



EMPLOYMENT TRIBUNALS

Claimant: Mrs D Smith

Respondent: Walsall Metropolitan Borough Council

Heard at: Birmingham **On:** 29 August 2018

Before: Employment Judge Gilroy QC

Representation

Claimant: In person

Respondent: Mr M Abdulla (Solicitor)

JUDGMENT

The judgment of the Tribunal is as follows:

1. By consent, the name of the Respondent is amended from Chuckery Primary School to Walsall Metropolitan Borough Council.
2. The Claimant's claim of unfair dismissal is dismissed.

REASONS

Introduction and Background

1. This is an unfair dismissal claim.
2. Dismissal was admitted by the Respondent. The Respondent contended that the reason for dismissal was the potentially fair reason of conduct and further contended that dismissal was fair in all the circumstances. As dismissal was admitted, the Respondent presented its case first.

Evidence and Material before the Tribunal

3. The Tribunal heard oral evidence on behalf of the Respondent from Miss Angela McMorrow (Manager and Investigating Officer), Mr James Pearce (Head Teacher and the presenting officer at the disciplinary hearing), and Mr Neil Ravenscroft (Chair of Governors and a member of the dismissal committee in this matter).

The Claimant also gave evidence. The Tribunal was provided with Witness Statements on behalf of all of the witnesses who gave live oral evidence.

4. The Tribunal was provided with an agreed bundle of documents [R1].

Findings of Fact

5. The Claimant was employed by the Respondent as a Pupil Specific Learning Support Assistant. The Respondent is a primary school providing education for children from the ages of 4 to 11. Some of the pupils at the school have special needs.
6. In 2016, following an incident involving the Claimant and a pupil, the Claimant was given written management advice in relation to the prohibition of wrist holds on pupils other than those who were visually impaired.
7. On 14 February 2017, the Claimant was given a formal final written warning in respect of a disciplinary matter described in the warning letter in these terms:

“That on 16 December the one-to-one child that you are assigned to, left the canteen through the fire exit, potentially placing the child at risk of harm.”
8. The Claimant was informed that the above warning would remain on her personnel file for a period of 24 months. She did not appeal against that warning.
9. The matter that led to the Claimant’s dismissal was an alleged incident which occurred on 21 June 2017, ultimately described as the inappropriate handling of a special needs pupil.
10. As of 21 June 2017, the final written warning imposed on 14 February 2017 was obviously still “live”.
11. On 21 June 2017, a parent at the school reported to the Respondent an incident which had allegedly occurred involving the Claimant and a pupil. The relevant authorities were notified, as is typically the case in a matter of this nature where there is a multi-agency involvement on behalf of various arms of the local authority and nothing in particular turns on that issue.
12. The Claimant was suspended on 22 June 2017.
13. On 27 June 2017, a Position of Trust meeting was held.
14. The Claimant was interviewed by the police on 3 July 2017.
15. It is standard practice in matters of this nature for an employer to await the outcome of a police investigation before proceeding with any disciplinary proceedings, for the obvious reason that for an employer to embark on such proceedings where it is possible that criminal proceedings may ensue, the findings made in the disciplinary proceedings may prejudice police enquiries, and, ultimately, a prosecution before the criminal courts. For that reason, the Respondent did not take the matter forward as a disciplinary issue until the police had completed their enquiries.

16. As matters transpired, shortly after interviewing the Claimant, the police concluded their enquiries on the basis that no action was to be taken. By that stage, the school was in recess for the summer.
17. Steps were nevertheless taken to interview witnesses, who it was considered may be able to throw light on the matter and who were involved in the reporting of the incident. They were interviewed on 14 July 2017.
18. At the beginning of the academic year 2017/2018, between 6 and 8 September 2017, the Respondent interviewed three of the Claimants' colleagues who had been identified by her during the course of her discussions with the police, namely, Julia Strazzanti, Debra Platt and Lisa McCaughtrie. They in fact added nothing to matters. They were unable to assist in relation to the relevant events.
19. The Claimant was interviewed on 15 September 2017.
20. An investigation report was prepared and, by letter dated 27 September 2017, the Claimant was notified that a disciplinary hearing would take place before a panel on 10 October 2017 to consider the following allegation of gross misconduct against her:

"You handled the one to one child that you work with inappropriately. This was reported by a parent on 21 June 2017".
21. The disciplinary hearing duly took place on 10 October 2017. The Claimant confirmed that she was content to proceed without representation. The management case was presented by Mr Pearce, Head Teacher. The Claimant put her case, and asked questions and raised issues as she saw fit.
22. The panel adjourned to deliberate, before reconvening and informing the Claimant that the allegation against her had been found to be proven, and that the matter in question constituted gross misconduct as it breached the school's behaviour policy and physical intervention policy, and was also regarded as a breach of the school's code of conduct. The panel stated that in view of the Claimant's past record in the form of her "live" final written warning, dismissal was the only appropriate sanction. Mr Ravenscroft, the Chair of the panel, confirmed the outcome to the Claimant by letter dated 11 October 2017.
23. During the Tribunal hearing, the Claimant raised, as at least a possibility, that Mr Pearce had retired with the panel for the purposes of their deliberations. There was no evidence to support that allegation, and the Tribunal rejected it.
24. The Claimant appealed against her dismissal. The Tribunal did not hear any oral evidence on that topic but was provided with correspondence and other relevant documentation concerning the appeal, including the Claimant's notice of appeal letter dated 14 October 2017, the notification of the appeal hearing in the form of a letter dated 19 October 2017, the minutes of the appeal committee meeting which convened on 1 November 2017, and the outcome letter relating to the appeal in the form of a letter dated 1 November 2017 from Mrs Victoria Deer, the Chair of the Staff Appeal Committee. The appeal was heard on 31 October 2017. Again, the Claimant was present. She again indicated that she was content to proceed without representation. The appeal proceeded on the basis of a review rather than a re-hearing, and in this regard the Appeal Committee dealt with the matter on the basis of the grounds of appeal put forward by the Claimant. The appeal was dismissed.

