EMPLOYMENT TRIBUNALS

Claimant: **Mrs T Maloney**

Respondent: **Rydal Penrhos Limited**

Heard at: **Mold** **On: 7 February 2019**

Before: **Employment Judge T Vincent Ryan**

Representation:
Claimant: Litigant in person
Respondent: Mr K. Mc Nerney, Counsel

JUDGMENT having been sent to the parties on 16 February 2019 and reasons having been requested, albeit out of time, by the claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

1. The Issues:

    1.1 Unfair dismissal: in a situation where the claimant was dismissed ostensibly for a reason related to her conduct the principal issues for the tribunal to determine were whether conduct was the reason for the dismissal and whether the respondent acted reasonably or unreasonably in treating that reason as sufficient reason for dismissing the claimant (the latter question being determined in accordance with equity and the substantial merits of the case having considered all the circumstances including the respondent's size and administrative resources). To assist the tribunal, in accordance with precedent, the tribunal will usually consider the following issues:

1.1.1 whether the dismissing officer had a reasonable and genuine belief in the claimant's guilt of the alleged misconduct;

1.1.2 whether at the time that belief was formed there had been a reasonable investigation upon which the dismissing officer based the belief;

1.1.3 whether dismissal, and indeed all actions taken by the respondent, fell within the band of reasonable responses of a reasonable employer;

1.1.4 Furthermore, in the event of a finding of unfairness, when it comes to dealing with remedy, a tribunal must consider making an award that is just and equitable and it may reduce both the Basic and Compensatory Awards in given circumstances. It ought also to take into account any risk facing a claimant of being fairly dismissed and that risk may be reflected in the eventual award, perhaps by way of a reduction of the Compensatory Award. There may therefore be relevant issues as to the extent of that risk as well as matters as to the blameworthy or otherwise of the claimant's conduct and the extent to which it caused or contributed to the dismissal.

1.1.5 The claimant makes the following specific allegations which are in issue:

1.1.5.1 Bias by Mr Colwell;
1.1.5.2 The final written warning was manifestly inappropriate and therefore it should not have been relied upon;
1.1.5.3 the investigation was unreasonable;
1.1.5.4 Mr Grenville Martin was not properly authorised to make the decision to dismiss her.

1.2 Wrongful dismissal (breach of contract): the issue here is not one of reasonableness but whether the respondent breached or did not breach the contract of employment with regard to notice of termination. The question will be whether the respondent was entitled to dismiss the claimant without notice, or without full contractual notice, because of the claimant's conduct.

2. The facts:

2.1 The Respondent is a school, a private limited company limited by guarantee whose objectives are primary and general secondary education. The Claimant was employed by the Respondent continuously from 21 April 1992 until her dismissal for a reason related to conduct on 30 September 2017. The Claimant was given one week's written notice of dismissal. She was dismissed for gross misconduct.

2.2 The Claimant was employed in a variety of roles as a domestic and catering assistant; she was previously employed by the Respondent between 1983 and 1987 in such roles. Following complaints about the Claimant's conduct in March 2015 she received a first written disciplinary warning on 10 June 2015 (pages 112 to 113 of the trial bundle to which all page references relate unless otherwise stated). There is a helpful agreed chronology so I am not going to go through all of the dates of all of the letters and all of the events, but that warning was in respect of nine matters including bullying and harassment, slow work, obstructive behaviour and ignoring management requests. The Claimant appealed against it and does not accept that the allegations were fair, but the warning stood and it was for a 12-month period.

2.3 Following complaints in March 2016, some 9 months later, the Claimant received a final written warning on 10 June 2016 (page 223 to 224). There were seven allegations including aggressive and harassing conduct, ignoring managers, not completing work, unreasonable and uncooperative behaviour. That warning was given for a period of 24 months because the disciplining officer who gave the warning gave serious consideration to dismissal; in the event she gave the Claimant the benefit of the doubt and instead gave her a final written warning which would expire and be removed from her record on 9 June 2018. She appealed and the appeal was rejected.

2.4 The Claimant was then absent from 13 June 2016 until November 2016 and upon her return to work there were incidents and further complaints about her. This in turn led to her Line Manager, the Domestic Bursar, writing to the claimant on 12 December, that is within a month of her return, requiring that the Claimant comply with instructions, policies and procedures with the threat of the recommencement of disciplinary proceedings if she did not do so.

2.5 Following two complaints received by colleagues against the Claimant in February 2017 the Respondent commenced a

disciplinary investigation, that went on for some months; the Claimant was suspended on 12 May 2017 following an incident on 10 May 2017. The suspension letter is at page 313 and that explains why the suspension was considered necessary and the Claimant was reminded that she was still subject to a final written warning.

2.6 Mrs Hind conducted a thorough investigation interviewing seven staff members and comparing statements and a chronology. She tried to meet with the Claimant but was unable to do so and she recommended disciplinary proceedings. The Respondent appointed Mr Grenville Martin, a senior manager, as Disciplinary Officer in accordance with the Respondent's disciplinary policy. The Claimant was invited to attend the disciplinary hearing and was informed of the allegations and the evidence that Mrs Hind had obtained. There were five allegations which I paraphrase as:

2.6.1 refusal to comply with management instructions,
2.6.2 uncooperative behaviour,
2.6.3 walking out during a meeting with a manager,
2.6.4 insubordination to managers and
2.6.5 unreasonable and uncooperative behaviour.

2.7 The claimant was given the right to be accompanied at any disciplinary hearing; at various times during this procedure the Claimant was supported by GMB Union.

2.8 There had been an aborted disciplinary hearing on 17 March held by Mr MacDuff. He postponed it for further investigations and that is what led to Mrs Hind's comprehensive and thorough investigation.

2.9 The Claimant attended a disciplinary hearing without a representative. Mr Grenville Martin who had read Mrs Hind's report tried to put questions to the Claimant and noted her replies; the Claimant walked out of the disciplinary hearing after 45 minutes. Mr Grenville Martin reviewed the report and notes of the Claimant's submissions given during that 45-minute period and decided to dismiss the Claimant for gross misconduct giving one week's notice effective on 30 September 2017, that is at page 340. He took into account that the claimant had a live final disciplinary warning and her record, as above. Mr Grenville Martin's decision was made for the reasons stated in his letter and it reflects his belief held in the light of the investigation and all that had been said and done as above.

2.10 The Claimant appealed against the decision to dismiss her in writing. She wanted a meeting with the Head Teacher, Mr Smith. She wrote a letter on 24 September 2017 by way of appeal and on 4

October Mr Colwell, Payroll and HR Manager, whom the Claimant accuses of bias, acknowledged the letter but confirmed that the dismissal for gross misconduct stood. The Claimant wrote to Mr Smith again on 6 October saying that she expected to have a meeting with him and in response she received a letter purporting to be from Mr Smith confirming that a review had taken place and the decision was made to uphold the dismissal. There was no appeal hearing. The Claimant was not given any rationale for Mr Smith's decision. Mr Smith's letter in the trial bundle is unsigned and Mr Smith was not available to the Tribunal to give evidence under oath and cross-examination. The Claimant asserts, without evidence, that the decision and letter was secretarial.

2.11 The Claimant had given Mr Smith her solicitors' details but there is no evidence that Mr Smith or the Respondent wrote to the solicitor. The Claimant believed that Mr Smith might be more considerate than the other managers and thought it relevant that he had seen her work whereas others had not.

3 The law:

3.1 Section 94 Employment Rights Act 1996 (ERA) states that an employee has the right not to be unfairly dismissed, while s.98 ERA sets out what is meant by fairness in this context in general. Section 98(2) ERA lists the potentially fair reasons for an employee's dismissal, and these reasons include reasons related to the conduct of the employee (s.98(2)(b) ERA). Section 98(4) provides that once an employer has fulfilled the requirement to show that the dismissal was for a potentially fair reason the Tribunal must determine whether in all the circumstances the employer acted reasonably in treating that reason as sufficient reason for dismissal (determined in accordance with equity and the substantial merits of the case).

3.2 Case law has provided guidance but is not a substitute for the statutory provisions which are to be applied. Case law provides that the essential terms of enquiry for the Employment Tribunal are whether, in all the circumstances, the employer carried out a reasonable investigation and, at the time of dismissal, genuinely believed on reasonable grounds that the employee was guilty of misconduct. If satisfied of the employer's fair conduct of the dismissal in those respects, the Employment Tribunal then must decide whether the dismissal of the employee was a reasonable response to the misconduct. The Tribunal must determine whether, in all of the circumstances, the decision to dismiss fell within the band of

reasonable responses of a reasonable employer; if it falls within the band the dismissal is fair but if it does not then the dismissal is unfair.

3.3 Questions of procedural fairness and reasonableness of the sanction (dismissal) are to be determined by reference to the range of reasonable responses test also (**Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588** and **Iceland Frozen Foods Ltd v Jones [1983] ICR 17**).

3.4 The Tribunal must not substitute its judgment for that of the employer, finding in effect what it would have done, what its preferred sanction would have been if it, the Tribunal, had been the employer; that is not a consideration. The test is one of objectively assessed reasonableness. In ***Secretary of State for Justice v Lown*** **[2016] IRLR 22** it was emphasised, amongst many other things, how a tribunal can err in law by adopting a "substitution mindset"; the point was made in **Lown** that the band of reasonable responses is not limited to that which a reasonable employer might have done. The question was whether what this employer did fell within the range of reasonable responses. Tribunals must assess the band of reasonable responses open to an employer, and decide whether a respondent's actions fell inside or outside that band, but they must not attempt to lay down what they consider to be the only permissible standard of a reasonable employer.

3.5 Under the **Polkey** principle it may be appropriate to reduce an award by applying a percentage reduction to the Compensatory Award to reflect the risk facing a claimant of being fairly dismissed or to limit the period of any award of losses to reflect this risk, estimating how long a claimant would have been employed had he not been unfairly dismissed, in circumstances where the respondent would or might have dismissed the claimant. I must consider all relevant evidence, and in assessing compensation I appreciate that there is bound to be a degree of uncertainty and speculation and should not be put off the exercise because of its speculative nature.

3.6 Where a Tribunal finds that a complainant's conduct before dismissal was such that it would be just and equitable to reduce a Basic Award it may do so (s.122 ERA). Where a Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce any compensatory award by such amount as it considers just and equitable having regard to that finding (s.123 ERA). In doing so a Tribunal must address four questions (**Steen v ASP Packaging Ltd [2014] ICR 56 EAT**):

3.6.1 What was the conduct giving rise to the possible reduction?

3.6.2 Was the conduct blameworthy?

3.6.3 Did the blameworthy conduct cause or contribute to the dismissal?

3.6.4 To what extent should the award be reduced?

4 Application of law to the facts:

4.1 Applying that law to the facts that I have found and taking into account, the principal points of the Claimant's arguments in turn:

4.1.1 The Claimant alleges bias by Mr Colwell: Mr Grenville Martin was the Dismissing Officer, it was his decision to dismiss her; there is no evidence of bias on his part and there is no evidence that Mr Colwell influenced the decision. This allegation does not provide the basis of any finding of unfairness.

4.1.2 The Claimant says the final written warning was manifestly inappropriate and therefore it should not have been relied upon. There is no evidence to support the Claimant's assertion that the warning was manifestly inappropriate. The evidence such as it is in letter form; the disciplinary officer who gave the warning queried whether or not she ought to dismiss the Claimant but she gave her the benefit of the doubt; the allegations at that time are of a piece with the other complaints both in 2015 and 2017. The Claimant appealed against the final written warning but the appeal was rejected. The warning was not manifestly inappropriate. If, however, an employee is subject to a final written warning that employee can expect to be dismissed if there is further misconduct during the currency of the final written warning. Reliance on the final written warning does not render the dismissal unfair.

4.1.3 The third challenge to the dismissal was that there was an unreasonable investigation. Mrs Hind's investigation was thorough; she was diligent and conscientious; she produced seven witness statements. The Claimant's defence was to deny that the incidents happened, to raise matters related to other people, or to deflect attention by reference to other issues not relevant to her conduct. The

investigation was fair and reasonable in all the circumstances and therefore the investigation does not make the dismissal unfair.

4.1.4 The fourth limb of the attack is that Mr Grenville Martin was not properly authorised to make the decision. I find that he was an appropriate senior manager; he was appointed in line with the disciplinary procedure and he had authority to sanction the Claimant up to and including dismissal. Mr Grenville Martin's role does not render the dismissal unfair.

4.2 I have got to consider whether there was any unfairness, not just those points raised by the Claimant, but to see if in all the circumstances the Respondent acted fairly and reasonably. I find that the respondent acted fairly and reasonably, within the band of reasonable responses of a reasonable employer, up to and including the decision to dismiss the claimant and notifying her (including therefore in respect of the investigation and the hearing). The principles of natural justice and the provisions of the ACAS Code emphasise however that an employee should be allowed to appeal against any disciplinary sanction; 'should' is the word the Code uses. It says an appeal should be heard without unreasonable delay and a dismissed appealing employee has the right to be heard and represented at an appeal hearing.

4.3 The Claimant had previously been given the benefit of the doubt in 2016 when dismissal was downgraded to a final written warning and in March 2017 when Mr MacDuff postponed the disciplinary hearing for further investigation. The claimant believed Mr Smith would be more sympathetic than others and she asked for a meeting with him in the expectation of further leniency as in the past. It was unfair and unreasonable of the Respondent not to hold an appeal hearing and not to give the Claimant a chance to be heard on appeal.

4.4 The absence of an appeal hearing makes the claimant's dismissal unfair. There is some evidence that the respondent conducted a review (although it is scant evidence). There is one unsigned letter and with no evidence being heard at the Tribunal, there is no evidence at all that the rejection of the appeal was a decision made by Mr Smith's secretary. By the same token there is no evidence to support the contention that Mr Smith carried out a fair, conscientious and diligent review; he certainly did not chair an appeal hearing.

4.5 I must take into account that the Claimant was on a final written warning and the expectation therefore is that she would have been

dismissed for further misconduct whilst subject to that final written warning. Whilst the earlier examples of having been given the benefit of the doubt may have led her to think the appeal could be successful the respondent would most likely have considered that she had already had the benefit of the doubt on two occasions. She could have been dismissed in 2016 but instead was given a warning. Mr MacDuff could have dismissed her in March 2017 but decided on further investigation; she had had several chances and I conclude that in all probability the Claimant would have been dismissed even if there had been an appeal hearing.

4.6 The Claimant's conduct was as described at page 294 of the bundle, that is the five disciplinary allegations; she was in repeated breach of disciplinary warnings and in a short time, that is between the first warning in June 2015 and the incident in March 2016 that led to the next warning, she was then absent from work and did not return until November 2016 and again there were incidents that gave rise to these disciplinary proceedings in February 2017. She was disruptive and uncooperative during the investigation and at the disciplinary hearing. That repeated conduct, in the face of repeated warnings and some leniency, was blameworthy; it was damaging to relationships between colleagues and between the parties. It was that conduct that led directly to the dismissal; the respondent had had enough. Therefore, although I find that the claimant was unfairly dismissed, taking all matters into consideration, I reduce the basic award to nil to reflect her conduct prior to the decision to dismiss her because I think that is just and equitable; her conduct was reprehensible and blameworthy, let alone in the face of repeated warnings and chances to improve her behaviour. I reduce the compensatory award to reflect the risk that she was facing and because she has caused or contributed to her own downfall; I reduce the compensatory award to two week's net pay being the time it would have taken for the Respondent reasonably to convene and conclude an appeal hearing and considering the one week's notice that she received. The claimant's behaviour was such that it would not be just and equitable to award her more than two week's net pay. I find that probably the claimant would have been dismissed even if there had been an appeal hearing; this exercise involves some speculation but it is clear from my findings that the claimant was repeatedly guilty of blameworthy conduct and showed no inclination to accept responsibility and to mend her ways as required and counselled by the respondent through repeated disciplinary proceedings.

4.7 The Claimant was unfairly dismissed and I award her two-week's net pay.

4.8 Breach of Contract: the claimant has withdrawn the breach of contract claim in respect of any pension entitlement and that was dismissed on withdrawal. The claimant has indicated however that she was still claiming breach of contract in respect of notice or notice pay because she did not receive full notice. I find that the Claimant's conduct was in breach of contract; the Respondent did not breach the contract by dismissing her summarily for gross misconduct, that is without contractual notice. In fact, the respondent gave the claimant some notice regardless; it was not full contractual notice; the respondent was entitled to dismiss summarily or with less than ful notice at its discretion in the circumstances of the claimant's breach of contract (by her gross misconduct). The claim of breach of contract fails and is dismissed.

4.9 In all the circumstances it was noted that a formal Remedy Hearing was not required and the parties were asked whether they could agree the figure representing two week's net pay. They agreed to settle the claim without a Remedy Hearing in the sum of £456.92; I heard no evidence and made no award such that recoupment does not apply.

Employment Judge T Vincent Ryan
Dated: 7th May 2019

REASONS SENT TO THE PARTIES ON

……8 May 2019…….

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS