



EMPLOYMENT TRIBUNALS

Claimant: Bronwen Evans-Shaw

Respondent: Lancashire Borough Council

HELD AT: Manchester

ON: 12 January 2018

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: In person

Respondent: Mr K McNerney, Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant's claims of unfair dismissal and wrongful dismissal fail and are dismissed.

REASONS

1. The claimant began working for Lancashire County Council in October 2003. She began as a Clerical Assistant in a Secondary School Pupil Referral Unit undertaking administrative duties and financial related invoicing. In 2005 the claimant was posted to Hendon Brook School in Nelson and remained there until her dismissal on 10 May 2017. The claimant claims unfair dismissal and wrongful dismissal.

Claimant's Submissions

2. The claimant submitted that her dismissal was unfair as the incident for which she was dismissed did not impact on her job, it had occurred in her own time and that it was not reasonable to dismiss for that matter. She also further denied that she had lied to the Head Teacher or that the school laptop had ever been seized by the Police and that it was unreasonable of the respondent to conclude it had.

Respondent's Submissions

3. The respondents submitted that it was fair to dismiss for the criminal conviction the claimant received as it had reasonably caused them to lose trust and confidence in the claimant and had confirmed dishonesty. The respondents also relied on Polkey and contributory conduct if the claimant succeeded in her unfair dismissal.

More detailed submissions are referred to in my conclusions.

Witnesses

4. For the Respondent I heard from James Pidcock, School Governor, from Miss Beverley Harrison Appeal Panel Member and from Miss Nicola Fielding, Head Teacher. There was an agreed bundle.

Credibility

5. The claimant's evidence where it was disputed I find unreliable. I did not find her a credible witness, in particular it was clear she misled the disciplinary and appeal panel about her appeal against her conviction and in alluded to legal advice when she had parted company from her representatives..

6. The Tribunal's findings of fact are as follows.

7. The claimant worked as a business support officer for the respondent school which dealt with vulnerable children who did not attend mainstream school. She had worked at a similar school previously, starting there in 2003.

8. On 24 October 2015 the claimant was involved in an incident outside work. She was arrested for allegedly being drunk and disorderly and was given a fixed penalty notice of £135.00, she did not take any further action about this penalty notice but did not pay it either as far as she was aware however it transpired it had been deducted by way of an Attachment of Earnings Order. The claimant did not report this to the school as she thought it was an isolated incident, it was not serious and she did not believe it affected her work at the school.

9. On 31 October the claimant was arrested in respect of a matter for which she was later charged with the criminal offence of malicious communication.

10. At some point in January 2016 the Head Teacher of the school was informed by an informant who wished to remain anonymous about the two incidents and the claimant was asked to attend a meeting with the Head Teacher on 11 January 2016. The Head Teacher did not keep a note of this meeting but she later recorded that the claimant said the incident concerned a complaint she had sent by email to Lancashire Police about the way she was treated when she was arrested for the first offence. The claimant said that laptops had been seized and the Head Teacher asked whether the school laptop had been seized. The Head Teacher said that the

claimant said it had but the claimant denied this. The claimant also later said that she told the Head Teacher that the malicious communications involved facebook posts however I do not accept this was true for reasons given below.

11. On 30 January 2016 the claimant was formally charged with sending malicious communications and she informed the Head Teacher of this. The Head Teacher sought advice and the claimant was suspended on 8 February 2016. The suspension from work letter stated that she was charged with sending a communication conveying an offensive message on 27 October and as a result she was on Police bail until 7 April 2016.

12. The school took no further action at the time awaiting the outcome of the trial which took place on 4 October 2016 and the claimant was convicted of sending malicious communications on 7 October. A Chair of Governors Mr Anthony Harrison attended the trial and took a note. The claimant alleged in the Tribunal that he told the Judge he was making notes as the claimant was going to be dismissed and therefore the claimant asserted that this was pre-meditated. The claimant had no independent evidence of this and did not raise it during the disciplinary process when she had the opportunity to question Mr Harrison. Therefore I do not accept this was said.

13. The claimant advised the Head Teacher that she had received a sixteen week suspended sentence. In January the respondents HR department made enquiries of Lancashire Police whether they could obtain the statements from the criminal trial, they were provided with some statements but were advised that in relation to the claimant's statement she would have to give consent and the claimant refused to give consent for this. The claimant believed that the releasing of these statements was a breach of data protection however the fact is that they were released by Lancashire Police by their Disclosure Officer and the respondents had them in their possession.

14. These documents included a police interview with the claimant, and a statement by the Police Officer who I shall refer to as Police Officer SD. SD was the custody officer the night the Police arrested the claimant for the offence of drunk and disorderly

15. Police Officer SD reported that a friend advised her on 29 October that he had received a private message by Facebook containing allegations about SD and he forwarded these. The Facebook message read "a woman known as SD one of your Facebook friends seriously assaulted and raped me tearing off my clothes against my will in the early hours of Saturday the 24th October 2015. She has seriously bruised me and violated my human rights and left me with irreparable scars. I am a grandmother of two and a mother of three, this is my statement of truth!".

16. SD said in her statement "I find the above message grossly offensive and reading it left me shocked and distressed as it is complete lies and totally false". SD reported that another friend contacted her the same evening who had received the same message. Officer who dealt with SD also found the same message to her

which went on to say "failure to acknowledge this claim within seven days will put you in a lasting tacit agreement!".

17. In an additional statement SD set out the circumstances of the claimant's arrest stating that because she refused to co-operate shouting that she was a Baroness and that she did not have to abide by their rules and because she failed to answer any risk assessment questions it was decided that she should be stripped and put in an anti suicide suit. This was done in the normal manner by three Police Officers and it was noted that her clothes had to be cut off as she was kicking and screaming and struggling and was shouting that they were raping her. SD agreed she slapped her on the back to distract her to allow her colleagues to gain control and remove clothing which is an agreed procedure. She also reported another friend received an additional message later on which said "I have a mutual friend with you X was my best friend at school and we are still close, you are friends with SD who has now changed her name to Sue X on Facebook. If you could tell me anything about her please I would appreciate it as I am prosecuting her, thanks in advance (smiley face)".

18. The interview with the claimant for the malicious communication offence stated that she replied continuously throughout the interview to any questions with "I don't consent to the questions asked".

19. The note from the trial recorded that the court saw the video evidence of the claimant's time in custody several times, that the offensive message had been sent to approximately thirty of SD's friends on Facebook, that SD had several hundred friends due to being involved in dog showing, that the message was still reoccurring to this day and that the claimant had refused to answer any questions saying "I do not consent".

20. Three previous convictions of the claimant regarding driving offences including one for drink driving in 2009 were recorded. During the trial the claimant had given evidence that SD had put a finger up her bottom which is why she had shouted rape and that she felt the Facebook message was not malicious as it was true and that it had felt like rape. She was asked why she had never mentioned the anal penetration before, her answer was not recorded simply that she had made a complaint about the unlawful arrest and presumed she would be interviewed and would be able to explain this at this stage. It was put to her she could have raised this in her interview on 30 October, she did not. She said she had not been sleeping and was disorientated at the time of her first arrest.

21. The defence summary was described as accepting the evidence regarding the sending of the Facebook message and it was said that the digital penetration of someone's bottom probably felt like rape, she was indignant and annoyed and her mistake was to go on Facebook and complain about what had happened. It is not hostile or malicious if it is true. The note noted that the jury took half an hour to conclude that the claimant was guilty of the offence, a pre-sentencing report was ordered and Mr Harrison did not return for the sentencing.

22. On 24 November 2015 Pauline Casey of Lancashire Police confirmed that the claimant had been found guilty and the case was adjourned for sentence on 17 November when she was given four months imprisonment suspended for 21 months. The claimant was asked for her consent to releasing her statement but she refused writing back that there was an appeal with the Royal Courts of Justice and therefore she was not at liberty to disclose any information to third parties which could prejudice her process.

23. Today in Tribunal the claimant told us that she had undertaken the appeal herself, no longer being represented by the solicitors and barristers who had attended court in the first instance and that because she had done this incorrectly this appeal was thrown out, that she had intended to appeal the decision to throw out the appeal but had not done so, she could not be sure when she knew that her appeal had been turned down, it possibly was some time towards the end of April. She further advised that she had been told not to communicate with her barrister again.

24. On 3 February the claimant was invited to a disciplinary meeting on 1 March to investigate the following concerns/allegations. The concerns/allegations were listed as:-

- (1) that you were arrested at approximately 1.30 on 24 October for being drunk and disorderly and kept in custody overnight following which you were discharged and given a penalty notice for disorder (PND) and a fine of £135.
- (2) that you did not disclose being arrested for being drunk and disorderly or being detained in custody or being issued with a PND to the Head Teacher.
- (3) That you were arrested for malicious communication on 30 October 2015 and the Police seized electronic equipment at your home address including the school laptop.
- (4) That you did not disclose being arrested for malicious communication to your Head Teacher and did not report to the Head Teacher that the Police had seized a school laptop.
- (5) That you were not truthful on 11 January 2016 when the Head Teacher specifically asked you about the alleged malicious communication as you stated that the communication in question was an email that you had sent to the Police regarding your treatment on 24 October 2015 informing the Police that you were going to make a complaint.
- (6) That on 4 October 2016 you were found guilty of malicious communication at court and on 17 November you were sentenced to four months imprisonment which was suspended for twenty one months. It was found that you had sent malicious messages on Facebook on 29 October to PC SD and forty nine of PC SD's friends on Facebook. It then quoted the messages referred to above.

(7) That you were not truthful about your sentence and instead reported that you had been given a sixteen week suspended sentence. Mrs Fielding

25. Mrs Fielding set out that she would seek her response to these questions and decide whether to deal with the matter herself or whether it should be referred to the Governors Disciplinary and Dismissal Committee. The minutes of the meeting on 4 March stated that the claimant said that she had appealed against her conviction and therefore was unable to provide any written evidence or further details regarding the case and she was concerned that in doing so may prejudice the outcome. Mrs Duckworth from HR explained that she would require confirmation that the appeal had been accepted by the Courts so the Head Teacher could make a decision regarding whether or not to continue with the investigation at this point. The claimant said her appeal had been submitted on 1 November and was accepted on 8 November and that it was being processed. The claimant stated that it had since transpired that neither of her representatives were qualified solicitors and this issue had been raised as it involved an issue of legal privilege the claimant had had to fill in a release form in relation to this. Comments had to be received by 31 January and it was now to go to a Judge to decide whether the appeal should go forward. Advice was sought from the respondents legal team as to whether the meeting could continue in the light of her appeal and the advice was that it could.

26. The respondent had twenty four questions for the claimant, the majority of which she answered "no comment". She said she wasn't sure if she was aware of the school's social networking policy, the Head Teacher stated that the claimant herself had given her a copy of this which had been adopted by the school. In respect of the laptop the claimant said that the Police hadn't seized it, she didn't recall them taking it.

27. In respect of the conversation on 11 January with the Headteacher the claimant said "I can't remember the conversation I have nothing in writing to refer to but a complaint was lodged in 2015". The question was why she hadn't mentioned the Facebook messages on 11th. ? She refused to confirm the content of the Facebook messages, she stated that the appeal had yet to be considered by a Judge and she was no longer being represented by her solicitors and barrister. She was asked why she said she had been given a suspended sentence for four months, she said that is what she understood the barrister had said and she appeared to agree that it was four months imprisonment suspended for twenty one months.

28. The claimant said she did not want to be obstructive but she was not at liberty to disclose any further information and if her appeal was unsuccessful she would be appealing further. She requested a copy of the social networking policy and that was sent to her.

29. Mrs Duckworth explained the possible options including a formal disciplinary warning or a referral to the Disciplinary and Dismissal Committee. It was decided to refer it to the committee as it was multi faceted and complex case.

30. The claimant attended this meeting without a trade union representative as she did all the meetings as there was some difficulty over her membership of the trade union.

31. The schools disciplinary policy included examples of gross misconduct, these included "... and other offences of dishonesty "and "other similar acts of misconduct may come within the general definition of gross misconduct." The policy additionally said it should also be noted that disciplinary action may be considered in relation to acts of misconduct which take place outside of work hours, for example an instance is a criminal prosecution and/or conviction/caution for such actions. The main consideration should be the relevance of the offence to the employee's duties and/or the effect on the contractual relationship with the employer and on clients/colleagues. Disciplinary measures will not automatically be appropriate in these instances.

32. There was some discussion about whether the code of conduct the respondents referred to had been adopted by the school or whether it had been opposed by the unions and whether it was the same policies the claimant had seen prior to her suspension. Mrs Fielding confirmed at the appeal the HR Advisor Kathy Neville had confirmed that it was the same as the code of conduct sent out to members of staff prior to the claimant's suspension. She said that the local union representative had advised members not to sign it but that the regional representative had then confirmed it was the standard policy adopted in all Lancashire schools.

33. The Code of Conduct made clear that breaches of it could be dealt with under the schools disciplinary procedure, although there was no specific mention in the list of misconduct/gross misconduct issues.

34. In paragraph 7 of the Code there were two paragraphs of relevance under professional conduct. At point 10 it said "notify the Head Teacher of any known or suspected breaches of the law or of the school's policies/procedures/regulations and cooperate with any investigation of such breaches particularly in relation to the safeguarding of children, health and safety and financial irregularity. Where this is considered not possible reference should be made to the school's whistle blowing policy".

35. At point 11 it said "disclose on appointment or at any time any civil/criminal charges or convictions being charged or in possession of a conviction may not necessarily debar from appointment/employment or lead to disciplinary action however failure to disclose where required will be considered as a serious act of misconduct".

36. Under personal conduct it said that all staff were expected to:-

- (1) notify the Head Teacher either after appointment or during employment of any personal relationship in or outside of the school which may result in honesty objectivity or integrity being brought into question' and

(2) notify the Head Teacher of any change in personal circumstances which could impact on the ability to carry out their role and

(3) conduct themselves both on and off duty including the use of social media (see model policy on the use of social networking sites and other forms of social media) in the manner compatible with their employment status with the school. The social media policy included at 4(3) that employees do not conduct or portray themselves in a manner which may bring the school into disrepute or bring into question their appropriateness to work with children or young people.

37. On 28 March the claimant was invited to a disciplinary hearing on 10 May to consider the following allegations of gross misconduct:-

(1) that she was arrested on 24 October 2015 for being drunk and disorderly;

(2) that she did not disclose being arrested or being detained in custody or being issued with a PND to the Head Teacher;

(3) was arrested for malicious communication on 30 October 2015 and that electronic equipment was seized including the school's laptop.

(4) did not disclose being arrested for malicious communication to the Head Teacher and did not report to the Head Teacher that the Police had seized the school laptop.

(5) was not truthful on 11 January 2016 when the Head Teacher specifically asked her about the alleged miscommunication as she stated that the communication question was an email that she had said she had sent to the Police regarding her treatment on 24 October informing the Police that she was going to make a complaint and did not mention or disclose the Facebook messages.

(6) on 4 October 2016 was found guilty of malicious communication at court and on 17 November was sentenced to four months in imprisonment which was suspended for twenty one months. It was found that Bronwyn Evanshaw had sent malicious messages on Facebook on 29 October to PC Large and forty nine of PC Large's friends on Facebook, details in the attached report.

(7) was not truthful about her sentence and instead reported she had been given a sixteen week suspended sentence.

38. She was advised that she could be dismissed without notice as an outcome of the hearing and that she could bring a fellow worker or a trade union representative with her to the hearing.

39. The Head Teacher produced a report for the hearing which was chaired by James Pidcock, a school governor. The claimant asked if she could record the meeting, this was refused but she was advised that if she wished to stop and consult the minutes at any time she could do so. The Head Teacher made a presentation and it was noted that the claimant disputed that she had been employed at Hendon Brook School since 27 October 2003 as she has started at Miles Hill School first.

40. Mr Harrison was called as a witness but the claimant had no questions for Mr Harrison. Mrs Sutton from HR asked a number of questions regarding quite small matters such as the fact that he reported thirty of the Police Officer's friends were contacted whereas it was now said to be forty nine, he explained this was because the facebook message was still circulating.

41. The claimant was able to ask questions of the Head Teacher. The claimant said why was she suspended her when there had been no convictions and suggested it was an infringement of her human rights under Article 8. Mrs Fielding replied that her behaviour was not compatible with employment at Hendon Brook as outlined at item 7 of the school's code of conduct. The claimant said she had not signed the code of conduct and it was clarified that all employees of the school are bound by it. The claimant reported the laptop was never seized by the police, she thought it had been taken but then realised they had only taken the family's IT equipment. The claimant stated she would not be asking questions as in doing so she could be in contempt of court.

42. The Head Teacher was questioned by the committee and clarified that the allegations were brought to the attention of the Head Teacher confidentially. She was asked whether there was any requirement to bring the PND notice to the attention of the school when there was no admission of guilt. The Head Teacher said she believed it came within 7(10) to notify the Head Teacher of any known or suspected breaches of the law or of the school policies etc. She explained that an enhanced DBS may disclose a PND matter and that item 7 under personal conduct reiterated all staff were expected to conduct themselves on an off duty manner compatible with their employment status within the school. The Head Teacher believed being drunk and disorderly contravened item 7(10) and the malicious communication breached item 7(11).

43. Regarding the code of conduct document this was given to staff at a meeting in September 2013, locally the trade union had not co-operated but later there was no objection and this had been adopted by the full committee, there was no distinct differences between the 2015 and the 2016 versions. She confirmed that the claimant had told her that the Police had seized the school laptop however she changed this on 1 March and said they hadn't, there was an entry on the police inventory for the arrest which did match the description of the school laptop as the school laptop was an Acer and the inventory showed an Acer had been seized by the Police. She confirmed there had been a live sanction on the claimant's record at the time of her conviction but not at this point in time.

44. The claimant raised the following points. She had been informed the whistle blower was not a staff member so how could this be dealt with under the whistle

blowing policy, the Head Teacher advised she was not at liberty to disclose the informant. The claimant submitted that regarding the school laptop it was not included as she had brought it into school for inclusion in the school's audit on 6 November 2015; That Chief Inspector Wendy Boyle was currently investigating how the school obtained documents from Court files while there was still an appeal ongoing. She stated on the advice of her solicitor she could not disclose anything linked with the court case and had requested a copy of the consent by the witnesses to have their statements released.

45. With regards to the sentence it had been relayed to her in layman's terms and this is how she had reported it to the Head Teacher. She believed she only needed to disclose if a charge or conviction had been made and this was undertaken immediately on 3 January 2016. She said that the fine she had been given was £60 which was not accepted, she did not sign to accept it. She was unaware she had to disclose the drunk and disorderly as she was not convicted of anything. Regarding the malicious communication the school laptop was not seized. On 11 January she had not been charged with malicious communication at that juncture, regarding not being truthful on 11 January she disputed this, she felt the conversation had taken place at a later date, she said she had made a complaint regarding professional standards, unlawful arrest and it was being investigated. She reported she did not send an email. She said she was found guilty on 7 October not 4 October and due to the ongoing appeal she was unable to discuss it further.

46. There were further questions for the claimant and she clarified the following:-

(1) she did not send an email and she did not accept she indicated otherwise during the investigation meeting on 1 March. Referring to the 11 January and the allegation she did not tell the truth she was sure she had told the Head Teacher about the Facebook messages and had no reason not to disclose everything.

(2) in response to this the Head Teacher and Miss Duckworth referred to questions 16 from the notes of the investigation meeting. The question was "why did you tell me that the reason why you had been arrested was for sending an email to the Police citing your intention to complain about their treatment of you on 24 October 2015 and not because of your Facebook messages" and the answer was "* can't remember the conversation and have nothing in writing to refer to but a complaint was lodged in 2015".

(3) when referring to the school's code of conduct the claimant reported she could not remember the reason for not signing the original copy but it was on the advice of the union, she reported she had a copy of the original document somewhere and Mrs Sutton advised she could send a copy to the clerk, i.e. if she believed that this said something different from the one being currently used.

(4) she agreed that as an employee she would be expected to work within the code of conduct and accepted the document was accessible in the school on the portal.

(5) at this point in response to a question from Mrs Sutton regarding allegation 7 the Head Teacher explained that she did not have a thorough understanding of the judicial system and therefore had sought advice and clarification was provided by the claimant that her sentence was for four months suspended for twenty one months. The Head Teacher stated that the claimant had not disclosed her arrest or conviction as expected of employees and it was directed in the code of conduct. The disciplinary procedure may be considered in relation to misconduct, criminal conviction and caution that she had stated that the laptop had been seized by the Police but had since changed her statement, that the malicious communication had been proved to be fact and was an intrusion into the police office's private life. That the conduct of the claimant was extremely serious and was not compatible with the behaviour expected of employees at the school.

47. The claimant said she believed there was a breach of Article 8 of the Human Rights Act (the right to a private life). The requirement of the code of conduct advised the employer should be informed once the employee had been charged with an offence and she had done this. She did not send an email to the Police, a telephone call was made. She understood a PND was the same as a parking fine and would not be included on an enhanced disclosure. The conviction was still subject to full determination and she had appealed against the decision. She could not provide further comments as she may prejudice the outcome of her appeal. She had given fourteen and a half years service to the school and had always worked to the best of her ability.

48. There was an argument then about what happened as the minutes said that the claimant decided not to stay when she was told that the decision might not be finalised for some time. The respondent disputed this. The claimant implied that she had been duped into leaving whilst the head teacher stayed but there was no evidence that the head teacher's case was advanced by this even if it was true.

49. The panel concluded that allegation 1 was substantiated and constituted serious misconduct for which there should be a final written warning, allegations 2 to 6 when considered individually or together all were substantiated and constituted gross misconduct for which the claimant should be summarily dismissed. Allegation 7 was not substantiated as this was a misunderstanding or mis communication.

50. A letter was sent to the claimant on 19 May giving the outcome of the hearing. The letter noted that the claimant had received a warning on 22 September 2016 but they had discounted this as the misconduct predated the issue of a first written warning. The committee noted that although the claimant said she could not discuss anything because of her ongoing appeal they had received legal advice that the investigation could proceed without prejudicing her appeal. In respect of allegation one they said this was serious misconduct as this was not the standard of conduct expected of employees of Hendon Brook School. The conduct was detrimental to the reputation of the school.

51. In relation to allegations two and six the panel concluded "there is no dispute that you did not notify the Head Teacher of the fact you had been arrested for being drunk and disorderly or being detained in custody or being issued with a PND, although you later told the Head Teacher when she asked you about this that you were arrested for being drunk and disorderly however you did not disclose an issue with the PND". It was noted that no admission of guilt is required to give a PND and that the liability is discharged when the penalty is paid. According to the Hendon Brook code of conduct all staff are expected to notify the Head Teacher or any known or suspected breaches of the law. The committee considered whether or not the non disclosures detailed above were serious or gross misconduct, whilst the code of conduct says will be considered as a serious acts of misconduct the committee formed an honest and reasonable belief in the balance of probabilities that you chose not to disclose your arrest or the fact that you were issued with a PND, they concluded on the balance of probabilities this amounts to a more than serious misconduct and constitutes gross misconduct.

52. Allegation three. You were arrested for malicious communication on 30 October and the Police seized electronic equipment. The committee believed the Head Teacher's account that you confirmed the laptop had been seized by Police on 30 October and that subsequently you retracted this.

53. In relation to allegation four it was confirmed that the committee believed you did not disclose being arrested for suspected malicious communication or disclose to her the Police had seized electronic equipment. On 11 January 2016 the Head Teacher asked you during a meeting about reports she had received to say the Police had been to your home and arrested you, you disclosed two arrests, one for drunk and disorderly and one on suspicion of malicious communication. However, you did not advise that it was for malicious communication. The respondent again quoted paragraph 7(10) - a suspected breaches of the law. They also referred to 7(11) - disclosing criminal charges or convictions. Again they referred to the fact the code of conduct said it was a serious act of misconduct but they believed it was gross misconduct.

