



EMPLOYMENT TRIBUNALS

Claimant: Mrs L Wordsworth

Respondent: Manor House School Limited

Heard at: Nottingham

On: Monday 25, 26, 27 and 28 September 2017

Before: Employment Judge Blackwell (Sitting Alone)

Representation

Claimant: Mr I Cartwright of Counsel

Respondent: Miss R Dickinson of Counsel

RESERVED JUDGMENT

1. The claim of unfair dismissal is upheld but:-
 - (a) Pursuant to Section 122(2) of the Employment Rights Act 1996 it would be just and equitable to reduce the amount of any award by 50%;
 - (b) Further pursuant to Section 123 subsection (6) it would also be just and equitable to reduce any compensatory award by the same 50%.
2. The claim of wrongful dismissal is upheld.

REASONS

1. Mr Cartwright represented the Claimant Mrs Wordsworth and he called the Claimant herself, Mrs P Beech, Mrs M Paumard, Mrs S R Kaushal and Mrs E A Scrine. Ms Dickinson represented the Respondent's and she called Mr A R Messent who dismissed the Claimant, Mr S Taank, the proprietor of the Respondent, Mrs T A Gaunt and Mrs F Millington-Pipe, both employees of the Respondent company. There was an agreed bundle of documents.

Issues and the Law

2. There is an agreed set of issues. As to the claim of unfair dismissal it is for the employer to prove a potentially fair reason for dismissal within the meaning of Section 98(1) and (2) of the 1996 Act. If such reason is made out then to that reason must be applied the statutory test of fairness set out in subsection 4 of Section 98:-

“(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):-

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

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

3. To that statutory law, case law has applied a number of glosses, the well known case of **BHS against Burchell** requires:-

“3.1 The employer to prove that the had a genuine belief in the misconduct complained of and;

3.2 formed that belief on reasonable grounds and after carrying out a reasonable investigation. The burden of proof on those two requirements is neutral. It is common ground that in regard to the reasonable grounds and reasonable investigation requirements the well known test for band of reasonable responses is to be applied both to the disciplinary process and also to the decision to dismiss.”

4. That test is at the root of this decision. The test has been described seminally in the decision of Mr Justice Brown Wilkinson in the case of **Iceland Frozen Foods Limited v Jones** [1983] ICR 17 as follows:-

“We consider that the authorities established that in law the correct approach for the Tribunal to adopt in answering the question posed by Section 98(4) is as follows:-

(1) The starting point should always be the words of Section 98(4) themselves.

(2) In applying the section a Tribunal must consider the reasonableness of the employer’s conduct, not simply whether they, the members of the Tribunal consider the dismissal to be fair.

(3) In judging the reasonableness of the employer’s conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

(4) In many, 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 another.

(5) 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.”

Findings of Fact

1. Mrs Wordsworth began employment at the Manor House School as a Teacher on 5 April 1990. She progressed to become Deputy Head Teacher and at the time of her dismissal was Acting Head Teacher. Manor House School is a small independent school which up until 4 April 2014 had been a Charitable Trust with a Board of Governors. On 4 April 2014 the Respondent limited company Manor House School Limited (MHSL) whose sole proprietor is Mr S Taank acquired the school.

2. On 31 December 2014 Mrs Scrine resigned as Head Teacher and Mrs Wordsworth became Acting Head Teacher. Mr Taank made a number of unsuccessful attempts to recruit a replacement for Mrs Scrine until the eventual appointment of Mr Messent on 2 October 2015.

3. In April 2015 Mrs Wordsworth became the Designated Safeguard Lead (DSL) and attended training in that role together with her deputy Mrs Fiona Millington-Pipe.

4. On 7 July 2015 there was an emergency inspection of the school by the Independent School Inspectorate (ISI).

5. On 22 September 2015 a report which was critical of the school was received from ISI.

6. On 24 November 2015 an investigation began into Mrs Wordsworth's conduct which investigation was carried out by an independent HR consultant a Mrs Jane Reid. The report begins at page 277 of the agreed bundle and 2 allegations are put to Mrs Wordsworth as follows:-

“1. An allegation of purchasing or allowing to be purchased new school stools without authorisation.

