraph 34, where the Tribunal said:

> **"We are therefore quite satisfied that there is no way that any respondent could reasonably have come to the conclusion that what occurred amounted to misconduct justifying dismissal."**

That, as a bald statement, would certainly stand up in reaching the conclusion they did as to unfair dismissal were it not for the word "therefore";' it seems to us that that can only be a reference back to the evidence that they refer to in the preceding two paragraphs, which is all the evidence that they had heard about the incidents.

14. Mr Griffiths has addressed us with considerable force on behalf of the Claimant. He suggests that the decision by the disciplinary panel was unsupportable. He says the first matter was simply an operational decision and with the second incident there was no reasonable inference to be drawn that the Claimant gave the apple to the boy as a punishment, and he says

that the committee clearly set the bar too high. The problem with that is that the letter sets out findings of fact and the Tribunal based their decision on other findings of fact that they had made about what happened. He may be right that the committee set the bar too high or that there was not the material for a finding of gross misconduct, but the Tribunal do not seek to analyse that in the way that they should have.

15. So far as the finding of wrongful dismissal is concerned, the Tribunal do not anywhere expressly address it in the body of their decision, although it is clearly implied by item 2 in the Judgment, namely that the dismissal was a breach of contract by the Respondents in that it was a dismissal without notice. At one stage I for one was of the view that the appeal in relation to wrongful dismissal could not succeed because the Tribunal had made their findings about what actually happened; they were clearly relevant to the wrongful dismissal element of the claim, and, the Tribunal having found that there was nothing that could even amount to misconduct, the finding of wrongful dismissal clearly followed. However, I am persuaded by Mr Self that the Tribunal have not really addressed their minds at all to the question of gross misconduct, they do not refer to any of the codes of conduct or matters that are particularly relevant in dealing with special schools, they have not made findings that are sufficiently clear in the earlier section to be sure that the conclusion that there was no misconduct justifying instant dismissal can stand, and, given our conclusions on unfair dismissal, we are of the view that the whole matter should go back to the Tribunal, and we also allow the appeal in relation to wrongful dismissal.

16. It is unfortunate that the Employment Tribunal has gone wrong; the matter must go back, we are afraid, to another Employment Tribunal to look at afresh. When they are looking at the question of unfair dismissal, they must concentrate on the employers' procedures, on the

evidence that the employers had to consider and on the sanction that the employers decided on in the light of relevant codes of conduct and, of course, the Claimant's employment record and so on, but what they must not do when they are thinking about unfair dismissal is concentrate on what they find actually happened on 10 and 11 May. We have enormous sympathy, of course, with Ms Smith, who has done nothing wrong to bring about this result, but unfortunately the Tribunal must do their job properly, and so we send the matter back. We would say that the ultimate result is by no means a foregone conclusion. The points forcefully made by Mr Griffiths may prevail, but it has to be analysed properly.