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EMPLOYMENT TRIBUNALS

Claimant: **Mr C Mason**

Respondents: **1. Federation of Orchard & Southwold Primary Schools**
2. London Borough of Hackney

Heard at: **East London Hearing Centre**

On: **22 and 23 June 2017**

Before: **Employment Judge Russell (sitting alone)**

Representation
Claimant: **Mr C Mardner (Lay Representative)**
Respondent: **Miss C Maclaren (Counsel)**

RESERVED JUDGMENT

1. **The claim of disability discrimination is dismissed upon withdrawal by the Claimant.**

2. **The claim of unfair dismissal fails and is dismissed.**

REASONS

1 By claim form presented on 1 September 2016, the Claimant brought a complaint that he had been unfairly dismissed, discriminated against on grounds of disability and was owed notice pay. The Respondent defended the claims. The disability discrimination claim was withdrawn on 18 November 2016 and is dismissed. The Claimant confirmed at the outset of this hearing that he was not claiming notice pay.

2 At a Preliminary Hearing on 28 October 2016, Employment Judge O'Brien identified the issues to be decided. These were:

2.1 What was the reason for dismissal? The Respondent relies upon conduct.

2.2 Did the Respondent hold that belief on reasonable grounds after a reasonable investigation?

2.3 Was the decision to dismiss a fair sanction within the range of reasonable responses?

2.4 Was dismissal, if unfair, did the Claimant contribute to the same?

2.5 Should there be any *Polkey* reduction?

3 I heard evidence from the Claimant on his own behalf. For the Respondent, I heard evidence from Mrs Giuiseppa Colella-Mare (School Business Manager); Mr Stephen Hall (Executive Head Teacher); Ms Gulcan Asdoyuran (Associate Head Teacher); Ms Catherine Dean (Governor) and Mr Richard Allen (Governor).

4 I was provided with an agreed bundle of documents and I read those pages to which I was taken in evidence.

Findings of fact

5 The Respondents operate three primary schools known as Orchard School, Southwold School and Hoxton Garden School.

6 The Claimant commenced employment as an IT manager in August 2013 initially for Orchard and Southwold Schools. Mrs Colella-Mare was his line manager. The Claimant was responsible for the initial configuration of IT devices (such as iPads and laptops), installing and maintaining software and the routine maintenance of IT resources. Due to a planned increase in the use of handheld devices in 2013, the Claimant increased his hours of work to full-time five days per week and an apprentice technician, Mr Mezzini, was employed to provide support. In April 2014, the workload of the Claimant and Mr Mezzini increased with the addition of Hoxton Garden which was not as well advanced in IT provision.

7 The Claimant was absent from 4 June 2014 due to a serious back issue. During the Claimant's absence from work, Ms Colella-Mare had become more involved in IT matters and had become concerned that the Claimant was not working in a sufficiently structured and planned manner but was instead dealing with issues reactively as they arose. She therefore started compiling a list of jobs that would have to be addressed once the Claimant returned to work. The Claimant returned to work on 2 November 2014, initially on a phased basis.

8 Ms Colella-Mare introduced one to one meetings with Claimant every fortnight in which she and the Claimant discussed IT issues, workloads, planning and support, agreed tasks and monitored the Claimant's progress. At such a meeting on 24 November 2014, the Claimant and Ms Colella-Mare discussed a spreadsheet which she had produced whilst managing the IT staff during the Claimant's absence identifying areas to be worked upon. As part of the desire for a more systematic and planned approach, it was agreed that the Claimant was to produce a timetable for the IT. Between November 2014 and October 2015, there were 11 such meetings and each resulted in a document in table form which was provided to the Claimant and set

out the item discussed, a summary of what was discussed and the agreed actions. From the summer of 2015, Ms Colella-Mare also wrote to the Claimant setting out the detail of their discussion and what had been agreed.

