EMPLOYMENT TRIBUNALS

Claimant: Ms E Rodrigues

Respondent: The Governing Body of Stockport School

HELD AT: Manchester **ON:** 2,3,4 & 5 January 2018

BEFORE: Employment Judge Sherratt
Ms D J Doughty
Mr A J Gill

REPRESENTATION:

Claimant: Mr C Sousa, Friend
Respondent: Ms R Wedderspoon, Counsel

JUDGMENT having been sent to the parties on 11 January 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In this case the parties came before Employment Judge Franey for a preliminary hearing. It was agreed at that time that the proper title of the respondent should be The Governing Body of Stockport School in accordance with the relevant legislation.

2. Employment Judge Franey recorded by way of summary that the claimant describes herself as being of black African origin, having been born in Mozambique, but of Portuguese nationality. She speaks little English with her own language being Portuguese. She was employed by the respondent school from 2008 in a permanent position as a cleaning operative. She was given a final written warning for unsatisfactory attendance and poor timekeeping in January 2015, then in September of that year there was an investigation into various other absence related matters and poor timekeeping which led to her being dismissed by the Head Teacher following a disciplinary hearing on 13 October 2015. That dismissal was with notice to expire in December 2015. The claimant appealed against the dismissal and although one part of her appeal was allowed the appeal did not succeed. The claimant brings claims of direct discrimination on the basis of race in connection with the decision to dismiss her and not to allow her appeal and of unfair dismissal.

3. At the hearing we heard evidence from the respondent's side first. Mr Ian Irwin, the Head Teacher who dismissed the claimant, gave evidence then we heard from Debbie Broadhurst, the Assistant Site Manager. She was at one time known as Debbie Hilton having married Mr Broadhurst subsequently. If her name appears in this judgment as Hilton rather than Broadhurst then I am referring to the same person. The final witness for the respondent was Mr Walter Barrett, the Chair of Governors, who was the Chair of the appeal panel.

4. The claimant gave evidence with the assistance of an interpreter and I thank the three people who have been here to interpret over the four days of this hearing. The Tribunal has found that they have conducted themselves admirably by allowing the proceedings to continue at a reasonable pace whilst keeping themselves quietly in the background. The claimant also called a witness, Ms Esperanza Parker, who was her former manager.

5. We were provided with a bundle of documents containing in excess of 500 pages, many of which were poorly copied and in whole or in part illegible.

Findings of Fact

6. The respondent school we understand has around 1250 pupils. It is a large secondary school. The claimant was one of the cleaning team. Her employment started in January 2008. She was to work 16 hours a week. During term time she appears to have worked afternoons only with different arrangements during the school holiday period when the pupils were not present and work could be done during the day.

7. The claimant was provided with a statement of the main terms and conditions of her employment by the Stockport Metropolitan Borough Council. It confirmed she was required to work 16 hours a week and as to holiday entitlement, the number of days are not relevant but "all leave should be taken during school holidays unless otherwise granted by your Head Teacher".

8. The claimant was not at work on Monday 5 January 2015. Debbie Hilton as she then was received a telephone call from someone described as a friend of the claimant at 5.00pm on 5 January to advise that the claimant was not yet back from holiday and would not be in work that day, although the shift had already started. This caused Debbie Hilton to meet with the claimant on her return in the presence of Mauro Amadeo, a caretaker working for the respondent, who spoke Portuguese as well as English and was there to provide some assistance to the claimant and indeed to Debbie Hilton with regard to translating.

9. At that meeting, the notes of which are signed by the claimant and Debbie Hilton, the claimant advised she did not come into work because she had only just got back from France in the afternoon. Debbie Hilton told her she should have come home earlier knowing that she had to be in work as the annual leave request did not cover Monday 5 January, and the claimant replied she was not the one driving the car. According to the notes, the claimant was reminded she had already had a meeting with regards to lateness on several occasions and matters would need to be referred to the Head and could possibly result in a warning. It is recorded that the claimant responded by shrugging her shoulders.

