



EMPLOYMENT TRIBUNALS

Claimant: Mr S Huie

Respondent: The Governing Body of Bonus Pastor Catholic College

Heard at: London South, Croydon

On: 19 November and the 20 November 2018 (in chambers)

Before: Employment Judge Sage
Representation

Claimant: In person

Respondent: Mr. J. Green of Counsel

RESERVED JUDGMENT

The Claimant's claim for unfair dismissal is not well founded and is dismissed.

REASONS

1. By a claim form dated the 22 February 2018 the Claimant claimed that his dismissal was unfair. The Respondent stated that the dismissal was fair and on the grounds of conduct.

The Witnesses:

2. The Tribunal heard from the Claimant and for the Respondent we heard from Mr Ronan the Investigations Manager, Mr Green the Dismissing Governor and from Ms. Cunningham the Appeals Governor.

The Issues

3. These were agreed to be as follows:
4. What was the reason giving for the dismissal and the Respondent maintained that it was misconduct which is a potentially fair reason to dismiss?

5. Did the Respondent hold a reasonable belief that the Claimant was guilty of misconduct and did they hold that belief on reasonable grounds after carrying out a reasonable investigation?
6. Did the Respondent act reasonably in treating the reason shown as the reason for dismissal, having regard to equity and the substantial merits of the case?
7. The Claimant confirmed to the Tribunal that he felt that the dismissal was unfair because:
 - a. The punishment was too harsh for a first offence;
 - b. The evidence against him was unreliable
 - c. He felt that the outcome was predetermined;
 - d. They had what he described as a low tolerance after a colleague of his (Mr Morrison) went through the disciplinary process.

Findings of Fact

8. The Claimant was employed as a Learning Support Assistant in September 2014 to work in the Respondent school, his role was to provide assistance to those with special educational needs. It was not disputed that prior to the incident that resulted in his dismissal, the Claimant was well liked and was an excellent employee. He was described by the headteacher as “approachable, hard-working and pleasant”.
9. The Claimant was taken in cross examination to a number of policy documents that applied to his employment, he accepted that he was provided copies of the disciplinary and grievance procedures, he also had a copy of the safeguarding and inclusion policies (see at pages 258 and 276 of the bundle). The Claimant was specifically taken to the inclusion policy at page 290 (which was unfortunately not in the bundle but the extract was in the Respondents submissions) were stated that “*members of staff and other persons authorised by the Principal to have control or charge of students are allowed to use such force as is reasonable in all the circumstances prevent a pupil from doing or continuing to do the following: committing a criminal offence (including behaving in a way that would be an offence if the pupil were not under age of criminal responsibility); injuring themselves or others; causing damage to property*”. Although it was put to the Claimant in cross examination that none of the above applied in the incident that led to dismissal. the Claimant stated that the child was trying to push his way into the room, the Tribunal conclude from this response that the use of reasonable force was not authorized in this situation as there appeared to be no risk of injury or damage to property and the act did not amount to a criminal offence.
10. The Claimant was then taken to the legal definition of the use of reasonable force contained in this the same document and was specifically taken to the following quote “*use of force can be regarded as reasonable only if the circumstances of the particular incident warrant it. Therefore physical force could not be justified to prevent a pupil from committing a trivial misdemeanour, or in a situation that clearly could be resolved without force. The degree of force employed must be in proportion to the circumstances of the incident and the seriousness of the behaviour or the consequences it is intended to prevent. Any force used should always be the minimum needed would receive the desired result*”.

The Claimant in cross examination accepted that the incident of a child trying to barge his way into the ICT room was a trivial misdemeanor and was evidence of him misbehaving, the Claimant's response suggested that any use of force in this instance would be deemed to be unreasonable.

The incident that led to dismissal.

11. The incident that led to the Claimant's dismissal occurred on the 7 June 2017.
12. The incident involved Child A, who suffered from Autistic Spectrum Disorder. Child A reported the incident to Mr Collins, the Assistant Head. The notes of the interview were on page 59 of the bundle. Child A reported that the Claimant had "pushed" him to the floor. Mr Collins asked Child A to write a statement then he viewed the CCTV evidence and concluded that the footage showed inappropriate physical interaction with a child. Child A's statement was at page 62 of the bundle and he stated that the Claimant "pushed me with his arm to my throat to the floor – I fell to the floor then he pushed my feet with his feet away from the door then shut it.."
13. The Claimant's statement of the incident was on page 56 of the bundle and it was his evidence that Child A "threw himself backwards on to the floor". The Claimant accepted that he "moved his legs to one side with my foot" and to this extent there was agreement that this part of the incident occurred.
14. The Claimant was then suspended, and the Respondent went through the safeguarding procedures including referring it to the Local Authority Designated Officer and the police. The Police investigated, and a note of the police interview was at page 74 of the bundle. The Tribunal were particularly taken to the note taken after the CCTV evidence was viewed which stated as follows: "Stephen viewed the CCTV and agreed it was him and Child A on the camera. He stated he can see how that may look. He stated he can accept it may look as if he chucked him. He stated he thought he moved him with his hands, but he can see he used his feet". This document was put to the Claimant in cross examination and he emphasized the use of the words "may look" but stated that the evidence on the CCTV footage was not clear.
15. The Tribunal was shown the CCTV evidence that formed part of the evidence relied on by the Respondent in the disciplinary process (and was viewed in the police interview). The footage showed a doorway to the ICT room, which was partly obscured from the line of sight due to being partially recessed. The footage showed Child A attempting to gain access to the room (having been banned previously from the ICT room on the 5 June 2017 for disruptive behaviour).
16. In the CCTV footage Child A's left shoulder and head disappear into the doorway and the Claimant's left hand then extends through the door and it appears to be near or touching the back of the Child A's head or neck. Child A then falls back on to the ground and the Claimant's right arm can be seen near the Child's torso. The Claimant is then seen to move the

Child A's legs out of the doorway and then disappears behind the door which is then closed. It was the Claimant's evidence that the child threw himself onto the floor and that the Claimant moved his legs out of the way as it was a trip hazard.

17. No criminal action was pursued by the police and the matter then proceeded to a fact-finding meeting by Mr Ronan under the disciplinary procedures. The charge the Claimant faced was that he had assaulted Child A on the 7 June 2017. The meeting was scheduled for the 26 September 2017, the Claimant was reminded of his right to be accompanied by a trade union representative.
18. The notes of the disciplinary investigation were seen in the bundle at pages 102-9, the Claimant was accompanied by his trade union representative Mr Collins. It was the Claimant's evidence to the investigatory hearing (see page 108) that Child A "*threw himself to the floor*", he also stated that the "*CCTV does not clearly show me placing my hands on Child A or visibly move him off the ground. It shows my hands coming into view after he threw himself on to the floor, in I believe a neutral instinct to prevent someone from hurting themselves..*". It was put to Mr Ronan in cross examination that the CCTV was not clear, and he replied that the Claimant and Child A could be identified, he was also sure he could identify inappropriate physical contact from the CCTV and he felt that this evidence was conclusive.
19. Mr Ronan's investigation report was in the bundle at pages 119-127. The report shows that he interviewed a number of staff and pupils. There was no criticism about the sufficiency of the investigation and it was not suggested that there were lines of enquiry that were not followed. The summary of the allegations, findings and conclusions were at pages 125-6; Mr Ronan concluded that the Claimant's conduct on the 7 June 2017 was inappropriate and there was no need for any use of restraint or use of force. He concluded that this was a case of gross misconduct and the Claimant had pushed Child A and his action in moving his legs with his foot was also wrong. He concluded that the charge should be that "*on the 7 June 2017, you assaulted a Bonus Pastor Catholic College student Child A by pushing him to the floor and, whilst he was on the floor, you used your foot to push his legs away in a sweeping motion away from the classroom door*". He concluded that the Claimant had "offered no mitigation that could possibly justify his actions".
20. The disciplinary hearing was held on the 3 November 2017 and the panel was chaired by Mr Green and the members of the panel were Ms. Street and Ms. Palumbo. The management case was sent to the Claimant under cover of a letter dated the 17 October 2017 (see pages 128-9). The Claimant was again accompanied by his union representative Mr Collins.
21. The minutes of the meeting were at pages 135-149 and it was noted that the panel viewed the CCTV evidence. Mr Green was cross examined about his view of the CCTV and his evidence was at paragraph 37 of his statement. Mr Green felt that the CCTV evidence was being 'pretty damning' and explained that although not everything could be seen in the footage, as part of the evidence was hidden behind the recess of the door,

it was his view it was clear what had probably happened. He accepted that he did not have what he described as 'a panoramic view' but concluded from all the evidence before him that on the balance of probabilities, the Claimant pushed Child A and discounted the Claimant's case that the child had fallen backwards. Mr Green told the Tribunal that he and one other governor was 80% sure that Child A fell after being pushed by the Claimant. He described this conclusion as based on a common-sense view of the evidence. The Tribunal note that the disciplinary panel did not reach a unanimous conclusion, two found that it was an act of gross misconduct which should result in summary dismissal, but the minority member felt that it was a misjudgment and that the Claimant should be given the benefit of the doubt (see paragraph 41 of Mr Green's evidence).

22. The Tribunal saw the outcome of the disciplinary panel's deliberations and decision on pages 162-172; the panel found as a fact that the Claimant pushed Child A backwards concluding that the alternative explanation suggested by the Claimant that Child A fell back spontaneously and of his own accord, was unlikely.
23. The corroborative evidence that supported the view reached by the disciplinary panel was the CCTV footage of the Claimant's arms going in the same direction of travel as Child A; it was concluded that there was contact between the Claimant and the Child and that the Claimant had pushed Child A backwards (page 166). This appeared to be a reasonable conclusion to reach on the evidence. It was also concluded that the force used was not justified under any of the Respondent's policies, it concluded that only passive force was justified in this case and any force above that level would be unjustified. It was concluded that the force applied was unjustified and disproportionate. The majority of the panel concluded that the infliction of unlawful force amounted to an assault which was not sanctioned by any of the Respondent's policies and as a result the only justifiable outcome was summary dismissal.
24. The Claimant appealed the decision by an email dated the 5 December 2017 (see pages 173-4 of the bundle). He stated that the CCTV should not have been relied upon as it was inadmissible as the school corridor was not a public area (therefore CCTV should not have been recording where the public have no access) and there were no prominent display notices warning of the CCTV recordings which was stated to be a breach of the law. He also stated that the testimony of the pupils was contradictory.
25. The Tribunal saw the appeal outcome at pages 229-230 where the issue in relation to CCTV evidence had been clarified; it appeared that a different point had been made in the appeal hearing as it had been agreed that the school corridor was a public place, but the breach identified in the appeal hearing was in relation to inappropriate signage. The Claimant also submitted that the footage was not of clear quality. Submissions were received from Mr Ronan and the panel was satisfied that there was appropriate signage in place. The appeal hearing did not view the CCTV evidence.

26. The appeal was conducted by Ms. Cunningham, she confirmed in cross examination that they upheld the decision to dismiss because they took the view that the Claimant had been employed to take care of those with special needs. The appeal outcome confirmed that they considered that the Claimant was employed to deal with challenging and vulnerable pupils and although he produced a number of character references, it was concluded that summary dismissal was the appropriate sanction (page 231).

The Law

98 Employment Rights Act 1996

(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,

(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.

Cases Referred to

27. The Respondent referred to the case of *British Homes Stores v Burchell* [1980] ICR 303.

28. The **closing submissions** were oral and also the Respondent provided written submissions which were relied upon. They will not be replicated in this decision.