9 Despite the meetings, Ms Colella-Mare remained concerned the Claimant continued to work in a reactive more than planned and proactive way to improve IT assets, audit equipment and plan routine maintenance work such as software updates. She considered that the Claimant was resistant to her offers of additional management training on a asset management system purchased in November 2013 (with the agreement of the Claimant) to support the tagging of existing equipment in order to maintain an up-to-date asset register. Whilst Ms Colella-Mare believed that the meetings were supportive but that the Claimant was not engaging constructively, the Claimant felt that he was being undermined, that his concerns about his workload were not being properly considered and that he was being 'failed' for trivial and unfair reasons. Over the course of the year, their working relationship deteriorated and the meetings became more strained.

10 A letter dated 13 November 2015 records the outstanding concerns discussed at the last informal meeting, which include maintaining and updating an online diary of IT works, insufficient forward planning of tasks for November and December, inadequate recording of tasks carried out, failure to keep up-to-date the asset register and dispose of old equipment. Mr Hall was present at that meeting on 11 November 2015 as he was concerned about the failure to make progress and the deterioration in communication between the Claimant and Ms Colella-Mare. The meeting did not go well. Ms Colella-Mare felt that the Claimant was not receptive to support, would refuse to listen and talk over her and Mr Hall. The Claimant believed that the meeting was unfair as Ms Colella-Mare was deliberately fault-finding and telling **"a bunch of lies**" in a personal vendetta against him.

11 As the meeting on 11 November 2015 had not been productive, it was agreed that Human Resources and the Claimant's trade union representative should become involved in the process. The first formal meeting took place on 11 December 2015, attended by the Claimant, Mr Hall, Ms Colella-Mare, Ms Lolita Brown (HR) and Ms Dionne Thompson (Unison). A letter setting out in detail the matters discussed was sent to the Claimant on 14 December 2015.

12 A formal support plan was produced which identified five agreed targets, agreed support, success criteria and a review date. Other columns recorded whether or not the target had been met, not met or partially met and any comments. I accept that the targets were reasonable and the success criteria were capable of objective assessment. By way of example, under the agreed target "schedule of work", the Claimant was required to produce a January and February 2016 calendar/diary by 6 January 2016 with sufficient information to show what and at which site tasks were undertaken by the IT team. A further example was the agreed target of setting up a spare set of 10 to 15 laptops in each school by 22 January 2016.

13 From January 2016, the Claimant's sense of injustice was such that he refused to communicate with Ms Colella-Mare unless his trade union representative was also present.

14 On 29 January 2016, the Claimant attended a further formal meeting with Mr Hall and Ms Colella-Mare at which the support plan was discussed. Also present were Ms Brown (HR) and Ms Thompson (Unison).

15 Mr Hall and Ms Colella-Mare's evidence was that the Claimant had failed to meet the previously agreed targets. As the areas of concern were discussed, the Claimant behaved in a rude and inappropriate manner, his body language and facial expressions felt aggressive, he would pretend not to hear questions and talked over other people. At one point he said to his trade union representative: "**I have felt they have been taking the piss**". He was warned by both Mr Hall and Ms Brown that his conduct was not appropriate and he was told several times to calm down, including by his own trade union representative. The Claimant was given time to step out of the meeting and spent approximately 10 minutes talking with his representative. Upon his return to the meeting, the Claimant was issued with a written warning. The Claimant began to shout and point across the table saying: "**don't you dare give me a written warning**". Despite being told to calm down several times by everyone in the room, he continued to shout and point to the extent that Ms Thompson attempted to usher him out of the room. As he was leaving, the Claimant shouted at Mr Hall: "**Don't take me for an idiot you can kiss my arse**" and swore using the 'f' word. There were young children in the classrooms and playgrounds immediately outside the meeting room. Mr Hall's evidence was that he thought that the Claimant may be about to assault him. He denied shouting at the Claimant. Mr Hall made a note of his version of events on 1 February 2016.