10. It is important to note that there is nothing in that meeting or subsequently at the disciplinary hearing from the claimant to say that she should not have been back in school on 5 January, or that on that day she had a pre-approved holiday.

11. The claimant was invited to a disciplinary meeting at the end of January 2015 with the allegation being "unauthorised absence on Monday 5 January", and according to the letter of invitation the matter was being raised where the maximum penalty would be a written warning. A management report was provided and the various legal niceties regarding an invitation to a disciplinary meeting seem to have been complied with.

12. At the meeting Mr Mauro Amadeo was present as the interpreter for the claimant. There was no official independent third party interpreter present. The claimant did not say she had authorised holiday. The Head Teacher at the end of the meeting decided that the claimant should be given a final written warning, and that was confirmed to her in writing by a letter dated 27 January 2015.

13. The claimant in the course of these proceedings disputed the respondent's notes of the hearing on 26 January 2015 but she did not put forward any alternative version as to what was or was not said.

14. The Head Teacher decided to give the claimant a final written warning notwithstanding that the request going out with the disciplinary invitation made reference only to a written warning. We have been taken to the respondent's disciplinary procedures which does allow for a Head Teacher in circumstances such as these to give a final written warning where it was deemed appropriate. The claimant did not appeal against the final written warning although the letter did give her the right of appeal.

15. As a part of the disclosure process a number of pages of documents relating to the claimant's holiday in December 2014/January 2015 had been disclosed. The quality of the copying of the holiday request form varies from bundle to bundle: indeed one of my colleagues even had the benefit of a coloured copy, but the holiday request form seems to be for 13 days from 15 December 2014 to 5 January 2015, and it was for annual leave. The form was completed on 5 December. It appears to have been signed off on 9 December although the signature is unclear. The form says on it that absence is authorised only when the form is received by the employee signed by the Head Teacher or the Head Teacher's PA. Indeed, when preparing his witness statement Mr Irwin, the Head Teacher, in reference to this has said, "the claimant requested annual leave from 15/12/14 through until 5/1/15 (41.75 hours) although this included 4½ days of term time". It was approved at the time due to exceptional circumstances associated with the claimant having a significant amount of annual leave entitlement remaining due to previous long-term sickness.

16. We were also provided with an annual leave chart for 2014/2015. It was a respondent document although the respondent seems to be seeking to say that it is not necessarily a complete or full record, but that also seemed to show the claimant taking off the number hours' holiday that would have included approved absence on Monday 5 January 2015.

17. Much has been made of the question of the final written warning in these proceedings, with the suggestion being from the claimant that the final written

warning should not have been given in circumstances where the claimant may have had authorised holiday on 5 January. However, bizarre as it may seem, it was the claimant who, as it were, gave herself in on 5 January as being absent without leave, which caused the respondent to take the action it did seemingly without looking at the holiday request form with the dates that had been seemingly approved by the respondent.

18. Given that the claimant did not appeal against the warning at the time, the Tribunal has considered the guidance given by the EAT in various cases on this subject, to the effect that the Tribunal should not go behind an earlier written warning unless the circumstances in which it was given were manifestly inappropriate or it was inherently wrong for the warning to have been given. Whilst we have some sympathy with the claimant in this regard, we do not feel that we are able to go behind the final written warning given to the claimant in circumstances where she, as it were, arguably brought it upon herself and she did not appeal against the outcome of the warning. In this regard the respondent does not go without criticism either, because in our judgment as a part of the investigation of the position on 5 January the claimant's holiday request form could and should have been considered as a part of the process.

19. There was reference by the Head Teacher in his evidence to what might be called a dispensation allowing the caretaking staff to have five days of holiday in term time, but he has not referred to it in his witness statement; he has not provided us with any document in which this information is provided to the relevant staff. The Tribunal does not find that there has been clarity coming from the respondent to the claimant and the other employees with respect to this five day potential concession for taking holidays in term time. However, the claimant's contract provides for the possibility of holiday being taken in term time in any event subject to the Head Teacher giving permission.

20. In her cross examination the claimant said she was never informed by Mr Irwin that she could take five days in term time, although in other parts of her evidence she seems to be taking the view that she would take perhaps ten days in term time, so there is a lack of certainty coming from the respondent and a lack of certainty or clarity coming from the claimant as well.

21. In September 2015 Debbie Hilton had a further meeting with the claimant of an investigatory nature. There were various topics. The first related to a number of absences in July 2015; the second to a single absence on 24 August; the third to various days in July and August in the school holidays when it was said the claimant had not arrived in work by the appropriate time. The last issue was an annual leave request from 14-28 September. This meeting was therefore on the Friday before the claimant was anticipating being away on holiday in Portugal from 14-28 September.

22. The first allegation as to absences in July does not appear to have been pursued beyond the disciplinary hearing so we shall not go into that.

23. The second allegation as to not being in seems to have moved forward towards contributing to the decision to dismiss. That relates to only one day. We shall not deal with that in any detail either.

24. As to the alleged late arrival on various days in July and August, although the Head Teacher found that the claimant appeared to have been in breach of her obligations, at the appeal Mrs Parker, the claimant's then manager, gave evidence to the effect that she had allowed the claimant certain leeway as to her arrival times during the holiday periods and therefore at the appeal this part was allowed. We shall not say anything more on this subject.

25. What we need to consider is the request for annual leave. The claimant completed a form which had a request for leave from Monday 14 September 2015 until Monday 28 September 2015. This was on the respondent's pro forma annual leave application form. This was the improved version designed to lead to clarity and certainty as to the dates when holidays started and finished. It has the claimant's name, the financial year, the number of days requested which seem to be possibly 14, 13 or 15 crossed out and then 11 left in. As I have said, the dates from 14-28 September, and then there is a line which says "agreed by line manager" and Debbie Hilton has initialled this form to say that she has agreed something: quite what she has agreed seems something of a mystery since she does not have authority to allow the claimant to go on leave.

26. The next box in the form says that the absence has been authorised only when the form is received signed by the Head Teacher or the Head Teacher's PA. The date of completion is said to be 4 September 2015 but Debbie Hilton said she had not written that on the form.

27. Then there is a note in the writing of Mr Irwin. There is an asterisk and it says, "Only one week approved in term time (please choose). Also you need to ensure that you leave some holidays for the Christmas closure period", and underneath that he has signed that little note: he has not signed in the appropriate place for the signing off of approval for the holiday. Then at the bottom of the note underneath the approval box there is added: "ER advised already booked – not approved prior" and there are the words "six days" underlined to be unpaid, and then there is the signature of the Head Teacher. What we do not know, because no-one has told us, is when the information was added to the form by Mr Irwin, or who wrote in about it being unpaid, or who wrote about the holidays being "booked but not approved prior". So that has remained something of a mystery.

28. When Debbie Hilton met with the claimant on 11 September according to her note:

> "DH advised that HR had recently requested annual leave from 14-28 September inclusive and had been advised that she could not take all this time as it was within term time. ER had responded by saying that she needed to as she had already booked her travel. DH advised that annual leave had to be approved by the Head prior to booking and this would need to be referred to him and asked ER to provide a copy of the booking. ER stated that she still did not have a copy of the booking. DH confirmed that ER had not followed the correct process requesting absence."

29. So on the basis of what is said in that note it does not appear that as at 11 September the claimant had authorisation to go on annual leave.

30. In terms of the sequence of events, it seems to be that on 4 September there was the dated leave request; on 5 September the claimant's friend booked flights with Ryanair as evidenced by his bank statement; on 11 September there was the investigation meeting and on 14 September the claimant flew to Lisbon with the flight documentation matching up with the payment shown on the bank statement.

31. In remains something of a mystery as to what was or was not said, or when it was said, in relation to the permission or otherwise for the claimant to take the annual leave. Debbie Hilton was cross examined on this. She did not remember giving the form back to the claimant before the claimant went on the holiday. According to her, she had not told the claimant she could go on the holiday.