2. An allegation of failing to fulfil your safeguarding responsibilities within the school leading to an unsatisfactory outcome of an inspection.”

7. Mrs Wordsworth was interviewed on a number of occasions and at considerable length (see pages 277 to 292).

8. There were a number of appendices to the report including minutes from the Friends of Manor House School (FMHS). In particular at page 295 appears under any other business of the minutes of the minutes of 9 October 2015 the following:-

“Purchase of stools for cookery room – we were made aware that stools were required within the cookery room to enable all students to be seated whilst being taught.

The committee felt this should be funded by the school and Mrs Wordsworth agreed and said that these could be purchased from school funds that we were holding on their behalf. The total cost would be £192 for 6 stools.”

9. Mrs Reid also interviewed Mrs F Millington-Pipe who was Mrs Wordsworth’s Deputy in the safeguarding role. Also interviewed was Mrs Gaunt whose role was to look after the school’s administration and in particular the administration of its finances.

10. Mrs Reid also sought assistance from Ms J Burns who had been appointed by Mr Taank in January 2015 in a consultant role. Mrs Burns was a very experienced Head Teacher and had also been an inspector with the Independent Schools Inspectorate. She was interviewed in relation to the second allegation concerning safeguarding.

11. It is not clear who decided that the consequence of the investigation should lead to disciplinary proceedings. However at 364 on 13 January Mrs Wordsworth is summoned to a disciplinary hearing by Mr Messent the newly appointed Head Teacher. The allegations have been expanded as follows:-

“Your involvement in misappropriating funds raised through school activities (summer fete) into an account held by FMHS and failing to disclose the amount of these funds to the school proprietor in order that they could be accounted for in an appropriate manner.

Your involvement in influencing/authorising the use of school and/or FMHS and/or other third party funds in the sum of £192 for the purchase of stools in the cookery classroom despite knowing you had no financial authority in respect of the school and that Mr Taank had refused such a purchase when a request was made by Claire Mayles, thereby undermining his authority.

Your failure to fulfil your responsibilities as designated safeguarding lead following your training in April 2015 – specifically to communicate new regulatory guidance to staff (working together to safeguard children – March 2015) in a timely manner; to follow up on cases as advised by inspectors during their visit in July 2015; and to update the safeguarding policy which contributed to the ISI identifying the regulations of the Welfare, Health and Safety Pupils Safeguarding (ISSR Part 3 paragraph 7(1) and (b)) has not been met during their inspection on 7 July 2015 as evidenced in their report received on 23 September 2015.”

12. The letter enclosed Mrs Reid’s investigation report and appendices. The letter went on:-

“You are advised that if the allegations are believed to be proven it will be considered gross misconduct under the company disciplinary rules and your employment may be summarily terminated.”

13. The disciplinary hearing took place on 25 January 2016 and the notes begin at page 398. Mrs Wordsworth was represented in the hearing by a solicitor who introduced on behalf of Mrs Wordsworth a statement by Mrs Kaushal, the then Chairman of FMHS and also provided further minutes of the FMHS committee. In my view the intervention of Mrs Kaushal was counter productive and had the effect of confusing rather than clarifying.

14. On 22 March the Claimant resigned in a letter of that date (see page 456) indicating that she would work her notice ie to the end of August 2016.

15. On 28 April 2016 Mr Messent wrote to Mrs Wordsworth a lengthy letter of dismissal (pages 458 – 463) which upheld all of the allegations and determined that dismissal was an appropriate sanction.

16. On 3 May 2016 Mrs Wordsworth appealed by letter beginning at page 470. The significant grounds of appeal in summary were that Mr Messent had not given sufficient consideration to Mrs Wordsworth's evidence, that dismissal was too harsh a penalty, that Mr Messent took into account in dismissing Mrs Wordsworth matters such as alleged breaches of confidentiality which were never put to her and that her 25 years of exemplary service had been given insufficient weight.

17. The appeal was acknowledged and an appeal hearing took place on 31 May 2016 and was heard by Mr Taank the proprietor. Again Mrs Wordsworth was represented by her solicitor. I should note that due to an oversight on the part of her legal advisers, an agreed amended version of the disciplinary minutes of 25 January which should have been provided in February were not so provided until after the decision to dismiss but Mr Taank agreed to take the amended minutes into account in hearing the appeal. It does not seem to me that the amendments to the disciplinary minutes are of any great significance. However Mr Taank did agree to have regard to them. The agreed appeal notes begin at page 514.

18. There was then a very considerable delay in Mr Taank reaching his decision which emerged in the letter of 28 September 2016 beginning at page 557. He rejected all of Mrs Wordsworth's grounds of appeal and upheld the decision to dismiss.

Conclusions

Reason for Dismissal

19. As a matter of law the Respondent's advanced the conduct of Mrs Wordsworth in relation to the 3 allegations addressed by Mr Messent and set out in his dismissal letter. Mr Messent was a difficult witness though I do not believe he was being deliberately obstructive. I do however accept his evidence that the decision to dismiss was his and his alone notwithstanding that he accepted that on 5 February 2016 he had a discussion with Mrs Beech a senior member of the teaching team in which he alluded to the possibility of Mrs Wordsworth being escorted off the premises on Monday 8 February.

I have also had regard to Mr Cartwright's submissions that the real reason for the dismissal was Mr Taank's antipathy towards Mrs Wordsworth as evidenced for example in the e-mail he wrote to her on 30 March 2015 at 348/349. On balance I accept Mr Messent's evidence and I also accept that he had genuine belief that Mrs Wordsworth had committed the acts of misconduct referred to in his dismissal letter.

Fairness of the Procedure

20. In my view there are significant flaws which render the procedure adopted by MHSL unfair. The first of these emerges from the dismissal letter itself. On page 462 after finding the 3 allegations proven Mr Messent appears to take into account at paragraph 2 that Mrs Wordsworth had allegedly breached confidentiality in discussing the disciplinary affairs with Mrs Kaushal (Mackay) he goes on bizarrely to make lengthy criticisms of Mrs Kaushal. That consideration alone renders the dismissal procedurally unfair.

21. The second matter is the impartiality of Mr Taank in his role as determining the appeal. Mrs Paumard gave evidence that she made contemporaneous notes of a staff meeting attended by Mr Taank on 28 April 2015, the day on which Mrs Wordsworth's dismissal was made known. Mr Taank is quoted as saying in relation to Mrs Wordsworth:-

"There were key events leading up to an investigation. Lots of things going on for 2 years now. We retract ourselves to leave Linda a space so she can correct that. We have persevered in trying to create a working relationship with this person but have to draw a line. We will be replacing the individual."

22. Mr Taank denies making that statement. I do not believe him. I note also in the appeal hearing at page 566 Mr Taank's comments under his paragraph 8, his antipathy towards Mrs Wordsworth is plain to be seen.

23. It is clear Mr Taank could not deal with the appeal objectively and his hearing of the appeal again on its own is sufficient to render the dismissal procedurally unfair.

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24. It therefore follows that I have to consider having regard to the allegations of misconduct made, what would be the result of a fair disciplinary process. That must begin with the consideration of the interlinked questions of whether there would have been reasonable grounds to uphold the allegations against Mrs Wordsworth following a reasonable investigation. As to the first two allegations which both in my view and that of Mr Taank are linked, it seems to me that the following facts emerge from that investigation:-

(a) There were two bank accounts to be considered. The first was the account of the Manor House School Fund Raising Committee (the Fund Raising Account). That account had in the past been used to receive the proceeds of the school fete. It had been used to purchase items such as a mini bus and other items which the school could not otherwise have afforded to purchase.

(b) That account had always been at the call of the Head Teacher and its contents had been dispensed in accordance with the Head Teacher's wishes though there may have been consultation with the Governors.

(c) The last two signatories on the account were Mrs Scrine and Mrs Turland the previous Accounts Manager. On Mrs Scrine's departure on 27 March 2015 the fundraising account became unusable because there were no signatories to authorise payments out.

(d) The second account was the property of FMHS and it received the proceeds, functions organised by FMHS. The school fete though the friends assisted with it was a school function. As Ms Kaushal correctly put it both accounts held funds on trust for the pupils.

(e) Thus in June 2015 it is common ground that the fund raising account was at least for the time being inoperable.

(f) On the day of the fete all of the proceeds were in cash and were counted by Mrs Gaunt on the school premises. She handed the counted funds to the Treasurer of FMHS and those funds were then deposited into the FMHS account.

(g) It is clear both from minutes and evidence given both to Ms Reid and to Mr Messent that the proceeds of the summer fete were only paid into the FMHS account because the fundraising account was inoperable. It is further clear that those funds were ring fenced in the FMHS account.

(h) Mrs Wordsworth authorised the purchase of 6 kitchen stools for use in the school cookery lessons knowing that Mr Taank had expressly refused permission to purchase those stools out of MHSL funds. Mrs Wordsworth also accepted that she had received Mr Taank's e-mail of 30 March 2015 which expressly told her she had no financial authority.

25. Mr Messent concluded that not only had she dishonestly misappropriated school funds but that she had also acted in an insubordinate fashion in failing to obey Mr Taank's express instructions.

26. I do not see how a reasonable employer could have reached that conclusion having regard to that evidence. The funds were accounted for and the stools were purchased out of the ring fenced school fete funds. It is interesting to note that after all of Mr Taank's protestations that the school fete money should have been paid into an MHSL account, in fact when the money was accounted for by FMHS it was paid into no other account than the fund raising account. I accept by then Mr Taank had unfrozen the account by making misrepresentations to the bank. However it seems extraordinary given his evidence that everything received including the school fete money was MHSL funds that he should continue to use the fund raising account.

27. In my view judged objectively the first two could not possibly have led to a disciplinary sanction. It was clear and ought to have been clear to any objective examination that Mrs Wordsworth genuinely believed throughout, and on reasonable grounds, that the school fete funds were not MHSL funds and were to be applied to purchase items that the school could not otherwise afford. That is exactly what she did.

28. Moving to the third allegation, the facts emerging from the investigation are I think reasonably summarised in Mr Messent's dismissing letter at pages 458 - 463 though I think he perhaps places too much weight on whether or not Julia Burns should have been used to assist in the process.

29. The misconduct supported by the investigation consists principally of Mrs Wordsworth's failure to update the school's safeguarding policy in a timely fashion. There was a failure on her part to prioritise that work having regard to its great importance. The failure to do so led in considerable part to the findings of the ISI inspection which are set out at pages 317 and 318 and in the action points at 321 and 322. There were also further delays following the inspector's visit and the submission of their report in September 2015.

30. These are serious failings and without mitigating factors would almost always lead to a decision to dismiss. However there were mitigating factors which were put forward during the course of both the investigation and the disciplinary hearing.

31. The first was that at all relevant times Mrs Wordsworth was fulfilling the role of Acting Head Teacher and her substantive role as Deputy Head. It also emerged from the questions raised of Ms Burns that material from the ISI was essential to the work that needed to be done and it is common ground that neither Mrs Wordsworth nor Mrs Millington-Pipe were receiving that material, indeed it may be that the school was not receiving it. A further mitigating factor appears from the ISI report again at the beginning of page 318 and continuing over the page on 319. As Mr Cartwright put it safeguarding on the ground was found to be satisfactory arising out of interviews that had taken place with members of staff and pupils. Indeed objectively the inspector's comments are complimentary. A further mitigating factor is Mrs Wordsworth 25 years of dedicated service to the school.