16 The Claimant's evidence was that during the meeting on 29 January 2016 he had felt frustrated that his requests for assistance had thus far fallen on deaf ears. He felt that he was being unfairly criticised by Mr Hall and Ms Colella-Mare and that he had achieved all objectives and targets agreed in December 2015. When the Claimant said that he had no trust in Ms Colella-Mare, Mr Hall became heated and would not allow him to put his points across. There were heated exchanges between the Claimant and Mr Hall for the next two to three hours, with the meeting descending at times into a shouting match. At one point, due to his ongoing back pain, he stood to relieve tension in his lower back which Mr Hall interpreted as a sign of aggression and stopped the meeting. The Claimant describes leaving the room with Ms Thompson, who was then suddenly called by Mr Hall and upon her return told the Claimant that he was to go home early to let things cool off. The Claimant says that the events on the 29th should be viewed as a culmination of the frustration that he had been experiencing from harassment and undermining behaviour by Ms Colella-Mare and Mr Hall.

17 Ms Thompson raised a complaint to the Governors on 10 February 2016 on behalf of the Claimant, setting out his view that he had not been fully supported, had become very frustrated over recent months by how he had been treated and that this had come to a head at the meeting on 29 January 2016. Ms Thompson's letter suggested that at times as the Claimant had tried to explain the reasons why some of the items had not been met or only partially met, he was shouted down by Mr Hall or points were contradicted or ignored. Ms Thompson concluded:

> "**Whilst we acknowledge that Mr Mason conduct was not what would be acceptable behaviour at the end of the meeting on the 29th January 2016. It was a culmination of what Mr Mason felt was ongoing unwarranted pressures from Mr Hall and Ms Mare and want**

> **to make it clear that this is not his normal behaviour. Mr Mason felt pushed in a corner and extremely frustrated after feeling that any efforts to work with the schools management were not being valued in anyway and totally discarded."**

18 The Respondent commenced a disciplinary investigation, undertaken by Ms Asdoyuran. The Claimant was invited to attend an interview on 23 February 2016 which he declined as he had been signed off sick until 4 March 2016. The Claimant was invited to a further investigation meeting on 7 March 2016 which he asked to be rescheduled on grounds that his trade union representative was off sick. The Claimant declined the opportunity of bringing an alternative companion and did not attend the meeting. On 7 March 2016, Ms Asdoyuran sent the Claimant the questions which she would have asked had the meeting gone ahead and asked that the Claimant reply in writing as the meeting had been postponed twice and she wanted his account. Ms Asdoyuran also interviewed Ms Colella-Mare, Mr Hall and obtained a statement from Ms Brown the HR representative present on 29 January 2016.

19 The Claimant provided his responses to the investigation questions in terms consistent with his evidence set out above. In response to a question about whether he had been asked to calm down, the Claimant said that Mr Hall had sarcastically motioned for him to be quiet when he was describing the effect of his injury upon his mobility, that a 5 minute break was required because of the heat in the room and that it was Mr Hall who was agitated when the warning was given. As for the allegation that he had pointed, the Claimant said that he had done so to determine to whom Mr Hall was directing a question and that one of his mannerisms is to gesture with his hands. The Claimant denied making any physical or verbal threats to anyone in the room, could not recall saying "**kiss my arse**" but had not sworn at anyone directly, nor had he used foul language.

20 Ms Asdoyuran decided that there was a disciplinary case to answer and a formal disciplinary was convened. An investigation report was produced which included the accounts of Mr Hall, Ms Colella-Mare, the Claimant's written replies and the letter from Ms Thompson. The report also attached as an appendix a report obtained from Occupational Health on 18 March 2016 which stated that the Claimant was fit to attend a disciplinary hearing and fit to return to work with some adjustments (these included possible CBT, a risk assessment, frequent breaks, restrictions on heavy lifting and limiting the amount of walking required in his role).