54. Allegation five. She was not truthful on 11 January when the Head Teacher specifically asked her about the alleged malicious communication and that she had said you had sent an email to the Police regarding your treatment on 24 October informing them you were going to make a complaint and did not mention or disclose Facebook messages. It also noted the claimant's answer to question 16 and they preferred the Head Teacher's account of the conversation on 11 January and therefore they concluded that the claimant was not truthful and attempted to deceive the Head Teacher.

55. In respect of allegation six the claimant had refused to answer any questions and they concluded it was the view of the committee that "your behaviour towards a member of the Police Force and the broader communication to several of her Facebook friends is wholly unacceptable, it is clear from the Police statements that you have caused a great deal of distress from your actions, neither have you shown any remorse for your actions, the schools adopted policy on the use of social networking sites says that when using social networking sites employees advised

they do not conduct or portray themselves in a manner which may bring the school into disrepute or bring into question their appropriateness to work with children and young people. The committee considers your conduct falls far short of these reasonable standards of behaviour. They note you have been convicted, the committee believes the communications were malicious and would be of the view whether or not you have been convicted of a criminal offence of malicious communication. In all school settings pupils have significant additional educational needs and as such every employee of the school must set a good role model for good behaviour and responsible citizenship both within the school setting and the community it serves. The committee believes you have brought Hendon Brook into disrepute through your actions. Their decision was in relation to allegations two to six above the committee concluded your misconduct was of such a nature that it fundamentally breaches the contractual relationship between you and your employer and as such amounts to gross misconduct. The unanimous decision is that you be summarily dismissed from your position as School Business Support Officer with effect from Wednesday 10 May on the grounds of gross misconduct.

56. They found allegation seven not proven and advised her of her right to appeal. The claimant's grounds of appeal which she submitted on 1 June were as follows.

57.

- (1) She challenged who had reported her as it was described as a bystander however she said there were no bystanders on 24 October.
- (2) That there was no legal power to use material taken from a criminal investigation in her discipline and dismissal, that the material was unlawfully obtained.
- (3) That there was a violation of her Article 8 convention rights entitling her to a private life.
- (4) In relation to allegation two that the policy stated that the school should be notified if charged with an offence.
- (5) With reference to paragraph 7(10) all staff are expected to notify the Head Teacher of any known or suspected breaches of the law. She said she understood this referred to breaches within the school setting which is why the section referred to the whistle blowing policy.
- (6) Regarding the school laptop. The audit showed that the laptop was present on 6 November and also she believed it was present in December although this audit was not available. She said the IT technician could confirm this and therefore it hadn't been seized by the Police but the Acer seized belonged to a family member.
- (7) That she had told the Head Teacher immediately she had been charged on 30 January in line with procedures.

(8) That she was truthful about the arrest in January 2016 and did not attempt to deceive the Head Teacher. She did phone the Police regarding her treatment on 24 October.

(9) re-iterating points two and three.

(9) She complained that the outcome of the hearing had not been posted to her within five days in accordance with the school's disciplinary procedure and that she should be notified by the Director of Children's Services which to date she still had not been notified.

(10) She queried the minutes and said there was a lot of inaccuracies in the minutes and she wanted to use a Dictaphone at the appeal hearing. She did not specify what those matters were.

58. An appeal hearing was arranged for 7 July which Miss Harrison was the Chair. Again Mr Harrison attended as a witness but the claimant only asked him why he had attended as the court case was irrelevant to her role at the school and did not affect her competency at work. He explained he had just been asked to attend on advice from HR. The claimant again did not suggest he had told the judge the claimant was going to be dismissed. The claimant was invited to ask any questions of the Head Teacher and she asked the same question she had asked Mr Harrison, the Head Teacher said that the claimant was the first point of contact in the school and a huge part of her role was communication. It was relevant as she faced charges of malicious communication. When questioned further she said that the statements obtained by the Police were received and obtained by secure email and were password protected. HR had contacted the Disclosure Unit and had obtained the authorisation of witnesses; there was some parts of the statement which had been redacted. The questions asked at the investigation were necessary to establish whether the alleged behaviour was compatible with employment at Hendon Brook as outlined in item 7 of the school's code of conduct and also to make the decision as to whether there was a need for the case to be brought before the disciplinary and dismissal committee.

59. In response to questions from the committee the Head Teacher clarified the following:

(1) It was confirmed that no other informal/formal discussions had taken place other than those meetings which had been minuted.

(2) That Ms Evanshaw was given the opportunity to make amendments, annotate the notes of the investigation meeting but she did not do so or return a signed copy as requested.

(3) That the LCC code of conduct had been adopted by the full committee at Hendon Brook School and was available to all employees on the portal.

(4) That she had been advised by HR representative to terminate Ms Evanshaw's contract with immediate effect. (It was clarified at the hearing that this was simply an instruction to send a letter out to that effect to payroll).

60. The claimant made the following points at the appeal:-

(1) She said that she felt there had been a breach of data protection and that the circulation of witness statements should not have been allowed by the Police.

(2) That her appeal against her sentence and the conduct of her trial had been made and was currently under investigation and she could not share any further details at present.

(3) No details of the outcome of the trial had been published, she had not brought the school into disrepute and this would not affect her ability to carry out her duties in school.

(4) That her employment should have been terminated by the Children Services Authority and she had been sent no notice by them. HR explained at this point that the outcome letter as it was issued by Lancashire County Council constituted being served by notice by the CSA as it was the same authority.

(5) The termination letter was received outside the procedural time scales.

(6) The disciplinary and dismissal proceedings had been amended and typed after she had been suspended. It was confirmed that the procedures issued by LCC had been adopted by a full committee at Hendon Brook School and the only change between the 2015 and 2016 version was the date, a copy had been sent out with the suspension letter and each communication since.

(7) The outcome of her hearing and appeal were pre-determined as she had been told by a member of staff that her desk and office had been cleared of her belongings.

61. Questions to the claimant elicited the following responses - that she did not accept Mr Harrison's version of the trial proceedings which she felt was totally inaccurate, she did not provide a statement regarding the removal of her belongings from the school office as she did not want to put other members of staff in jeopardy. She explained the nature of her role, she confirmed she had been suspended on full pay for fifteen months. She pointed out that the procedures stated that disciplinary measure would not automatically be taken in cases of criminal prosecution, conviction or caution. She said at the meeting on 11 January she had not disclosed she had been arrested as she believed disclosure was only necessary when charged with an offence.

62. The Head Teacher's summing up was that she had not disclosed her arrest or convictions expected of employees and directed in the code of conduct and disciplinary procedures. She said the laptop had been seized but had since changed his statement. Mr Harrison had attended court where malicious communication had been proven to be a fact and deemed to be an intrusion into the Police Officer's private life, that the conduct of the claimant was extremely serious and was not compatible with the behaviour expected of employees of the school.

63. The claimant stated she would like the committee to consider all the points she had raised and felt it had been unnecessary to suspend her for fifteen months as there was no potential risk or harm. That she had never received an appraisal and she objected to the point about the laptop as it was never seized and the audit showed that it was present in the school.

64. The appeal outcome was confirmed by a letter of 10 July. The letter commented in general that they were satisfied a fair and reasonable investigation had been conducted by the Head Teacher and that the claimant had been given sufficient opportunity to respond to the allegations and offer mitigation. In respect of allegation one of being drunk and disorderly etc on 24 October the committee agreed that the conduct was serious misconduct and upheld the outcome to issue a final written warning. Regarding allegation two the committee noted paragraph 7X of the code of conduct, the requirement to notify the Head Teacher of any known or suspected breaches of the law. It was clear she had failed to do this and the appeal committee agreed it was an act of gross misconduct. Allegation three was deemed to be factually correct. In relation to allegation four under 7(10) she was obliged to notify the Head Teacher of her arrest as this constituted a known or suspected breach of the law. They concluded the offence was wholly relevant to her duties as a Business Support Officer quoting Annex 1 of the school disciplinary procedure. Regarding allegation five that she was not truthful on 11 January about the nature of the malicious communication they considered that all the information presented established an honest belief on the balance of probabilities that this was an attempt on her part to conceal the truth from the Head Teacher which was an act of gross misconduct. They noted allegation six regarding the guilty verdict they noted legal advice was it would not prejudice her appeal to answer the questions at the disciplinary hearing and that it was a matter of fact that she sent the Facebook messages. The committee concluded that her behaviour fell significantly short of that of an employee of Hendon Brook School bearing in mind the needs of the pupils and the nature of her role. It was agreed it was an act of gross misconduct as it was a fundamental breach of trust and confidence and the decision was upheld. Accordingly her appeal was dismissed and she had no further right of appeal.

The Law

Unfair Dismissal

65. Section 98 of the Employment Rights Act 1996 sets out the relevant law on unfair dismissal. It is for the employer to show the reason for dismissal, or the principal reason, and that the reason was a potentially fair reason falling within

section 98(2). Conduct is a potentially fair reason for dismissal. In **Abernethy v Mott, Hay & Anderson [1974] CA** it was said that:

“A reason for the dismissal of an employee is a set of facts known to the employer or it may be of beliefs held by him which caused him to dismiss the employee.”

66. Once the employer has shown a potentially fair reason for dismissal a Tribunal must decide whether the employer acted reasonably or unreasonably in dismissing the claimant for that reason. Section 98(4) states that:

“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 sufficient reason for dismissing the employee; and
- (b) shall be determined in accordance with equity and the substantial merits of the case.”

67. In relation to a conduct dismissal **British Home Stores Limited v Burchell (1980) EAT** sets out the test to be applied where the reason relied on is conduct. This is:

- (1) Did the employer genuinely believe the employee was guilty of the alleged misconduct?
- (2) were there reasonable grounds on which to base that belief?
- (3) was a reasonable investigation carried out?

Some other Substantial Reason

68. Section 98(1)(b) provides a final potential admissible ground of dismissal namely "some other substantial reason" ("SOSR"). It provides a residual potentially fair reason where the other categories do not fit the reason for dismissal. SOSR must be of such a kind as to justify the dismissal of an employee holding the job in question, it needs to be a substantial reason and genuine. In **Harper -v- National Coal Board (1980) EAT** the EAT said an employer cannot claim that a reason for dismissal is substantial if it is whimsical or capricious reason which no ordinary person would entertain however where the belief is "one which is genuinely held and particularly is one which is most employers would be expected to adopt it may be a substantial reason even where modern sophisticated opinion can be adduced and suggests that this has no scientific foundation". Once a reason has been established it is up to the Tribunal to decide whether the employer acted reasonably under Section 98(4). It is often used in a situation where trust and confidence necessary for the employment relationship to function has broken down irremediably.

The distinction has to be drawn between the breakdown in the relationship and an individual's part in that breakdown, if there was blameworthy conduct it is likely the case should be considered as a conduct matter.

Criminal Offences outside employment

69. In **Singh -v- London Country Bus Services Limited (1976) EAT** it was accepted that conduct outside work could be the basis of a dismissal "so long as in some respect or other it affects the employee or could be thought to be likely to affect the employee when he is doing his work". Consideration needs to be given to what effect the charge or conviction of a criminal offence has done to the employee's suitability to do the job and his or her relationship with the employer/work colleagues and customers (ACAS code of practice on disciplinary and grievance procedure). Types of offence most commonly affecting the employment relationship are sexual conduct, violence or dishonesty. The nature of the respondent's business, the potential effect on the business and relationships with fellow workers, the employee's length of service and status all need to be taken into account. The potential damage to employer's reputation is also an important factor, particularly where public service employees are concerned.

Human Rights Act 1998

The claimant submitted that was against her human rights to dismiss her for a matter which had occurred in her private life (Article 8). Courts and tribunal must interpret domestic legislation in way which is compatible with the European Convention on Human Rights, as far as it is possible to do so. It has been accepted that the 'whether it was reasonable to dismiss' test captures all the relevant considerations for consideration of whether there has been a proportionate interference with Article 8 rights.

Range of reasonable responses

70. In respect of deciding whether it was reasonable to dismiss **Iceland Frozen Foods Limited v Jones [1982]** states that the function of the Tribunal:

"...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."

71. The Tribunal must not substitute its own view for the range of reasonable responses test.

Fair Procedure

72. In respect of procedure, the procedure must also be fair and the ACAS Code of Practice in relation to dismissals is the starting point as well as the respondent's own procedure. In **Sainsbury's PLC v Hitt [2003]** the court established that:

"The band of reasonable responses test also applies equally to whether the employer's standard of investigation into the suspected misconduct was reasonable."

73. In addition, the decision as to whether the dismissal was fair or unfair must include the appeal (**Taylor v OCS Group Limited [2006]** Court of Appeal). Either the appeal can remedy earlier defects or conversely a poor appeal can render an otherwise fair dismissal unfair.

Polkey

74. In addition, if it is found that the claimant's dismissal was unfair, in relation to remedy the following issues must be considered (**Polkey v A E Dayton Services [1988]**). If the Tribunal finds there was a failure to adopt a fair procedure and the consequence was that dismissal was unfair then the Tribunal can consider whether, had a fair procedure been followed the claimant would still have been dismissed? If the procedure failings were so severe that no reasonable employer acting reasonably would have dismissed the claimant then **Polkey** does not act to reduce any compensation.

75. In **Software 2000 Limited v Andrew & others [2007] EAT** the President of the EAT reviewed all the authorities on the application of **Polkey** and summarised the principles to be extracted from them. These included:

- "In assessing compensation for unfair dismissal the Employment Tribunal must assess the loss flowing from that dismissal which would normally involve an assessment of how long the employee would have been employed but for the dismissal.
- If the employer contends that the employee would or might have ceased to be employed in any event had a fair procedure been adopted, the Tribunal must have regard to all the relevant evidence including any evidence from the employee.
- There will be circumstances where the nature of the evidence for this purpose is so unreliable that the Tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made.
- However the Tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation even if there are limits to the extent to which it can confidently predict what might have been. It must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

- A finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can be effectively ignored.”

76. The President stated that:

The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example there may be insufficient evidence or it may be too unreliable to enable a Tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the Tribunal to conclude that on any view there must have been some realistic chance that he would have been some. Some assessment must be of that risk when calculating the compensation even though it will be difficult and to some extent a speculative exercise.”

Contributory Conduct

77. Section 123(6) of the Employment Rights Act 1996 says:

“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...compensation award by such proportion as it considers just and equitable.”

78. There must be a causal link between the blameworthy conduct and the dismissal.

Wrongful Dismissal

79. Any dismissal by the employer in breach of contract can give rise to an act for wrongful dismissal, common law, for example dismissal with no notice or inadequate notice were summary dismissal was not justifiable is a classic case therefore it has to be established there was repudiatory conduct by the employee justifying summary dismissal. In order to amount to a repudiatory breach the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract, *Laws -v- London Chronicle (Indicator Newspapers (Limited))* 1959, an employer placed with such breach by an employee can either affirm the contract and treat it as continuing or accept the repudiation which results in immediate i.e. summary dismissal. The employer must be able to prove there was a repudiatory breach in order to justify summarily dismissing an employee, it is not enough for the employer to prove that it had the reasonable belief that the employee was guilty of the misconduct, the Tribunal must be satisfied both that the employee committed the misconduct and that it was sufficiently serious to amount to repudiation, *Sure -v- BMW Group Limited* EAT 2011.

80. This is a different standard to unfair dismissal where a reasonable belief may suffice. The Court of Appeal in *Briscoe -v- Lubrizol Limited* 2002 approved the test set out in *Neary and Others -v- The Dean of Westminster* 1999 ECJ Special Commission where the Special Commissioner asserted that the conduct "must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee's employment. Many factors however may be relevant including the nature of the employment and the employee's past conduct, it can be relevant whether the misconduct in question has been designated as something warranting summary dismissal in the respondent's own disciplinary process (however it was not here).

81. It is well established that certain actions such as dishonesty, serious negligence and wilful disobeying a lawful instructions justify summary dismissal and common law but there are few hard and fast guidelines as attitudes change over time.

82. Where dishonesty is cited as the reason for dismissal the EAT is held that the best working test is to be found in the case of *R -v- Ghosh* 1982 Court of Appeal which is that:-

(1) was the employer's conduct dishonest according to the ordinary standard of reasonable and honest people;

(2) must the employer have realised that his or her actions were dishonest by that standard;

Conclusions

83. There were four allegations of misconduct relied on to justify a fair dismissal: allegations 2 to 6.

Misconduct

84. The claimant was in breach of the social media policy contained in the personal conduct section in respect of her facebook messaging, that could be considered as a misconduct issue .

85. Once reported a conviction could be considered under the disciplinary policy as a misconduct issue.

86. Dishonesty was a misconduct issue

87. Regarding breaches of the respondents Code of Conduct :I have considered the points the claimant raised. The claimant raised points regarding the school's code of conduct and whether this was in place at the time of her transgressions and before she was suspended, she had no evidence that it had been altered from the copies she had been sent as part of the school communicating with its workforce a standard code of conduct used in most Lancashire schools. The school had

evidence there were no changes to it and I have accepted that the code of conduct the claimant was sent was the same. The school had no date to establish when it was adopted but there was some opposition initially from the local trade union representative but this was quashed by the regional representative who advised that as it was the same code of conduct adopted throughout Lancashire there was no reason for objecting to it. I am satisfied therefore that this code of conduct was in place at the time of the relevant events.

88. The claimant however raised a further moot point as to whether 7(10) was meant to cover breaches of the law if occurring within the school environment rather than any breach of the law as the clause refers to the whistle blowing policy which is concerned with school related matters. The actual wording itself however suggests that it is any breach of the law not just those occurring within the school.

89. In addition the claimant says that she was only required to report charges or convictions under 7(11) It was however in my view reasonable at the time for the claimant to believe 7(11) would not apply in these circumstances and that she only had to report actual charges or convictions for criminal offences which she in fact did albeit this was only because it had already been raised with her on 11 January, but on 11 January she had not been charged with anything and therefore she was certainly not in breach of 7(11).

90. Therefore it was reasonable to believe the claimant was in breach of 7(10) but not 7(11).

91. As the code of conduct made clear breaches could be dealt with under the School's disciplinary policy it was reasonable to consider the matters as a conduct issue.

