EMPLOYMENT TRIBUNALS

BETWEEN

Claimant **Respondent**
MR TONY MCGUIRE **AND** **COLEG Y CYMOEDD**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF ON: 2ND JANUARY 2018

EMPLOYMENT JUDGE MR P CADNEY MEMBERS:

APPEARANCES:-

FOR THE CLAIMANT:- **IN PERSON**

FOR THE RESPONDENT:- **MS A CHRISTEN 9SOICITOR)**

JUDGMENT

The judgment of the tribunal is that:-

1. The claimant was wrongfully dismissed by the respondent.

2. The claimant has suffered no loss and no award is made against the respondent.

Reasons

1. By this claim the claimant brings a claim of wrongful dismissal. The facts can be summarised relatively shortly. The claimant began his employment as a work-based learning assessor on 20 July 2017. One of the respondent's clients to whom it provided work-based learning assessments was HSS Ltd. On 16 August 2017 the

claimant attended their premises and spoke to at least one student. The following day the respondent received a complaint from HSS about the contents of the discussion between the claimant and one of those students, it being alleged that he had asked at least one inappropriate question about her personal circumstances.

2. As a result there was a meeting with the claimant that same day and the claimant accepted asking a question about her personal circumstances, and it was decided that he would be dismissed with immediate effect. That dismissal was confirmed in writing on 22 August. Although as there is nothing in the notes are of the meeting itself to suggest that he was dismissed with notice, he was given one month's pay in lieu of notice.

3. The claimant appealed and the appeal was heard on 12 September 2017. The outcome was the same in that the dismissal was upheld, although at the appeal stage the reason for dismissal was that he was no longer able to fulfil probationary period of his contract as the client was no longer prepared to accept him.

4. Before dealing with the specifics of this case, given that Mr Maguire is a litigant in person it may be sensible to set out in outline the jurisdiction of the tribunal in relation to dismissals. There are two types of claim that broadly may be brought. The first is for wrongful dismissal, and the other is unfair dismissal. Wrongful dismissal is in essence simply a claim for unpaid notice pay, as it is the contractual entitlement of any employer to dismiss any employee with the appropriate notice without having or giving any reason for doing so. Parliament has determined that that may cause injustice and so has for many decades enacted the statutory right not to be unfairly dismissed. In order to balance the interests of employers and employees Parliament at present requires in general employees to work for a minimum two years before they have the right to bring a claim for unfair dismissal. There are exceptions to this which require no specific length of service at but they do not apply in this case. The claimant does not have two years' service and as none of the exceptions apply, he could not have brought a claim for unfair dismissal, or he had the tribunal would have had no jurisdiction to hear it. In reality however most of the arguments that the claimant places before me in this case are assertions that the decision to dismiss him was in the circumstances unfair, rather than wrongful in the contractual sense.

5. For completeness sake, however the claimant seeks to rely on a number of alleged breaches of contract, so as to bring his claim within a contractual framework. Firstly he asserts that clause 22.3 of his contract of employment protects academic freedom. This provides that "The Corporation affirms that professional staff have freedom within the law to question and test received wisdom relating to academic matters and to put forward new ideas, and controversial or unpopular opinions about academic matters without placing themselves in jeopardy or losing the jobs and privileges they have at the corporation." The claimant contends that this case falls within that clause of his contract of employment it in that there was an academic purpose of asking the question he did of the female student in that he wished to understand whether there was any impediment to learning her in her home life and he therefore should have received the protection of clause 22.3.

6. In addition he contends that the respondent's disciplinary process has contractual force and that there was a failure to comply with the disciplinary procedure. This is referred to at paragraph 26.1 of his contract of employment, which provides that details of the procedure are to be found on the College extranet, and he contends that it is a term of his contract, and that the failure to follow it necessarily places the respondent in breach.

7. Thirdly he contends that all contracts of employment contain the implied term of mutual trust and confidence and that the respondent's treatment of him was in breach of that term in that he was required to attend a disciplinary meeting on the same day that the complaint was received with no notice of the allegations against him and was dismissed with immediate effect on that same day. Further he contends that the college must necessarily have realised that it was either in breach of its own procedures or that the dismissal for the reason given initially was unsustainable in that at the appeal that the reason given this dismissal is that the claimant was unable to continue with an complete his probationary period as the client would no longer accept his return to the premises.

8. The respondent submits that clause 22.3 is not engaged at all. That is a clause which provides protection for academic freedom and this is not a case which the claimant was dismissed for expressing a view contrary to any received wisdom or which was academically controversial and therefore the that clause has no bearing on this case. He was dismissed initially for asking an inappropriate question in an interview with a student, and ultimately on appeal because he was unable to complete his probationary period because of the view the client had taken of the inappropriateness of that questioning.

9. In respect of clause 26 there is nothing in the contract or in the disciplinary policy itself to indicate that it has any contractual force. Necessarily if it is not a term of the contract it cannot be a term in respect of which the respondent is in breach.

10. In my judgement the respondent is correct in its assertions as to those two allegations. However in my judgement it is at least arguably correct that there has been a breach of the implied term of mutual trust and confidence where the respondent has a disciplinary policy, even one without contractual force, which it has failed to abide by and which has resulted in the dismissal of the claimant. However that doesn't avail the claimant greatly in that it simply means that if correct he could have resigned prior to the point of his dismissal and claimed that he had been constructively dismissed. He would still however not have had two years' service and so would still be in the position that he had there would be no basis for any claim for unfair dismissal and he would still therefore only be able to bring a claim for wrongful dismissal.

11. The question for me therefore is whether the claimant was wrongfully dismissed. It appears to me that he was, but on a slightly different basis to that which has been advanced by either party. The fact is that both parties agree that he was dismissed orally with immediate effect on 17 August 2017. There is no suggestion in the notes of the hearing, and the respondent has called no evidence before me to suggest that

he was informed on 17 August that he was to receive pay in lieu of notice. Similarly the letter of 22 August does not dismiss the claimant on notice, rather at pays him in lieu of notice. There is however nothing in the contract of employment which would entitle the respondent to dismiss with pay in lieu of notice rather than to give notice. Clause 3 of the contract specifically provides for the provision of one month's notice, and does not contain any PILON clause. The respondent has called no specific evidence before me which would allow me to conclude that the claimant had himself been in sufficiently serious breach of contract to justify summary dismissal without notice. In addition the respondent itself paid him in lieu of notice on 22 August and it would appear to follow from that that the respondent at that stage was not seeking to assert that it was entitle to dismiss summarily.

12. It follows in my view that, as a matter of pure technicality, that the claimant has in fact made out his claim that he was wrongfully dismissed in that he was dismissed without notice on 17 August 2017. That ordinarily would entitle him to damages which would be the pay he should have received during his notice. However given that he has already received that as set out in the letter of 22 August 2017, whilst he has established a breach, he has suffered no loss at and accordingly there can be no order for any damages to be paid to the claimant.

_____

EMPLOYMENT JUDGE CADNEY

Dated: 31 January 2018
Sent: 7 February 2018