21 On 12 April 2016 a panel of three governors, Ms Dean, Ms Fox and Mr Erol, heard first the Claimant's appeal against the written warning issued on 29 January 2016. Mr Hall and the Claimant attended and made representations to the panel. The panel considered this evidence and a report, attached to which were the support plans and letters confirming what had been discussed at performance meetings. The panel unanimously agreed to uphold the written warning on grounds that there had been insufficient improvement.

22 The panel then considered the disciplinary allegations against the Claimant, the report produced by Ms Asdoyuran and its appendices. The panel heard evidence from Ms Colella-Mare, Ms Brown (HR), Mr Hall and the Claimant. Ms Thompson attended the disciplinary hearing as the Claimant's trade union representative. At the disciplinary hearing, the Claimant accepted that he might have used the words alleged

but, if he did swear, it was not directed at anyone, stating:

> "**I'm from the Caribbean and it's terminology we use sometimes to show annoyance, I apologise in advance. If someone says kiss my arse, that's all it is, it's not something you would say to your parents, but it's terminology I never denied using it. I also said that I left the room very annoyed**."

The Claimant apologised if children had heard him swear, stating:

> "**Yes, I was very annoyed when I left the room and I have used the words that are not appropriate and I apologise. Just to confirm I did not swear directly at anyone**."

23 Having considered the evidence, the appeal panel decided that Claimant had been guilty of misconduct. Ms Dean was an impressive witness and I accept her evidence as to the thought process of the panel of governors. The panel took into account the ongoing issues regarding capability and the build up to the meeting on the 29 January 2016 as the context in which the Claimant's behaviour had occurred. The panel concluded that the statements and oral evidence of the three Respondent witnesses present at the meeting was consistent and corroborated each other. The Claimant now accepted that he had acted and spoken in the manner described. The panel considered whether or not the conduct was gross misconduct or something else. They agreed that the Claimant's conduct fell within the category of "acts of violence, including physical assault, threats or intimidating behaviour towards others" (an example of gross misconduct in the disciplinary policy) as well as being a failure to treat colleagues in a professional manner such that there had been a breakdown in trust and confidence between him and the school.

24 In determining sanction, I accept Ms Dean's evidence that the panel considered the Claimant's good work and unblemished conduct record but concluded that his behaviour on 29 January 2016 was of such magnitude that even though he had a previously good record it had to be taken seriously. The panel also took into account that whilst the Claimant accepted a degree of remorse at the disciplinary hearing on 12 April 2016, this was three months after the incident and, until then, the Claimant had denied doing anything wrong. The panel concluded that the relationship of trust and confidence had so broken down that it was not appropriate for the Claimant to be back in a school setting. Indeed, I accept as genuine Ms Dean's belief that it would be a dereliction of her duty to other staff if they were to permit the Claimant to return. Even taking into account the Claimant's frustration with the capability process, Ms Dean and the disciplinary panel did not think there could be any justification for his conduct at the meeting.

25 The panel concluded that the disciplinary allegations were substantiated and the Claimant was dismissed for gross misconduct but with seven weeks' paid notice. This was confirmed in a letter sent on 18 April 2016.

26 The Claimant was informed of his right of appeal, which he exercised on 22 April 2016. His grounds of appeal were that the sanction imposed was too harsh and that his previous record and contribution to the service had not been taken into account. He suggested that his dismissal was an act of discrimination on grounds of disability or race, neither of which is an issue for this Tribunal. The Claimant suggested that it had

been unfair not to meet him in the investigation stage and that it was management's unfair treatment of him which had initiated any breakdown in trust and confidence. The Claimant again denied that he had used threatening behaviour and language, but had made an emotional comment borne out of frustration.

27 The disciplinary appeal was heard by a panel of governors chaired by Mr Allen and Ms Klettner, with the assistance of Ms Akinmutande as HR support. The Claimant was asked to set out his grounds for appeal and to expand upon the same. He set out his account of the performance management process, which he regarded as unfair and frustrating and which had led to an explosion of emotions in the meeting on 29 January 2016. The appeal panel heard evidence from Ms Dean, as Chair of the disciplinary panel, and questioned her about the extent to which the Claimant's mitigating circumstances and apology were taken into account. Ms Dean explained that a significant feature had been the Claimant's failure to apologise or show remorse before the actual disciplinary hearing. Ms Dean confirmed that they had considered other actions, such as written or verbal warnings, but that these were not appropriate. Ms Thompson was also present at the appeal hearing; whilst she did not recall the Claimant using the 'f' word, at no other point in the hearing did she disagree with the Respondent's description of the Claimant's behaviour.

28 The Claimant's appeal was not successful.

Law

29 The employer must show a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996. The Respondent relies upon conduct within section 98(2)(b). The legal issues in a conduct unfair dismissal case are well established in the case of **BHS –v- Burchell** [1978] IRLR 379, namely:

(1) did the employer genuinely believe that the employee had committed the act of misconduct?
(2) was such a belief held on reasonable grounds? And
(3) at the stage at which it formed the belief on those grounds, had the employer carried as much investigation as was reasonable in all the circumstances of the case?

30 Section 98(4) of the Employment Rights Act 1996 requires the Tribunal to determine whether the Respondent acted reasonably or unreasonably in treating any such misconduct as sufficient reason for dismissal in accordance with the equity and substantial merits of the case. This will include consideration of whether or not a fair procedure has been adopted as well as questions of sanction.

31 In an unfair dismissal case it is not for the tribunal to decide whether or not the claimant is guilty or innocent of the alleged misconduct. Even if another employer, or indeed the tribunal, may well have concluded that there had been no misconduct or that it would have imposed a different sanction, the dismissal will be fair as long as the **Burchell** test is satisfied, a fair procedure is followed and dismissal falls within the range of reasonable responses (although these should not be regarded as 'hurdles' to be passed or failed).

32 The range of reasonable responses test or, to put it another way, the need to apply the objective standards of a reasonable employer, applies as much to the adequacy of an investigation as it does to other procedural and substantive aspects of the decision to dismiss, see **Sainsbury's Supermarkets Limited v Hitt** [2002] IRLR 23, CA.

33 The test for the range of reasonable responses is not one of perversity but is to be assessed by the objective standards of the reasonable employer rather than by reference to the tribunal's own subjective views, **Post Office –v- Foley, HSBC Bank Plc –v- Madden** [2000] IRLR 827, CA. There is often a range of disciplinary sanctions available to a reasonable employer. As long as dismissal falls within this range, the Tribunal must not substitute its own views for that of the employer, **London Ambulance Service NHS Trust v Small** [2009] IRLR 563. However, the band of reasonable responses is not infinitely wide and it is important not to overlook s.98(4)(b) the provisions of which indicate that Parliament did not intend the Tribunal's consideration of a conduct case to be a matter of procedural box ticking and it is entitled to find that dismissal was outside of the band of reasonable responses without being accused of placing itself in the position of the employer, **Newbound –v- Thames Water Utilities Ltd** [2015] IRLR 734, CA.

34 Relevant factors in the overall assessment of reasonableness under s.98(4) include, amongst other matters going to the equity of the case overall, (a) the conduct of an employee in the course of a disciplinary process; (b)disparity or inconsistency of treatment; (c) mitigating factors, including length of service and disciplinary record.

35 In deciding whether the dismissal was fair or unfair, the tribunal must consider the whole of the disciplinary process. If it finds that an early stage of the process was defective, the tribunal should consider the appeal and whether the overall procedure adopted was fair, see **Taylor –v- OCS Group Limited** [2006] IRLR 613, CA per Smith LJ at paragraph 47.

36 The Tribunal must also have regard to the ACAS Code of Practice which sets out basic principles of fairness to be adopted in disciplinary situations, promoting fairness and transparency. This includes the requirement that employers carry out necessary investigations to establish the facts of the case.

Conclusions

37 Mr Mardner sought to persuade me that the reason for dismissal in this case was capability, insofar as the events of the 29 January 2016 occurred as part of the performance management process. I did not accept his submission. Based upon my findings of fact, the Respondent has proved that the reason for dismissal was the conduct of the Claimant in the meeting on 29 January 2016 which Ms Dean and the other members of the disciplinary panel genuinely believed to be an act of misconduct. Whilst the capability process was the background and context to the Claimant's behaviour on 29 January 2016, it was his conduct that day and not his broader failure satisfactorily to meet the agreed targets which led to the disciplinary allegations and dismissal. As it is a conduct dismissal, the Tribunal must consider the **Burchell** issues. As such, it is not for this Tribunal to find whether or not the performance management process was fair or not, rather to consider whether it was within the range of

reasonable responses for the disciplinary panel to conclude that the process culminating in a written warning had been fair and to give limited weight to it as mitigation.

38 In reaching their conclusion that there had been misconduct, the panel had before it the evidence of the management witnesses about what the Claimant had said and done. It also had the Claimant's admission that he may have used the language alleged, even if not directed or threatening according to him. The evidence of Ms Thompson, included again as an appendix to the investigation report, acknowledged that there had been inappropriate behaviour by the Claimant, albeit possibly not using the 'f' word. There was ample evidence upon which the panel could, and did, prefer the evidence of the management witnesses to that of the Claimant and found its belief that there had been misconduct by him, rather than inappropriate or provocative behaviour by Mr Hall. In the circumstances, I accept that there were reasonable grounds following a reasonable investigation for the conclusion of the disciplinary panel.

39 As for the alleged procedural failings, I bear in mind that I must consider whether or not the procedure adopted fell within a reasonable range rather than requiring a counsel of perfection. An investigation meeting will often be a necessary step for a fair procedure, but it is not always the case. The Respondent had twice tried unsuccessfully to convene a meeting. In those circumstances, it was a reasonable step to offer the Claimant the opportunity to respond in writing to the questions which would have been asked orally. The Claimant was not deprived of an opportunity to advance his case before a decision was made to proceed to a disciplinary hearing.

40 The Claimant had a further opportunity to present his case at the disciplinary hearing, and to challenge the evidence of the management witnesses, by which point he admitted using the phrase '**kiss my arse**' in a meeting with the Headmaster of the school. The decision to proceed to a disciplinary hearing was also made with the benefit of Occupational Health advice which was obtained and attached as appendix to report for consideration by the disciplinary panel. I prefer the submissions of Ms McLaren to those of Mr Mardner and concluded that a reasonable investigation did not require further medical evidence about possible counselling or CBT, not least as it was not the Claimant's case that his conduct was caused by a medical issue rather by frustration caused by the performance process. Nor do I accept that a fair procedure required the Respondent to complete the performance management process before deciding the disciplinary allegations relating to the Claimant's conduct. Contrary to Mr Mardner's submissions, it was reasonable for the same panel to consider first the appeal against the written warning and then the disciplinary allegations. If the Claimant had been unfairly issued the warning for performance, it would have been relevant to the disciplinary hearing. The panel, however, concluded that the warning was warranted and fair.

41 The disciplinary panel carefully considered the evidence and mitigating material before deciding the appropriate sanction. The Respondent considered but rejected the Claimant's assertions that the criticisms of his performance were unfair. The panel took account of his unblemished disciplinary record but considered it insufficient reason for leniency in the circumstances. As for the submission by Mr Mardner that a 'cooling

off period' was required, this is not a requirement of the ACAS Code and, furthermore, the conduct for which the Claimant was dismissed occurred immediately after just such a break for the Claimant to calm down. The panel considered alternative sanctions but rejected them due to the nature of the working environment, a primary school with children within earshot when the Claimant had sworn in a meeting with the Headmaster. Dismissal was within the range of reasonable responses.

42 The dismissal was fair and the claim fails. Having already been withdrawn, the disability discrimination claims is also dismissed.

Employment Judge Russell

26 September 2017