32. The claimant's evidence was unclear and confused. For instance she said that the Head was not in school at the time she made the request and then later she accepted that he was. She was not able to tell us when the form was given back with Mr Irwin's writing or the comments as to part paid/part unpaid in respect of the leave.

33. In conclusion we take the view it is more likely than not that the claimant was not given any permission to take the holiday before she left school on 11 September prior to taking the holiday from 14 September.

34. Because of this the respondent, in the form of Mr Irwin, could find at the subsequent disciplinary hearing, the details of which I do not need to go into because the parties here are fully aware of what happened, that the claimant was absent without leave from 14 September onwards, and it could use that finding together with the final written warning that was still current as a further act of misconduct during the period of the final written warning, thus entitling them to dismiss the claimant with notice for the further act of misconduct. I have already said that the claimant appealed. There was a point in her favour in respect of the alleged lateness during the school holidays but the appeal panel upheld the dismissal in respect of the claimant being absent without permission on holiday from 14 September onwards.

The Relevant Law

35. The statutory provision concerning the claimant's unfair dismissal claim is section 98 of the Employment Rights Act 1996 which provides as follows:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a) –

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

36. The claimant's claim of direct discrimination is based upon section 13 of the Equality Act 2010 which provides that:

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others."

37. Section 4 of the Equality Act 2010 provides that race is one of the protected characteristics, and section 9 provides that race includes colour nationality and ethnic or national origins.

38. Section 136 deals with the burden of proof as follows:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision".

39. It is for the respondent to satisfy the Tribunal as to the reason for the dismissal, and if the Tribunal is satisfied that the dismissal was for a potentially fair reason then the overall question of fairness is to be determined by the Tribunal, applying section 98(4).

40. In respect of the allegation under the Equality Act 2010, section 136 reverses the burden of proof if there are facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent has contravened the legislation. For there to be facts from which the Tribunal could decide that the respondent had contravened the relevant provision there must be relevant evidence before the Tribunal.

Conclusions

41. There was an investigation and a copy of it was supplied to the claimant with the letter inviting her to the disciplinary hearing. The claimant was told of the various accusations against her. She had the opportunity to state her case at the disciplinary hearing.

42. Having considered all of the circumstances we find that the claimant's dismissal on notice was for a reason related to the conduct of the claimant and was fair. In our judgment it was within the band of reasonable responses for the respondent to have decided to dismiss the claimant on notice for a second similar offence when the claimant was already subject to a final written warning.

43. The Tribunal, however, has not reached this conclusion lightly because we have considerable sympathy for the claimant given her language difficulties and given the apparent lack of documentation coming from the respondent as to holidays etc., the lack of detailed evidence as to dates of when, where and how things happened, the various points raised above in connection with the giving of the first warning, and the lack or proper investigation around the time it was given. This does not however detract from the basic fact that the claimant was absent without leave.

44. There is the further allegation of direct race discrimination in respect of the dismissal and the appeal. The claimant does not deal with it in her witness statement. There were no questions to the respondent's witnesses as to direct race discrimination. In our judgment the claimant has not put forward facts, let alone proved them, in support of an allegation of direct discrimination, so this allegation must also be dismissed.

45. We did try to look at the annual leave forms of the claimant's named comparator. They were unfortunately some of the documents in the bundle that were illegible. However, we were not taken to any document to the effect that the comparator had a final written warning, thus not making her a true comparator of the claimant. Had we been looking at a hypothetical comparator there is nothing to say that such hypothetical comparator would not have been treated in the same manner as the claimant whatever his or her race.

46. For these reasons we do not accept any of the claimant's claims brought to the Tribunal and they are dismissed.

Employment Judge Sherratt

25 January 2018

REASONS SENT TO THE PARTIES ON

8 February 2018

FOR THE TRIBUNAL OFFICE

[AF]