32. At this point I again remind myself of the stricture not to substitute my own view for that of the reasonable employer. I also note from Mr Messent's dismissal letter at page 462 the following:-

"I stated at the beginning of this letter that this has been a long and hard decision. Your length of service would in many cases, mitigate the sanction to one short of dismissal. However I have taken into consideration several matters of fact."

33. Those matters of fact which were firstly not matters of fact are the reasons why I have found above that the decision to dismiss was procedurally unfair. It seems to me therefore that Mr Messent even with his findings of dishonesty and insubordination, would other than for those matters he should have not taken into account, would not have dismissed.

34. I therefore conclude that had a fair procedure had taken place there would have been a sanction less than dismissal.

Contributory Fault

35. The relevant provisions are Section 122 subsection 3 and Section 123 subsection 6 of the 1996 Act. It is trite law that in order for there to be a deduction for contributory conduct there must be both culpable conduct and such conduct must have caused or contributed to the dismissal. In relation to Mrs Wordsworth's failures in the safeguarding context, such were clearly culpable. They also clearly led to the dismissal. In my judgment having regard to the seriousness of Mrs Wordsworth's failings it would be appropriate for a deduction of 50% to be made both in regard to the basic and compensatory awards. In reaching that conclusion I also take account of the allegation made by Mr Taank though apparently not taking into account by Mr Messent that on the day of the emergency inspection ie 7 July 2015 Mrs Wordsworth had assured him that there were no safeguarding issues. In that contention Mr Taank's evidence is supported by Mrs Gaunt. Mrs Wordsworth denied that she would have made any such remark on the basis that once the report was to hand she would be revealed as a liar. I prefer Mrs Wordsworth's evidence.

Wrongful Dismissal

36. The test here is whether Mrs Wordsworth has committed a repudiatory breach of the contract of employment. Has there been a significant breach going to the root of the contract demonstrating that Mrs Wordsworth no longer intended to be bound by the terms of the contract? Based on the same findings as above I conclude that there was not such an anticipatory breach entitling the employer to dismiss without notice. The claim therefore succeeds and it follows that Mrs Wordsworth is entitled to the balance of her notice pay without deductions.

Remedy

37. I discussed with Counsel prior to their closing submissions the unusual circumstances of this case, namely that at the time of dismissal Mrs Wordsworth was serving her notice which it is common ground would have expired on 31 August 2016. I invited Counsel to make submissions as to how that would affect the compensatory award. Ms Dickinson submitted that the compensatory award should cease to have effect as at 31 August 2016. She further submitted that if the compensatory award were to extend beyond that period I would have to make a finding that at the point of dismissal there was evidence to support a finding that at that date there had been a repudiatory breach of the contract of employment by MHSL and further that Mrs Wordsworth had resigned as a consequence of that breach and had done so promptly without affirming the contract.

38. Mr Cartwright submitted that it would not be just and equitable for MHSL to escape the consequences of an unfair dismissal simply because of Mrs Wordsworth's resignation although in general I think he accepted Ms Dickinson's submissions.

39. On balance I agree with Ms Dickinson and on the facts before me I cannot find that there was in effect a constructive dismissal as at 22 March 2016. In her evidence Mrs Wordsworth alluded to a number of factors but the principle one seemed to be the exchange of e-mails with Mr Taank as far back as March 2015 and her general view that she could no longer work with Mr Taank.

40. There is insufficient evidence therefore in my view to find that Mrs Wordsworth was entitled to resign as at that point in response to a repudiatory breach by her employer. I therefore conclude that the compensatory award should cease at 31 August 2016. I trust given the limited nature of the issues now remaining that the parties will be able to come to terms as to the basic and compensatory awards. If not then I make the following direction.

DIRECTION

1. If agreement cannot be reached as to the amount of compensation to which Mrs Wordsworth is entitled then the Claimant is to apply to the Tribunal for a remedy hearing.
2. If there is no such application by 30 November 2017 the claims will be dismissed on deemed withdrawal by the Claimant.

Employment Judge Blackwell

Date

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS