EMPLOYMENT TRIBUNALS

Claimant: Mr J Evans

Respondents: 1. The Governing Body of Deepdale Community Primary School
2. Lancashire County Council

Heard at: Manchester **On:** 18 and 19 October 2018

Before: Employment Judge Sherratt

REPRESENTATION:

Claimant: Miss R Howard, Consultant
Respondents: Mr M Mensah, Counsel

JUDGMENT having been sent to the parties on 1 November 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. The claimant was employed as a Higher Level Teaching Assistant and level 3 PE/Sports Coach at Deepdale Primary School from 1 September 2015 until his dismissal on 20 October 2017.

2. He brings an unfair dismissal claim. The respondents say that the dismissal was for a reason related to the claimant's conduct and that it was fair.

3. The issues to be determined by the Tribunal are to be found in section 98 of the Employment Rights Act 1996. What was the principal reason for the dismissal? Was it a potentially fair reason? If yes was the dismissal fair or unfair?

4. The respondents called evidence from Mr Y Bhailok, a parent governor, who chaired the disciplinary hearing, then from Ms J Manogue, a co-opted governor who was a member of the appeal panel and finally from Ms N Mirza the headteacher. The claimant gave evidence on his own behalf. There was a bundle of documents.

5. The mother of child R reported an incident to a member of staff when collecting her child from school. An investigation was started and when it was found

that the incident involved a member of staff rather than a pupil the investigation was escalated to a higher level.

6. Statements were taken from child R, R's cousin, two welfare assistants and two other children.

7. During the hearing questions were raised by the claimant about the original statements of the welfare assistants. In my judgment it is likely that they were both handwritten by the same person who used the some of the same words when describing the events. As the person who prepared the statements was not before the Tribunal there was no further enquiry into this issue.

8. Ms Mirza subsequently saw the welfare assistants herself and obtained new statements from them.

9. The claimant was seen twice. The first meeting was an informal one and the second meeting was a formal one at which the claimant was accompanied by a work colleague. Notes were taken at both meetings.

10. In the first meeting - "At this point Mr Evans said he grabbed him by the arm and led him out just to show him. Mr Evans said I didn't do it maliciously."

11. In the notes of the second meeting it records that the claimant was asked to demonstrate, using his colleague, how he took hold of pupil R's arm. According to the note this involved "holding the left arm underneath with his right hand and guiding him forwards showing and telling him why he couldn't leave the dining hall because of the congestion in the corridor.

12. It was put to the claimant in the meeting by Ms Mirza that two members of staff and at least two pupils had stated they saw him grab the pupil by the front of his jumper and at this point he was shown four witness statements. The claimant said he could honestly say that he did not grab the pupil and pull him against the wall. Later on during the course of that interview he said looking back he should not have taken hold of the pupil but the circumstances were such that the corridor was congested and the pupil was not listening.

13. When the claimant made his own voluntary statement he started by explaining his use of the word "grab". He had not used it in the sense of an aggressive grasp of someone, he uses the word "grab" such as, for instance, if his mother asked him to help move the dining table they would each grab one end. Going further into the statement and the words used by the claimant, he told R not to answer a member of staff back. R continued to kick off because he wanted to get out of the dining hall to get back to his classroom:

> "I asked him to come here, please. He ignored me. I asked him again to come here please. I then took hold of his arm and we walked together the four or five steps to the corridor where I showed him the congestion and explained why he couldn't leave just yet, because of the number of children in the corridor. He was much happier as showing him helped him to understand. He then returned to his queue. I remained at the door."

14. The claimant notes that at that point another child shouted, “that’s abuse, call Childline”, and he responded to that saying, “that’s a very serious allegation, please be quiet”. The claimant recalls how he then was supervising R for the remainder of the lunchbreak and during the PE lesson that afternoon. There appeared to the claimant to be no complaint from R at the time. The claimant having touched the child, he did not feel it appropriate to make any report in the school’s incident book.

15. A decision was taken following the gathering of the evidence that the claimant should be suspended and thereafter a decision was taken to move to a disciplinary hearing. The letter of suspension refers to an allegation which was potentially gross misconduct that “on Wednesday 28 June you grabbed and pushed a Year 5 pupil”, who I am told would have been aged 10 or 11 at the time of the incident.

16. The investigation gathered quite a quantity of paperwork which was attached to a report from the Head Teacher. The Head Teacher was whilst preparing her report assisted and guided by HR from Lancashire County Council.

17. The allegation was first set out in the letter of suspension. There was a letter inviting the claimant to a disciplinary meeting, and at that stage all of the papers gathered together in support of the case against him were supplied. The claimant was told that it could lead to his contract being terminated. He was given the opportunity to be accompanied by a colleague or trade union representative and if he had papers to submit or witnesses to call he should provide that information to the respondent’s advisers in terms of the Lancashire County Council HR.

