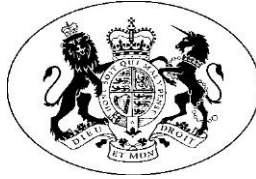


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EMPLOYMENT TRIBUNALS

Claimant: Mrs P Saleem

Respondents: (1) London Borough of Newham
(2) The Governors of Brampton Primary School

Heard at: East London Hearing Centre

On: 17 and 18 October 2018

Before: Employment Judge C Hyde (sitting alone)

Representation

Claimant: In person

Respondent: Ms S King (Counsel)

JUDGMENT having been sent to the parties on 9 November 2018 and written reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, those reasons are provided herewith.

REASONS

Preliminaries

- 1 The reasons are set out in writing only to the extent that I considered it necessary to do so in order for the parties to understand my decision in this case; and only to the extent that it is proportionate to do so.
- 2 All facts were found on the balance of probabilities.

Evidence Adduced

- 3 The Claimant gave her evidence in chief by way of a six-page witness statement [C1], and relied on a two-page witness statement of Colleen Smith [C2], who did not attend to give evidence live.
- 4 The parties had agreed the contents of a bundle, which was prepared by the Respondent and marked [R1]. It consisted of approximately 300 pages in a lever arch file. In addition, Ms King prepared a nine-page written submission which she handed in at the start of the hearing [R2]. The Respondent also prepared the agreed Cast List and Chronology, marked [R3] and [R4] respectively.
- 5 The witnesses who gave evidence on behalf of the Respondent were Kevin Jenkins, Chair of Governors, 16-page witness statement marked [R5]; Stephen Sammy, Parent Governor, 2-page witness statement marked [R6]; Maria Lewington, former Governor, 14-page witness statement marked [R7]; and Kevin Reid, Headteacher, 20page witness statement marked [R8]. All the Respondent's witnesses gave evidence live, but Mr Jenkins' evidence (other than his witness statement) was taken by way of a telephone conference call.

Relevant Law

- 6 No unusual aspects of the law on unfair dismissal were engaged in this case. The List of Issues adequately set out the legal principles to be applied.

The Issues, Facts Found and Conclusions

- 7 A complaint of unfair dismissal was brought by Mrs Perveen Saleem. It was unfortunate that the events in question occurred in 2014 but this is one of those cases in which the Claimant was initially adversely affected by the fees provisions. Her claim was subsequently reinstated. The original claim alleged race discrimination as well but the Claimant was precluded from bringing that claim by the Judgment of another Tribunal following an Open Preliminary Hearing. As noted in the reasons for that Judgment which were given by my colleague when she granted the Claimant leave to proceed with the unfair dismissal complaint, this is a case in which there are a considerable number of documents which were contemporaneously created for the purposes of an internal disciplinary process. Those documents were considered by this Tribunal.
- 8 The Claimant was employed by the Respondent as a primary school teaching assistant from September 2005 until 28 May 2014 when she was dismissed summarily. There was no dispute that the function which she carried out as a teaching assistant which is relevant for the purposes of this case was to support an autistic child in year three during the course of his school day. In order to preserve the confidentiality of the child, the pupil will be referred to hereafter a "TC". The Respondent relied on an incident which was said to have taken place on 20 January 2014 as the incident which led them to take disciplinary action.

- 9 There was no dispute that the Claimant had been dismissed by the Respondent: **section 95** of the Employment Rights Act 1996 (“the Act”).
- 10 The Claimant accepted that the Respondent had a genuine belief that she had committed an act of misconduct. She did not agree that she had, but she accepted that they had that genuine belief in her guilt. Her criticism of the fairness of the dismissal was directed at their investigation which she alleged was not a reasonable investigation, so that the Respondent did not have reasonable grounds for their belief in her guilt of the misconduct alleged.
- 11 In the Case Management Summary of Employment Judge Russell which was written after the hearing of 19 June 2018, the Judge set out the issues in this case. In considering them, this Tribunal also addressed various points made by the respective parties.
- 12 Employment Judge Russell set out the agreed issues as follows:
- “21.1 Did the Respondent have a genuine belief she had committed an act of misconduct. The Claimant concedes that the disciplinary panel did.
- 21.2 Was that belief reasonable following a reasonable investigation? The Claimant will say that the investigation was unfair insofar as: (a) it failed to include interviews of two teachers; and/or (b) notes of the interviews and investigation were not complete; and/or (c) it was improperly motivated by bias on the part of Ms Sheppard.
- 21.3 Was dismissal fair in all the circumstances of the case? The Claimant will say that: (a) it was an unduly harsh sanction; (b) it failed to take properly into account her mitigation and the impact of the decision upon her career; (c) a colleague, “Saji” was treated more leniently in respect of this or similar allegations of misconduct.
- 21.4 If dismissal was unfair, should any award be reduced for **Polkey** to reflect the chance that the Claimant would have been fairly dismissed in any event?
- 21.5 If the Claimant was unfairly dismissed, should any award be reduced for contributory conduct?”
- 13 The Claimant’s employment was terminated because the Respondent believed that the Claimant had been guilty of acting inappropriately when working with the vulnerable child TC. It was not in dispute that she had no disciplinary record prior to this incident, and the Tribunal took that into account.
- 14 The first point that the Claimant made in relation to the fairness of the investigation was that it did not include interviews of the two relevant class teachers. It did not appear to me that this was a good objection because the class teachers who she was referring to, were not said to have been witnesses to the events that led to the

disciplinary action. The Claimant said that they were in a good position to have given evidence of the background of this child and the child's behaviour particularly on that day. It was not in dispute that the child was autistic. There was also plenty of undisputed evidence in the documents which were available to the disciplinary and appeal panels not least from the Claimant herself about the fact that the child was distressed and displaying disturbed behaviour on the day in question. I considered that the Respondent's failure to pursue this line was not unreasonable and did not constitute a breach of a fair process.

- 15 The next point the Claimant made in relation to procedure which was set out in the List of Issues was that the notes of the investigation interviews were not complete. The Claimant attended an investigatory meeting and was accompanied at the relevant times by a trade union representative. She made the point subsequently that the notes were not accurate but she did not give any detail at all or attempt to demonstrate which aspects of the notes were inaccurate. I found that she was given the opportunity to elaborate on this during the course of the internal process but she failed to do so. Even during the Tribunal hearing she was unable to provide any more detail. Thus, even if it was right that the notes were inaccurate or incomplete, there was no evidence before this Tribunal to identify in which respects, or whether the inaccuracies were significant. There was nothing to suggest that if there had been a procedural breach which rendered the dismissal unfair, that any such errors would have been material to the determination and outcome of the disciplinary and appeal panels: ***Polkey***.
- 16 The next point of criticism that was identified at the previous Preliminary Hearing in terms of the investigation was that the Claimant said that the disciplinary action was motivated by bias on the part of Ms Shepherd.
- 17 Ms Shepherd was the head teacher of the school at the time. She conducted the investigation but did not conduct the disciplinary or the appeal hearings. In the bundle there was considerable evidence by way of notes of those two hearings and there were full notes of the investigation meetings. None of those was referred to by the Claimant in support of the allegation that Ms Shepherd was improperly motivated. Indeed, it appeared to me that the investigation processes were very thorough. Employment law concerning unfair dismissal does not require an employer to have conducted itself perfectly and no employer is held to the standards of criminal investigation: section 98(4). It appeared to me that the school took on board very quickly that there had been an initial delay in reporting this on the part of one of the teaching assistants ("TA"). The TA gave an explanation for this at the time of making the report. The Respondent then acted reasonably in taking the matter forward because they also had a report from the other TA who had been present, Ms Kurup. Ms Kurup's report had been made rather earlier.
- 18 Finally there was ample evidence to support the disciplinary panel's decision without any regard to any bias on the part of Ms Shepherd which I found in any event was not substantiated.

- 19 The core of the case and the difficulty the Claimant faced, was that the governors and indeed the appeal panel would have been entitled to believe on reasonable grounds the accounts of Ms Bibi and the other witness Ms Kurup as to what they said they saw. Moreover, no reason of any substance was put forward by the Claimant as to why they should have made this allegation up.
- 20 The further reason why it was reasonable for the Respondent to have believed those accounts was that the Claimant's own reasonably contemporaneous account of what happened was consistent with the two witnesses' statements. Her account was set out in a document which she described to this Tribunal that she prepared at the time but which she had not intended to put forward as a detailed and accurate record of the events. I considered that this was a difficult position for the Claimant to maintain. It was not in dispute that she holds a bachelor of arts degree (obtained in 2012), she was hoping to be a teacher, and she is clearly an intelligent and articulate woman. Indeed, her closing submissions reflected that degree of competence. She followed a structured and logical order in addressing the points at issue.
- 21 It was very unlikely, it appeared to me, that she would have written a record of events in full knowledge that she had been suspended as she was before school on the following day 21 January, and have entered in that record things which she believed to be inaccurate. The Tribunal fully accepted she would have been rather shaken by being suspended but she certainly used it as a record to assist her when she attended the interview and she then handed it in and that was then part of the disciplinary bundle. So, even if it were right that she did not want to rely on it, she knew that it was in the possession of the Respondent and that it was information that they would have regard to, when deciding whether they had reasonable grounds to believe that she was guilty of the conduct alleged. There was no attempt by the Claimant to supplement or elaborate on that document or to clarify it and to tell the Respondent that the contents were inaccurate.
- 22 It appeared to me that this evidence supported the governors' finding that they had reasonable grounds to believe that the Claimant was guilty of the conduct alleged.
- 23 As to an alternative motive or reason why Ms Kurup and Ms Bibi would have made up the reports, the Claimant effectively said that Ms Kurup was the Teaching Assistant who was in charge of the child in the morning session (the Claimant's incident was alleged to have happened in the afternoon at about 2 o'clock), and that something must have happened during the morning session to have led to the injury, because she certainly did not cause it. Ms Saleem also referred to various pieces of evidence which Ms Kurup put forward as tending to show that Ms Kurup was trying to cover up her own culpability.
- 24 This argument was not consistent with the Claimant's own account of her interaction with Ms Kurup. As Ms King pointed out during her cross-examination of the Claimant, there were several pieces of evidence generated by the Claimant herself both in the sort of file note or aide memoire which the Claimant compiled but also during the meetings when the Claimant was being questioned, when she clearly put

forward a defence to the injury on the child's wrist in response to a reference to the allegation against her. In any event, there was also corroboration from Ms Bibi and she had nothing to gain from making something up. Indeed, I asked the Claimant on several occasions during the course of the hearing if she had suggested or was suggesting that Ms Bibi had lied. The conflict in evidence about what had happened including Ms Bibi's description of the degree of force the Claimant used in handling TC, was such that it would need to have been a lie. Mrs Saleem declined to assert that Ms Bibi was lying or had lied. She said that it was her case that there should have been an investigation of the events during the morning. I did not consider that this addressed the difficulty that she faced both in terms of her own contemporaneous account of her actions and the account of the two other members of staff, one of whom was not said to have had any motive to have made up what was potentially a very serious allegation against a colleague.

25 During her summing-up, the Claimant made various further points. She argued that there was really insufficient evidence about a mark on the child. For the reasons already outlined above, this was not an argument which suggested that the governors had acted unreasonably. It was unclear whether this argument had been put in the internal proceedings, but it was reasonable for the Respondent to have found that there had indeed been a mark on the child at the material time, because of the accounts and diagrams which were available to the governors and the evidence of the Police involvement. Just because there was no evidence of another sort, like photographs, or the Claimant was not shown the mark, did not mean there was not sufficient evidence for the governors to have accepted that there was a mark on the child's wrist.

26 The Claimant also argued that certain procedures were not correctly followed like the welfare officer, Janice Graham not examining the child herself or talking to him. Again, given the other evidence which was available, it did not appear to me that this was something which should have led the governors to believe that there was not reasonable evidence before them of the Claimant's guilt.

27 The next point the Claimant made was about the failure by the other Teaching Assistants on the Respondent's case to have followed the rules which apply in a safeguarding situation. She said in summary that she believed they had failed the child. That may have been the case in terms of the delay in reporting referred to above, for a matter of a few hours. The evidence was that Ms Kurup made a report at about 2.30pm and Ms Bibi made a report later on that afternoon at about the time of after school club. However, the delay in reporting was a different issue which the governors were not asked to deal with. They had been asked to deal with the disciplinary charge that the Claimant faced and it did not appear to me that this point undermined the reasonableness of their belief in the incriminating evidence which was presented to them about the Claimant's actions.

28 The next point was about the Teaching Assistants writing up various 'concern forms' with the help of Ms Graham after school. Ms Saleem argued that they were not independent. This point has already been addressed above. There was no basis

for concluding that this argument should reasonably have persuaded the governors to reach a different view.

- 29 Further evidence which the Claimant said she was missing was the witness statements which were given to the Police. Whilst it was certainly possible that the witnesses gave completely different evidence to the police than they had given to the Respondent, there was no evidence of this and no basis for concluding that the governors did not have all the appropriate evidence. They had the evidence of the Respondent's investigation and the answers that were given during the disciplinary hearing and as I concluded above, this provided a more than adequate basis for them to reach the conclusion that they did.
- 30 The Claimant also made a point about the school failing to provide the handwritten notes from the investigatory interview with her. The Claimant did not provide any alternative notes and she had her trade union representative with her during the interview. Furthermore, even during this hearing, she was not really able to point to anything which she said was lacking from the notes that were produced by the Respondent.
- 31 I reiterated that the Tribunal understood that the Claimant and the other witnesses must have experienced considerable stress surrounding this case because this stage had only been reached some four years after the event.
- 32 This was also a school that the Claimant's children attended so I had no doubt that this had been a very devastating experience for the Claimant. However, the Tribunal has to decide cases according to the law and in particular had to decide whether the Respondent had acted as a reasonable employer/within the band of responses of a reasonable employer, on the basis of the evidence actually presented and/or evidence which they could reasonably have obtained. The burden of showing this is neutral.
- 33 In the circumstances I concluded that the Respondent had reasonable grounds for the belief that she held in the Claimant's guilt.
- 34 The next question then was whether the dismissal was fair in all the circumstances, as was identified in the list of issues which was agreed before Employment Judge Russell.
- 35 The contention was that it was an unduly harsh sanction and that it failed to properly take into account the Claimant's mitigation and the impact of the decision upon her career. As a comparison, the Claimant referred to the way in which a colleague, Saji was treated in respect of a similar allegation of misconduct.
- 36 Just dealing with the last point about the comparison with Saji, the evidence was that Saji was alleged to have man-handled or physically mistreated another pupil but there was not much detail about the circumstances before this Tribunal. More importantly it was an event which occurred after this incident and the Respondent put forward sufficient detail to distinguish it from this case i.e. the exact nature of

the alleged manhandling was unclear – whether Saji was said to have been rough with the pupil’s clothing or actually man handling the pupil, as the Claimant was accused of doing here. There was insufficient evidence about the circumstances to establish inconsistent treatment by the Respondent which could render the sanction of dismissal unfair. It appears that a final written warning was imposed in Saji’s case. Both a final written warning and a dismissal are sanctions which can reasonably be imposed in cases which involve serious misconduct. For this reason also, the comparison with Saji unfortunately did not help the Claimant.

37 As to the other point about the mitigation, I accepted the point that Ms King made, namely that the Claimant did not actually put forward any real mitigation. She referred to the child’s behaviour in the morning. However, that was said in support of her contention that she was not guilty of the conduct, because she did not consistently accept that she had caused the injury. In that sense therefore, there was no mitigation that the Respondent could have taken into account. The other consequence of this position is that when an employer has reasonable grounds for believing that an employee is guilty of misconduct which is serious, it is then very difficult to maintain trust and confidence when the employee does not accept that they are guilty of that misconduct.

38 I also had regard to the position of trust the Claimant had in relation to a vulnerable child. In all the circumstances, and to the extent that the Respondent argued that it was an issue of trust and confidence as well and that they could not be assured that the Claimant would not repeat her actions in the future, I concluded that dismissal was within the range of reasonable responses and it was not unduly harsh.

39 In all those circumstances I was satisfied that the unfair dismissal complaint was not well founded and I therefore dismissed it.

Employment Judge C Hyde
04/01/2019

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE