EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Dee	**v**	**Suffolk County Council**

Heard at: Norwich **On:** 1 December 2017

Before: Employment Judge Postle

Appearances

For the Claimant: Mr Khan, Counsel.
For the Respondent: Mrs Sheppard, Counsel.

RESERVED JUDGMENT ON REMEDY

1. The compensatory award will be reduced by 50% to take account of a Polkey reduction.

2. The claimant contributed to his dismissal and a 50% reduction is made to the compensatory award.

RESERVED REASONS ON REMEDY

1. This remedy judgment should be read in conjunction with the reserved liability judgement promulgated on 2 May 2017 in which the respondent was found to have unfairly dismissed the claimant and, further the respondent was found to be in breach of contract.

2. In this remedy hearing the tribunal have had the benefit of written submissions on behalf of the respondent which run to some ten pages, the tribunal also had the benefit of written submission on behalf of the claimant which run to some eight pages.

3. In addition to the above there is a witness statement from Miss L Wragg dealing with issues relating to pay. Finally, there is a bundle of documents prepared for the remedy hearing of 145 pages which includes the claimant's schedule of loss and the respondent's counter schedule of loss.

4. The issues that are particularly relevant for this remedy hearing are:

   4.1 Whether there should be a Polkey reduction.

   4.2 Whether there should be a reduction in any compensation on the grounds of the claimant's blame worthy or culpable conduct.

   4.3 Whether there should be an ACAS up lift on the awards.

5. Finally, there is the award for the breach of contract which is dealt with at paragraphs 101 to 103 of the liability judgment.

6. Mrs Sheppard for the respondent indicated at the outset of this hearing there was no issue with the claimant's mitigation of loss as fortunately the claimant has now been able to obtain employment as a teacher albeit not as a Head Teacher.

The Law

7. S.123(1) of the Employment Rights Act 1996 provides:

> "The amount of the compensatory award shall be such amount as the tribunal consider just and equitable in all the circumstances having regard to the losses sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
>
> Where tribunals have found employers wanting in the procedures they have adopted to effect dismissal which might otherwise have been fair, this aspect of the broader question of compensation is known as the 'Polkey' deduction after Polkey v AE Dayton Services Limited [1988] ICR 142.
>
> A Polkey deduction has these particular features. First, the assessment of it is a predictive; could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainly that it would have dismissed, or certainly it would not) they will more usually fall somewhere on a spectrum between these two extremes. This is the recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer; it is assessing the chances of what another person (the actual employer) would have done. The tribunal therefore has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the tribunal, on the assumption that the employer would this time have acted fairly though it did not do so before hand."

8. S.123(6) of the Employment Rights Act 1996 provides:

> "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

9. It should be noted that wording of the test differs between that for the basic award and other awards. The basic award may be reduced when the tribunal "considers that any conduct of the claimant before the dismissal (or whether dismissal was with notice, before the notice was given) was such as it would be just and equitable to reduce or reduce further the amount of the award to any extent".

10. These different methods of calculation mean that the figure for contributory conduct can be different for the basic award and the compensatory award.

11. To fall into this category, the claimant's conduct must be "culpable or blame worthy" save in respect of the basic award, such conduct must cause or contribute to the claimant's dismissal, rather than its fairness or unfairness.

12. Put another way, if a person is blameless, it can neither be just nor equitable to reduce compensation on the ground that he or she caused or contributed to the dismissal.

13. Conduct by an employee capable of causing or contributing to dismissal is not limited to actions that amount to breaches of contract or that are illegal in nature. In Nelson v BBC (No 2) [1980] ICR 110 CA the courts said such conduct could include perverse, foolish, bloody minded or merely unreasonable in all the circumstances. Whether the conduct is unreasonable will depend on the facts. The most typical forms of blame worthy conduct are misconduct in the conventional sense ie disloyalty, dishonesty but s.123(6) can cover wider forms of conduct where an employee for example manages to aggravate a situation or precipitate the dismissal.

14. The claimant's submissions as I have already indicated are set out in some detail in their written submission but to summarise dealing with Polkey it is said on behalf of the claimant that:

- Any Polkey reconstruction is too riddled with uncertainty.
- There are too many procedural failings.
- The respondent's argument on Polkey is flawed because it asks the tribunal to reset or rescript the entire process from day one.
- Impossible to strip out bias.

15. Finally, speculating on the basis of opaque evidence in relation to the governors' disciplinary decision.

16. In relation to contributory fault it is said again by the claimant's counsel that there should be no reduction because the decision to use restraint was not blame worthy or culpable.

17. The pupil had a known track record of hitting other pupils.

18. She had locked the classroom door to prevent staff entering.

19. The claimant had made repeated verbal requests.

20. He used restraint only because he perceived non-movement by the pupil.

21. The claimant's judgement call balancing competing factors.

22. The claimant's judgement was not perverse or wildly off the spectrum.

23. The claimant's conduct was not in breach of contract nor was it perverse, foolish or bloody minded.

24. The respondent's submissions, again these are well set out and detailed in the written submissions but to summarise as follows:

- Would the respondent have dismissed but for the procedural defects, to answer that question the tribunal must not determine what would have happened if those procedural failings had not occurred.

- The tribunal's judgment concluded the claimant's dismissal was for a reason related to his conduct.

- The governors at the disciplinary and appeal hearings believed the claimant was guilty of misconduct.

- Easy to conclude the governors plainly had reasonable grounds upon which to form those conclusions.

- The claimant's conduct justified dismissal, clearly within the range of reasonable responses.