The Decision

29. The first issue before the Tribunal is whether the Respondent has shown a potentially fair reason to dismiss and there appeared to be no dispute that the potentially fair reason relied upon was misconduct. There was also consistent evidence to show that they dismissed the Claimant for conduct. Although the Claimant referred at the start of the hearing to the Respondent having what he described as a low tolerance after the dismissal of his colleague Mr Morrison, there was no consistent evidence to show that this was the case. The Claimant in cross examination accepted that the case of Morrison was on a different issue involving different facts and the dismissal hearing was heard by a differently constituted panel. There was no evidence before the Tribunal to suggest that the Respondent somehow 'made an example' of the Claimant or that the process, procedure and the outcome was in some way tainted by an earlier case. Although the Claimant also said that he felt that the outcome was predetermined there was no evidence that this was the case.
30. Turning to the procedure followed by the Respondent, there appeared to be no criticism of the investigation conducted by Mr Ronan and it appeared to be thorough and fair. He interviewed all relevant witnesses and did so in a timely manner; the Claimant accepted in cross examination that there was nothing missing from the investigation. The Respondent followed their procedures by first referring the matter to LADO and to the police and after the police decided that the matter would not be taken further, it was appropriate for the Respondent to proceed to a disciplinary investigation to decide whether there was a case to answer. It was only after a thorough investigation that it was concluded that there was a serious misconduct case to answer.
31. The Claimant was afforded a fair disciplinary hearing and was represented by his trade union representative. He made submissions about the inadmissibility of the CCTV evidence and this was dealt with in the outcome report (page 179). The disciplinary panel concluded that the CCTV was admissible and could be relied upon. The Claimant's submissions that the school was not a public place was rejected on the facts. The Claimant also stated in the alternative that the CCTV footage was unclear. This was again rejected by the panel who found the footage to be compelling.
32. The disciplinary panel considered all the evidence before them, taking into account the statement from Child A and the Claimant with the CCTV evidence and on the balance of probabilities concluded that Child A's evidence was to be preferred to that of the Claimant. They concluded when taking into account all the evidence that this was an unjustifiable use of force that amounted to an offence of gross misconduct.
33. The Claimant then appealed the decision, which was unsuccessful.

34. I have to consider whether the Respondent formed a reasonable belief on reasonable grounds and from the evidence before me I conclude that they did. The Respondent considered all the evidence and reached a decision that was well within the band of reasonable responses that would be open to this employer. Where facts are disputed an employer must decide whose evidence they prefer, and they must show to a Tribunal that they conduct this exercise by reaching a decision on the balance of probabilities, which is the appropriate standard of proof. This they have done by explaining why the evidence of Child A was preferred to that of the Claimant and applying a commonsense view of the evidence before them.
35. I also took into account that this Respondent is a school and all employees working in the education sector are subject to high standards of care and conduct, as set down in their safeguarding policies as well as in primary legislation on the acceptable use of force (in the Education Act 1996). The Respondent has set high standards of behaviour for all those dealing with pupils. The Claimant was aware of the inclusion and safeguarding policies. The Claimant also conceded in cross examination that he used force because Child A was trying to get into the room, but his answer suggested to the Tribunal that the circumstances did not warrant the use of force. The Claimant also accepted the incident at the ICT room was only a trivial misdemeanor therefore the use of force he applied in this case could not be shown to be proportionate or reasonable.
36. The Respondent was entitled to view this incident as being serious taking into account the Claimant's role and the high standards of behaviour expected of those dealing with vulnerable pupils. The Respondent was entitled to conclude that this incident was serious and amounted to an assault and it should be treated as an act of gross misconduct entitling them to summarily dismiss.
37. Although the Claimant has stated that this was a harsh decision for a first offence, on the evidence I conclude that the decision was within the band of reasonable responses open to the Respondent.
38. The dismissal is fair.

Employment Judge **Sage**

Date 20 November 2018