18. It would appear that the disciplinary hearing was properly set up and all papers were made available to the claimant before the hearing. There was a minor issue leading up to the hearing in that not all papers were provided to the claimant when they came into existence. Some papers the claimant found when he made a subject access request, and certain information was provided to him around the middle of August following his request in July. The claimant however accepted in cross examination that by the time of the disciplinary hearing in October he had received all of the relevant papers.

19. The hearing itself was to be a full hearing involving witnesses before three of the school’s governors. The claimant attended with a representative. Mr Yakub Bhailok, who gave evidence, was one of the three members of the Governing Body that heard the claimant's case. He was cross examined. He confirmed that he was not influenced by what was said in the report of the Head Teacher that the Governing Body was to consider the claimant's tenure. [The question of tenure is a rather strange word to be used in such circumstances; it appears that it is on a pro forma document produced by Lancashire County Council which the Head Teacher used when preparing her report.]

20. Mr Bhailok confirmed that there had been the full hearing and that the decision was made on the basis of the evidence before the panel and nothing else.

21. The conclusion of the disciplinary hearing, sadly for the claimant, was that his employment should be terminated by reason of gross misconduct. The claimant was informed of this in a letter which was sent on 24 October by Fiona Graham of Governor Services who was involved in the disciplinary hearing advising and/or

assisting the governors. It is a lengthy letter and it sets out in some detail why the committee decided as it did. There was, it is said, no reason provided to disbelieve the evidence provided by the witnesses or to doubt their integrity. The witnesses were credible and their evidence stood up to scrutiny in cross examination. The evidence provided by the two staff witnesses and four pupils was consistent with each other. As to that, for the two staff witnesses and four pupils there were witness statements, but only one of the staff witnesses who was involved in the incident attended the disciplinary hearing.

22. Taken from the letter:

> "The governors concluded that given the consistency of the evidence provided by the four pupil witnesses and two staff witnesses it was more likely than not that the incident took place as described by those witnesses in that you grabbed pupil R by the collar/neck area of clothing and pushed him against the wall. The committee were disappointed that you had questioned the integrity of the witnesses, in particular the integrity of Mrs M who had taken the witness statements, and that you alleged she had adversely influenced the witnesses. You did not provide any evidence to support your assertion. The governors were concerned about the discrepancies in your own account in relation to your grabbing of the pupil. All witnesses including yourself confirmed that the incident took place in a matter of seconds, and therefore the governors concluded that you did not consider using any further strategies for managing behaviour before you used physical intervention, and that this was a snap decision arising out of temper rather than a considered response to a risk of harm."

23. The letter went on to say that the claimant showed little remorse for his actions and instead tried to justify the use of physical force on the pupil. The claimant confirmed if faced with the same circumstances again he would still use physical intervention and wanted to be trained in positive handling so he could use the correct restraint technique. The governors were not convinced that the claimant understood or appreciated that physical intervention should only ever be used as a last resort and only by an appropriately trained member of staff. The committee concluded it therefore had no confidence that the type of incident would not happen again and that the claimant's actions had breached the trust and confidence they were entitled to place in him, and the governors took the decision to summarily dismiss the claimant from his employment.

24. The claimant was given the right of appeal, which he exercised in a letter dated 1 November 2017, in which he set out the basis upon which he was appealing against the decision to dismiss him.

25. An appeal hearing was fixed for December 2017. Along the way there was a problem in that the minutes of the first hearing were only supplied to the claimant when he asked for them and then only on the second occasion. However, on that second occasion they were supplied fairly quickly, so again the claimant was by the time of the appeal hearing fully prepared with all of the paperwork and he had the opportunity to prepare for that hearing and to decide what his questions were going to be to the witnesses who were called for a full re-hearing.

26. After that re-hearing the panel decided to dismiss the appeal. Janet Manogue, another of the governors was one of the members of the appeal panel. She had experience in education, teaching students in a pupil referral unit. Her evidence was to the effect that it was a very difficult decision to make, it was a hard decision to make but she as someone with teaching experience was satisfied that it was the right decision. The only thing that they wanted to change was the finding of the original panel that the claimant had acted in temper. They thought he had acted more out of frustration, and unfortunately although Ms Manogue said she wanted the appeal outcome letter changed to reflect that matter it was not.

27. The claimant in cross examination said that he was very disappointed that this had happened to him. However, he would have accepted a final written warning had that been given to him because he loved the job and would have been glad to get back to it even on those terms.

28. Ms Nawal Mirza, the head teacher of the Deepdale Primary School, was subjected to a lengthy cross examination over matters of detail and procedure, none of which it seemed to me going to the questions I have to consider namely the reason for the dismissal and the fairness of it. She accepted that there were occasions when things might have been done better, for instance the provision at an earlier date of the minutes of meetings to the claimant. She accepted that although the claimant had a right to some sort of pastoral care or assistance when he had been made the subject of disciplinary proceedings that it was not provided.

29. These matters, it seems to me, are marginal and do not relate specifically to the issues that are before me.

30. Both representatives produced written submissions and I have read and considered them.

The law, discussion and conclusions

31. In an unfair dismissal case the relevant legislation is to be found in section 98 of the Employment Rights Act 1996. In simple terms it is for the employer to show the reason for the dismissal and that it is a potentially fair reason. One of the potentially fair reasons set out in sub-section 98 (2) is one which relates to the conduct of the employee.

32. Section 98(4) then goes on to deal with the question of fairness: whether in the circumstances the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee, and this shall be determined in accordance with equity and the substantial merits of the case.

33. In employment law there are a number of appeal cases that give us guidance, and one of the classic cases from the 1970s is **British Home Stores v Burchell [1978] IRLR 379** in the Employment Appeal Tribunal. This holds that in a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is fair or unfair an Employment Tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that

misconduct at that time. This involves three elements. First, there must be established by the employer the fact of that belief: that the employer did believe it. Second it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief, and the third the employer at the stage at which he formed that belief on those grounds must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

34. Looking at the third matter first: had the employer carried out as much investigation into the matter as was reasonable in all the circumstances of the case? Here they had interviewed the claimant twice and he had provided his own voluntary witness statement. The two welfare assistants had each been seen at least twice. After the initial witness statements were provided further statements taken by the Head Teacher were provided from them, and I have referred above to the four statements from the children, one of whom was child R, the person involved in the incident. It seems to me that in the circumstances as much investigation as might reasonably have been done was done in this case.

35. Did the employer have reasonable grounds upon which to sustain the belief? The employer in this case in the form of a committee of governors had the report from the Head Teacher, it had the evidence before it including the claimant's statement, it heard from the claimant who was, through his representative and/or himself, able to question the witnesses and to make his own submissions to the governors on whether or not they should find against him. That hearing, it seems to me, gave the governors reasonable grounds upon which to sustain their belief, and as to their conclusion it was established by Mr Bhailok and confirmed in the letter of dismissal that they did have the belief that the claimant had done that which was alleged against him. This was confirmed following the appeal.

36. It seems to me looking at the whole of this case that there is no doubt that the claimant did lay hands upon the child concerned: he has admitted it. The evidence from the witnesses was to the effect that the "laying on" was rather more serious than the claimant stated. It is not for me to decide which version I prefer. It is for me to consider whether there was evidence before the Governing Body, both at first instance and at appeal, that could have allowed them to reach the conclusions that they did to the effect that what happened in the incident was in accordance with the statements of the school's witnesses and not in accordance with the statement of the claimant.

37. In all of the circumstances it seems to me that the **British Home Stores v Burchell** tests when examined are passed by the respondent. I am satisfied that the reason for the claimant's dismissal related to his conduct

38. I must move on to consider whether the dismissal was fair? Guidance on this question can be found in another case from the 1980s, **Iceland Frozen Foods Limited v Jones [1982] IRLR 439**, another case in the Employment Appeal Tribunal. The correct approach for a Tribunal to adopt when answering the question of fairness in section 98(4) is as follows. The starting point should always be the words of section 98(4) themselves. In applying the section an Employment Tribunal must consider the reasonableness of the employer's conduct not simply whether they (the members of the Employment Tribunal) consider the dismissal to be fair. In judging the reasonableness of the employer's conduct an Employment Tribunal must

not substitute its decision as to what was the right course to adopt for that of the employer. In many cases, though not all cases, there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view another quite reasonably take another. The function of the Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair.

39. This case was decided at a time when unfair dismissal claims were heard by a panel of three people made up of a Chairman and two non-legal members but the principle still holds good today.

40. It is not for me to substitute my decision for that of an employer unless the decision is manifestly unreasonable. Here the employer was a school involved in caring for and educating young children, aged from around 6 to 11. They are a tightly regulated organisation, as all schools are. Schools have to judge for themselves the standards of behaviour that are acceptable taking into account the school's rules, and the behaviour of the adults and the children concerned.

41. Given the nature of the matters outlined above, given the fact that the disciplinary panel thought the claimant had not, as it were, learned his lesson and he would have done it again, it seems to me it is unarguable that the decision to dismiss was within the band of reasonable responses therefore I am unable to in any way interfere with the decision reached by the school 's panels, both at first instance and on appeal. The unfair dismissal claim is dismissed.

Employment Judge Sherratt

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14 November 2018

REASONS SENT TO THE PARTIES ON

26 November 2018

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FOR THE TRIBUNAL OFFICE

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