- What would have happened if procedural failings had not occurred?

- Inconceivable that a committee of the governing body would have seen fit to allow the claimant to continue in his role pending the police or internal investigation, suspension was plainly necessary.

- Gossip between the governors about the head teacher's absence, no evidence before tribunal the chair of the governor's decision was shaped by such matters.

- The claimant accepted under cross examination that the disciplinary panel were entitled to reach their conclusion.

- What difference would it have made if the claimant's account in the incident log had been shared at the original LADO meeting, no difference still seven witnesses detailing potential serious incident.

- What if the claimant had been informed of the exact charges against him at the suspension meeting, it has not been suggested this would have changed the way he defended himself at the disciplinary hearing.

- Holding off the internal investigation until after conclusion of the criminal proceedings, it would have made no difference given the conclusions of the panel.

- The investigator Mrs Jones expressing her views at the initial LADO meeting and in the investigation, no suggestion the investigation was not thorough or the report prepared by Mrs Jones misrepresented the evidence or her recommendations were contrary to the evidence.

- Failure to interview student teacher, the claimant never raised this as a concern.

- Tribunals concern as to whether disciplinary panel reached their conclusions on their own or they were that of Mr Davis, it was not put to Mrs Chevin during the course of evidence that this is what actually happened. Further she was an impressive and credible witness.

- In relation to contributory fault the respondent submits that; the tribunal had concluded that the respondent had reasonable grounds to conclude that the claimant was guilty of misconduct and that it was within the range of a reasonable response.

- The tribunal's findings of fact established that the claimant was plainly guilty of misconduct.

- The claimant's conduct was the sole reason for the dismissal.

- Therefore, it is the claimant who is wholly to blame for the dismissal and a 100% reduction should be made to both the basic and compensatory awards.

- In the alternative it has been submitted any reduction should be certainly not less than 75%.

Conclusions

25. The tribunal reminds itself when considering whether or not to make a "Polkey" reduction it must construct from the evidence, and not from speculation, a framework which is a working hypothesis about what would have occurred had the respondents behaved differently and fairly. That inevitably does involve a prediction and thus some speculative element. It is never an easy task.

26. The tribunal reminds itself of its findings in the Reserved Liability Judgment, particularly the reason for dismissal, conduct and the disciplinary panel findings in relation to that conduct (paragraphs 77-88).

27. However, the tribunal also reminds itself of a number of procedural failings made by the respondents in the process leading up to dismissal and including the lack of any reasoning (produced by the chair of the panel) other than that completely prepared by Mr Davis of HR. There was the length of suspension, a period of some fourteen months, should it have been concluded as soon as reasonably practicable (which it could have been) after the proceedings in the Magistrates Court in September had found the claimant not guilty of assault. It seems more likely had that happened there was more chance, a very good chance a fair-minded set of governors might not have dismissed, given also a shorter period of suspension, April to September. Given also the findings of the Magistrate Bench on the creditability of the respondent's witnesses. The fact that if the respondent's/governors have a clear policy or who/how to suspend. It should be followed (paragraph 89) suspension, further was never reviewed by the governors.

28. The failure of Mrs Jones at the LADO meeting to put forward the claimant's account of what happened.

29. Given the length of suspension, some 15 months, did Mrs Chevin the chair of the panel of governors conducting the disciplinary consciously or otherwise already made up her mind as to what the panel's decision would be regarding any mitigating factors, or perhaps looking at the matter more objectively herself?

30. Why could the internal investigation not be convened much earlier, there was no evidence the police prevented this. Again, did the respondents hope/believe the claimant would be found guilty of the criminal charges and that would then solve the problem/need to have a disciplinary at all.

31. Did Mrs Jones throughout the process have a closed mind, expressing her view without any qualification at the LADO meeting, and wishing to accelerate the claimant's suspension? Furthermore, Mrs Jones' final report as investigating officer is bias, there is no balanced presentation of facts concluding:

> "The Investigating Officer concludes that on the balance of probabilities and taking into account the frameworks within which staff in schools are expected to conduct themselves. Mr Dee has used unnecessary and excessive force in removing a pupil from a classroom on 3 April 2014, and that this amounts to serious professional misconduct."

32. It is difficult to see in light of Mrs Jones' decision going far beyond the remit of an investigator, how a panel of school governors with no prior experience of disciplinary processes or training would or could come to a different conclusion. Mrs Jones should only have presented the facts and not pushed the governors into a corner.

33. The tribunal therefore concludes on predicting, could the employer have fairly dismissed, and if so, what were the chances that this employer would have done so are 50% in assessing the chances of what another panel of governors would have done, had the procedural unfairness been removed?

34. On the question of contribution. Clearly removing the child in the manner in which it occurred as the claimant acknowledges with hindsight was not the best way forward. It was in the heat of the moment and potentially an escalating situation with a volatile child. The claimant must accept some blame and contribution towards his dismissal which the tribunal also assess at 50%.

35. The breach of contract is dealt with at paragraphs 101-104 of the Liability Judgment sufficient for the parties to calculate the loss.

36. The tribunal also understands from the parties' counsels at the remedy hearing in December that once an assessment on Polkey and contribution had been determined the parties could then agree the compensation. If Employment Judge Postle has misunderstood, no doubt the parties will advise.

37. Finally, Employment Judge Postle apologises for the delay in this Remedy Judgment, this is due to problems with digital recording encountered in January 2018.

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Employment Judge Postle

Date: 14 March 2018

Sent to the parties on: .....

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For the Tribunal Office