Submissions

25. The Respondent provided written closing submissions and Mr Abdulla spoke to those submissions at the conclusion of the evidence. He essentially submitted that this was a classic case of a gross misconduct dismissal with the consequence that the Tribunal should apply the well known test set out in the case of *British Home Stores Ltd v Burchell [1978] ICR 303*. He referred to the relevant milestone events in the case and contended that this was a case involving a reasonable investigation with a conclusion that was merited on the basis of the facts as found by the employer, a reasonable belief, a proper outcome that was within the reasonable band of responses, a proper appeal against that outcome, which was properly considered by the Respondent and appropriately dismissed. He observed that the Respondent did not need to have conclusive direct proof of the employee's misconduct, only a genuine and reasonable belief which was based on reasonable grounds. He further submitted that the Respondent had interviewed all of the relevant witnesses and considered the Claimant's explanation before making findings against her. He submitted that the *Burchell* test was amply satisfied and that the ACAS Code of Practice had been followed. He submitted in the alternative that if the dismissal was in any way procedurally unfair, the Claimant would have been dismissed had a fair procedure been adopted (the well known "*Polkey*" principle).
26. The Claimant made oral submissions. She essentially made four points.
- (1) There had not been a thorough investigation.
 - (2) The Respondent acted in breach of its own policies.
 - (3) The governors did not properly equip themselves at the dismissal committee by failing to read the relevant papers.
 - (4) She had not inappropriately handled a child in her care during the course of her employment with the Respondent.

Discussion

27. The Tribunal approached this case with the following six broad propositions in mind:
- (1) It was for the Respondent to show the reason or if more than one the principle reason for dismissal and that such reason or reasons was or were potentially fair within the meaning of sections 98(2) and (2) of the Employment Rights Act 1996, conduct being such a reason.
 - (2) If the Tribunal was satisfied that dismissal was for a potentially fair reason, it then had to consider the reasonableness of the decision to dismiss.
 - (3) Where an employer purports to dismiss an employee on the grounds of conduct it is not the function of the Tribunal to determine whether the employee was indeed guilty of that conduct, rather the Tribunal asks itself whether at the time the decision was taken to dismiss: (1) the employer genuinely believed the conduct complained of had taken place; (2) that belief was based upon reasonable grounds; and (3) the decision was made after a reasonable investigation.

- (4) In the context of its consideration of the reasonableness or otherwise of this decision to dismiss, it is not the function of the Tribunal to substitute its own view for that of the employer, rather, the Tribunal has to determine whether the employer's decision fell within the range of reasonable responses.
- (5) Insofar as there was any procedural unfairness in the dismissal would the Claimant have been dismissed in any event had a fair procedure been followed ?
- (6) If dismissal was unfair, did the Claimant contribute to his or her dismissal ?
28. The Tribunal was satisfied that dismissal was for the potentially fair reason of conduct. The Tribunal was satisfied that the Respondent had a genuine belief that the Claimant had been guilty of misconduct when the decision to dismiss was made. The Tribunal was satisfied that the Respondent had reasonable grounds to reach that conclusion, having conducted a reasonable investigation. The Tribunal rejected the contention made by the Claimant that there had not been a thorough investigation. The Tribunal concluded that the Respondent did not act in any material respect in breach of its own policies. The Claimant was invited for an investigatory interview. She was given the opportunity to give her version of events. She was provided with all the relevant evidence prior to the disciplinary hearing. The issues were investigated at that hearing. If the Claimant had wanted to identify any issue she was freely at liberty to do so, and she had had ample time to prepare for that hearing in advance. Adequate reasoning was given in support of the decision to dismiss. She can have been in no doubt as to what the rationale was behind that decision. The Claimant was given the right to appeal and the appeal was fair. A proper rationale was provided for the dismissal of that appeal. The Tribunal was satisfied that dismissal fell within the band of reasonable responses and the Tribunal was fully cognisant that it must not substitute its own view for that of the Respondent. The decision to dismiss, plainly fell within the reasonable band, particularly in light of the Claimant's final written warning of 14 February 2017. The Claimant's contention that she did not inappropriately handle a child in her care was obviously not a matter for the Tribunal to determine.
29. The Tribunal's function was not to determine what happened in relation to the incident which was alleged to have occurred on 21 June 2017. The function of the Tribunal was to review what the Respondent did in relation to that alleged incident, and the Tribunal was satisfied that the Respondent held a reasonable belief, supported by adequate investigation, when concluding that the Claimant was in fact guilty of the conduct alleged, and in the circumstances the decision to dismiss was fair.

Conclusion

30. For all of the above reasons, the Tribunal concluded that the Claimant was not unfairly dismissed. Her claim is therefore dismissed.

**Employment Judge Gilroy QC
08 January 2019**