BHS v Burchell

92. First I have to consider whether the respondents have established that the claimant was guilty of misconduct in the light of BHS -v- Burchell test. Regarding allegations two, four and six these were agreed to be factually correct and I cannot see that any issue arising on the BHS vs Burchell test in these circumstances.

93. In respect of allegation three I find that the respondent did not have sufficient information to reasonably conclude that the claimant was guilty in respect of the laptop issue, the claimant produced evidence to show that it was included in school audits in November and December which was good evidence that the Police did not have possession of it and that it was likely the Acer Laptop belonged to a member of the claimant's family. Further by itself this would only be a matter of misconduct not gross misconduct unless there was an element of lying involved. I therefore discounted this allegation.

94. Allegation number five regarding the events of 11 January was a matter which required consideration. This was dependent on the panel preferring the Head Teacher's evidence to the claimant as there was no note of the conversation on 11

January. The Head Teacher's evidence was clear and was recorded post hoc in the report for the dismissal committee and in the disciplinary investigatory interview with the claimant on 1 March. The most the claimant says is that she thought she told her (the Headteacher) about the Facebook messages. I have found this is inherently improbable as the Head Teacher without doubt would have asked for a copy of the Facebook messages, how many people it had been sent to etc and there is no evidence whatsoever of any discussion of that nature. Accordingly in the circumstances and considering that there was evidence the claimant was not credible in any event then the panel both the disciplinary and the appeal were entitled to conclude that the claimant was guilty of lying to the Head Teacher on 11 January and deliberately so to cover up the true nature of the accusations against her which involved much more reprehensible conduct than simply complaining about her treatment on the 24 October. The witnesses agreed that had the claimant just sent an email setting out how she felt she had been mistreated on 24 October, as she had claimed she did when questioned on 11 January, she would have been perfectly within her rights and no issue would have arisen with the school. The respondent was entitled to prefer the head teacher's evidence over the claimant's as it was supported by her later report. Accordingly they meet the BHS and Burchell test.

Procedural issues

95. I find it was not a procedural defect to proceed before the criminal appeal was determined (insofar as the claimant argued this) The claimant refused to answer any questions (on what turned out to be spurious grounds) that she could not do so while her appeal was pending, (although she knew by this stage that her appeal had been rejected, that she had parted company with her solicitor/legal adviser and barrister and in fact actually said her barrister had told him never to contact him again and therefore it was not true to say that she had got legal advice not to answer any questions regarding the offence whilst the appeal was pending).

96. The respondents whilst they did not know these facts at the time did obtain legal advice that they could proceed whilst an appeal was pending and it was reasonable of them to go ahead in the circumstances on the basis of the evidence they had. Particularly in circumstance were they had paid the claimant on suspension for nearly a year by the date of her dismissal.

Range of reasonable responses

97. Was it within the range of reasonable responses to dismiss the claimant for allegations two to six? I find it was reasonable to dismiss singly and/or collectively for allegations five and six.

98. Allegation 5 was a potentially gross misconduct issue on the basis of dishonesty. The claimant had been reasonably found to have lied to the Head Teacher on 11 January in order to deliberately conceal the nature of the malicious communications I find it is within the range of reasonable responses for the reasonable employer to dismiss for that alone. Lying to the Head Teacher would be an 'offence of dishonesty' as referred to in the disciplinary policy.

99. Allegation 6 it would also have been reasonable within the range of reasonable responses of a reasonable employer to dismiss for the conviction of malicious communication. The respondents own enquiries supported that she had in fact sent these Facebook messages and therefore they did not just rely on Mr Harrison's report or the conviction itself. They also addressed their mind to whether the conviction was relevant to the actual nature of the claimant's job. Her role required her to be the front face of the school and to liaise with various bodies including parents and children, particularly sensitive given that the children had emotional and behavioural difficulties. Moreover her role required the use of technology and she had misused social media, contrary to the respondent's policy.

100. In addition it had the potential to damage the school's reputation, I have no doubt that had the facts of this case been reported which luckily to date it has not been there would be considerable parental disquiet at the continued employment of the claimant and that the school's reputation would be damaged.

101. It was a matter which established dishonesty and ill judgment, conduct understandably which undermined the respondent's trust and confidence in the claimant, trust and confidence was required for the claimant's role and the dishonesty and lack of judgment undermined the confidence the respondent could have in the claimant to undertake her job properly in the future.

102. I have considered the Article 8 issue. Firstly I do have doubts if article 8 is engaged where the claimant was sending out offensive messages to individuals she did not know. In relation to that individual she was informing them about her private life, therefore she chose to make those matters public. Accordingly I find article 8 was not engaged. However if it was, the respondent has undertaken a balancing exercise – their own disciplinary policy recognises that not every offence will lead to disciplinary action or dismissal and they carefully considered whether the issue was sufficiently connected with the claimant's role to justify dismissal. Accordingly the requirements of the 1998 Act are met.

103. Accordingly I find that the respondent's decision to dismiss the claimant was in respect of the 11 January incident and the actual conviction within the range of reasonable responses and that therefore the dismissal was fair.

104. In relation to SOSR my finding would be the same, these were matters which undermined the respondent's trust and confidence in the claimant, they followed a fair procedure and it was fair to dismiss for the reasons given above.

Wrongful Dismissal

105. In respect of this claim considering the advice given in the case of R v- Ghosh I would find that the employee's conduct was dishonest, both in lying to the Head Teacher on 11th January and in sending out the malicious communication referring to

rape when there was no evidence of rape until this was mentioned at the claimant's criminal trial where she was clearly disbelieved by the Jury. In the context of a school for vulnerable children and in a forward facing role the claimant had committed a repudiatory breach as she could not be trusted going forward. The respondents did not wholly rely on the conviction but they also had the Police statements and Mr Harrison's report and therefore were reasonable in the steps they took before drawing the conclusions regarding the claimant's actions that there was a repudiatory breach..

106. Accordingly the claimant's actions were sufficient to justify summary dismissal and the claim of wrongful dismissal also fails.

Employment Judge Feeney

Date: 6TH February 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

8 February 2018

FOR THE TRIBUNAL OFFICE

[JE]