



EMPLOYMENT TRIBUNALS

Claimant: Mrs Marylyn Smith

Respondent: The Governing Body of West Gate School (R1)
Leicester City Council (R2)

Heard at: Leicester **On:** 1, 2 and 3 July 2019

Before: Employment Judge Hutchinson (sitting alone)

Representatives

Claimant: Mr M Anastasiades, Solicitor

Respondent: Mr J Heard of Counsel

JUDGMENT

The Employment Judge gave judgment as follows: -

1. The Claimant was employed by the first Respondent. The proceedings against the second Respondent are dismissed.
2. The claim of unfair dismissal fails and is dismissed.
3. The claim for notice pay fails and is dismissed
4. . Any application for costs made by the Respondent will be considered in writing.

REASONS

Background and Issues

1. The Claimant presented her claim to the Tribunal on 16 March 2018. She had been employed as a Teaching Assistant at the West Gate School. She claimed that the first Respondent was responsible for her direct management and the second Respondent assumed responsibility because it funded the first Respondent.

2. She first started to work at the school in 2004 and was dismissed on 12 December 2017 for gross negligence which amounted to gross misconduct without notice. She claimed: -

- Unfair dismissal
- Breach of contract

3. The alleged misconduct was that: -

- On 27 January 2016 she failed to supervise a vulnerable student doing a swimming session
- The failure amounted to gross negligence in the performance of her duties.

4. The Claimant says in respect of her claim of unfair dismissal that: -

4.1 The investigation was not reasonable.

4.2 All the circumstances were not considered.

4.3 She was a scapegoat.

4.4 There was inconsistent treatment of her compared to others.

4.5 The Respondent failed to take all mitigating circumstances into account.

4.6 Dismissal was not in the band of reasonable responses i.e. that she could have been dealt with in an alternative way; by for example a final written warning.

5. We agreed at the outset that the Respondents must establish the reason for the dismissal and that it was a potentially fair reason namely relating to the conduct of the Claimant. If they can establish that I must go on to consider the test as set out in section 98(4) of the Employment Rights Act 1996 ("ERA"). In doing so I apply the classic test in: -

- **BHS v Burchell** [1978] IRLR 379

That deals with the test regarding fairness. I must be satisfied: -

5.1 That the Respondent's had a genuine belief that the Claimant was guilty of the misconduct alleged.

5.2 That the Respondent's had reasonable grounds upon which to sustain that belief.

5.3 That at the time that they formed that belief they had carried out as much investigation as was reasonable.

6. I also reminded the parties that in deciding whether the dismissal was fair in accordance with section 98(4) ERA I must decide whether the dismissal was within the band of reasonable responses as defined in the case of **Iceland Frozen Foods Limited v Jones** [1982] IRLR 439.

7. In respect of the claim of wrongful dismissal the test is whether the Claimant had committed a fundamental breach of her contract of employment which entitled to the Respondent's to dismiss her without notice.

8. I also had to determine who the employer was. The Claimant insisted that she was employed by both Respondents. She relied on such matters as her P60 which she produced to the Tribunal. The Respondent's case was that the first Respondent had converted to a foundation special school in January 2013 and was no longer maintained by the second Respondent. They relied on section 36 of the Education Act 2002 which showed that the Claimant was in fact employed by the first Respondent, not the second Respondent.

Evidence

9. I heard evidence from the following: -

- Nicola Meskimmon, Human Resource Adviser for Leicester City Council
- Liam Mahoney, Governor and member of the dismissal panel
- Michel Laurent-Regisse, Chair of Governors and member of the appeal panel
- Marylyn Smith, Claimant

10. There was an agreed bundle of documents and where I refer to page numbers it is from that bundle.

11. I also had sight of the CCTV footage comprising seven and a half minutes in respect of the time at the pool when student A almost drowned.

12. In this case the outcome of the claim did not turn on the Claimant's evidence. In respect of the Respondent's evidence all the Respondents gave compelling and credible witness evidence. I agreed with Mr Heard that they "were impressive witnesses who gave considered and straightforward answers". Insofar as it was relevant some of the Claimant's evidence was unreliable. An example was her misrepresentation of incontestable facts that I could see on the CCTV footage with regard to her proximity to student A and her attention towards him.

The facts

13. The Claimant commenced working at the Emily Fortey School in 2004. In December 2005 that school amalgamated with Piper Way School. On 1 January 2006 these schools became West Gate School which at that time was maintained by Leicester City Council.

14. There was a break in the Claimant's employment between 30 November 2008 and 7 November 2011. Her continuous employment commenced on this later date. During this intervening period, she was employed by the NHS but was located at the school.

15. On 1 January 2013 the school converted to a foundation special school and was no longer maintained by Leicester City Council.

16. The school caters for students with moderate to severe learning difficulties; autism, specific conditions, profound multiple learning difficulties and highly complex needs.

17. Although it is a school that is independently run by Governors it does have

assistance from Leicester City Council.

18. Since 7 November 2011 the Claimant had worked at the school as a Teaching Assistant.

19. On 27 January 2016 there was a hydro therapy session and the Claimant was supporting the session along with four other members of staff.

20. The Claimant knew student A well. She had known him since 2010 and from September 2015 she had worked with him. She knew that he was a vulnerable student and that he “flapped a lot”. She had spent time with student A in the pool previously and she knew she had a general duty to safeguard him.

21. On the day in question she had been allocated the role of one to one supervision of student A. He is eighteen years old and is a profoundly disabled young man.

22. The Claimant accepted that she was responsible for him whilst he was in the water and she was required to stay close to him and keep her attention on him at all times.

23. He was not able to swim and had a rubber ring which was used by him as a buoyancy aid.

24. I have seen the CCTV footage which shows another student being lowered into the pool. I could see that for a considerable period i.e. about seven and a half minutes the Claimant turned her back on student A and did not see him slip through the ring and become submerged. I saw this and that for about ninety seconds he was under water before another member of staff saw him and pulled him out of the water. He almost drowned and had to be resuscitated. It was thought initially that student A might not recover at all. He has suffered brain damage because of the incident.

25. A Police investigation followed and the Claimant was suspended the following day. This was by Virginia Ursell the Acting Head Teacher and a letter confirming her suspension is dated 29 January 2016 (pages 48-49). The reason for the suspension was that the Claimant:

“May have committed a serious breach of health and safety rules, and in so doing, may have harmed or placed at risk of harm a vulnerable person and failed to uphold the core duties of your role.”

26. At the time the Claimant gave a short statement (pages 43-44) as did a colleague Sam Pease (page 45).

27. Two of the Claimant’s colleagues were also suspended namely Eileen Coull and Jo Whitehouse.

28. The incident was reported to the local authority designated officer (“LADO”) and the Health and Safety Executive who were to carry out an investigation.

29. Eileen Coull had already (in November 2015) given notice of her resignation by retirement in February 2016 and she did so retire.

30. At a meeting of the Children and Young Persons Safeguarding and Quality Assurance Unit attended by representatives of the Police and the Health and Safety Executive a conclusion was reached that the concerns in respect of Jo Whitehouse were unfounded in relation to neglect to student A and did not call her suitability into question.

31. They all agreed that on the balance of probability Eileen Coull and Marylyn Smith had neglected their duty of care for student A and the concerns were substantiated in respect of them and called into the question their suitability to work with children in the future.

32. Because of this meeting the suspension of Ms Whitehouse ended at a meeting with the Head Teacher on 12 September 2016 and a letter confirming that dated 19 September 2016 is at pages 50-51.

33. The report of the Children and Young Persons Safeguarding and Quality Assurance Unit is at pages 49a-d.

34. The Claimant and Ms Coull were prosecuted and appeared before the Crown Court on 13 July 2017. The Claimant pleaded guilty to an offence that she had failed to discharge her general health and safety duty at work contrary to section 7 and 33(1)(a) of the Health and Safety at Work Act. The particulars were that she and Eileen Coull had failed whilst at work to take reasonable care for the health and safety of student A who may have been affected by their acts or omissions. She was given a conditional discharge and the sentencing remarks of the Judge His Honour Nicholas Dean QC are at pages 60-64. The Claimant relies heavily on the comments made by the Judge. The Respondents were not represented in the Crown Court but those remarks were before both the disciplinary panel and the appeal panel.

35. The Judge referred to the Claimant's own behaviour and that of her colleague Eileen Coull. He said:

“These defendants bear responsibility and culpability for that but they are not alone in doing so.”

He said in respect of the Claimant:

“Marylyn Smith's role was to supervise student A on a one to one basis. In other words, she was responsible for him while he was in the water, and was required to stay close to him, and keep her attention directed towards him at all times.

These were not roles the defendants were unfamiliar with, although it is right to say that there were significant deficiencies in the training with which they had been provided and the systems of work in place at the time – I will return to these deficiencies in due course.”

He went on to say:

“It is clear that each defendant should or would have been conscious that the other was so involved because they were close together at the time. They had their backs to student A who was at the opposite end of the pool.”

He then said:

“The failings of these defendants are all too obvious. Each allowed herself to be distracted from important aspects of her work. It is important to note that the distraction was in the form of a focus upon something that was also important, the safety of the boy student A – and the distraction was itself a consequence of inadequacies in the systems of work in place and the equipment provided... Unfortunately, even if their distraction was understandable, they were each distracted for a not insignificant amount of time and so they neglected their duties towards student A for sufficient time for him to come to harm.”

Finally, he said:

“Marylyn Smith had direct one to one responsibility for student A’s care. Jointly thought, their culpability seems to me if not to be wholly subsumed within, or extinguished by, the manifest failings in the systems of work that have been identified, and very largely so. The failings here were in truth not primarily those of the defendants, but rather of those responsible for systems of work and safety in the West Gate School.”

36. By then the HSE had conducted its own investigation and the report is dated 31 October 2016 and is at pages 52-55. It sets out various contraventions by the school and actions it required to be undertaken.

37. After the conclusion of the criminal case Ms Debbie Stanley (HR for Education Ltd) was appointed to investigate the allegations. She undertook an investigatory meeting with the Claimant on 16 November 2017 (pages 74-77). She contacted Louise Kirby and the e-mail exchange between them in November 2017 is at pages 84-85. She was the Assistant Head in the summer of 2016.

38. Virginia Ursell, Acting Head Teacher at the time of the incident, was also interviewed and a statement obtained on 27 November 2017 (pages 86-89).

39. Ms Stanley also had a copy of the Judge’s remarks and a statement from LADO.

40. Her report dated 28 November 2017 is at pages 65-71 with appendices (pages 72-93). Her recommendation was that the matter should be referred to a disciplinary hearing for consideration and determination.

41. On 28 November 2017 the Claimant was invited to attend a disciplinary Hearing (pages 94-95). The letter says that the disciplinary hearing would consider allegations of gross misconduct. The allegations were:

“1. On 27 January 2016 you failed to supervise a vulnerable student during a swimming session.

2. This failure amounts to gross negligence in the performance of your duties which caused significant and irreversible harm to a vulnerable child.”

42. The disciplinary hearing held on 12 December 2017 was before two Governors, Liam Mahoney and Jennifer Norman. The Claimant was advised and represented by Bob Gale an experienced trade union representative. The minutes are at pages 112-123.

43. The Claimant submitted a document entitled, "legal submissions on behalf of Marylyn Smith" with attachments (pages 96-111). The minutes of the meeting are at pages 112-123.

44. At the hearing the panel viewed the CCTV footage which I have seen at the hearing myself. The Claimant had already seen it.

45. Ms Stanley presented her investigation report and Mr Gale questioned her and then questions were asked by the panel.

46. The Claimant was then given an opportunity to set out her response and she was then questioned by the panel. Both sides provided closing remarks and the matter was adjourned. At the request of both parties it was agreed to inform the Claimant in writing of the outcome.

47. The panel considered the matter for over four hours and reviewed the evidence and the CCTV footage on several occasions.

48. Their decision was unanimous. They did not feel it was appropriate to conclude whether the harm to student A was significant and reversible. It was their view that the Claimant was an experienced and trained member of staff who was aware that it was her responsibility during the swimming session to provide one to one support for student A who was a vulnerable adult.

49. The Claimant accepted that she was negligent in her duty and that she had failed to supervise student A.

50. The panel did not feel the situation had been chaotic as the Claimant had claimed. She had not kept a close eye on student A or stayed close to him at all.

51. They considered the mitigating circumstances. The letter of dismissal specifically refers to the mitigation that had been presented to them. They accepted that there were failings by others but the Claimant had herself abrogated her own responsibility to student A with terrible consequences.

52. They considered other sanctions including a final written warning but they were satisfied that there was no alternative but to dismiss Mrs Smith in the circumstances of the case.

53. Mrs Smith was written to on 15 December 2017 with the outcome (pages 124-125). Dismissal took effect from 12 December 2017 and the Claimant was not entitled to any notice pay. She was told of her right of appeal

54. On 4 January 2018 the Claimant appealed against the decision (pages 126-127). Mr Gale, for the Claimant, contended that the panel failed to make a fair and objective assessment of all the circumstances of the case The Claimant was invited to attend an appeal hearing which took place on 24 January 2018. This was conducted by Mr Laurent-Regisse with a panel including Simon Osbourne, Vice Chair of Governors. At this hearing the Claimant was not in attendance by her own choice and she was represented again by Mr Gale.

55. Mr Mahoney had prepared and presented his response to the Claimant's grounds of appeal (pages 132-140a). In respect of the claimant's grounds of appeal he said;

- They had considered the Crown Court Judge's sentencing remarks. They did not feel it took away from Mrs Smith responsibility to supervise student A on a one-to-one basis. That meant she was responsible for him while he was in the water and was required to stay close to him and keep her attention directed towards him at all times. She had failed to do this.
- They had considered the letter from the HSE to Rev Canon Peter Taylor, then Chair of Governors. Notwithstanding those recommendations they concluded that had Mrs Smith properly supervised student A he would not have been placed in danger and would not have been able to slip out of the ring and remain under the water for the length of time that he did.
- They had considered the remarks of the judge along with Mrs Smith's oral evidence to the panel. They had seen the CCTV footage and concluded that there was not a chaotic situation as described by Mrs Smith.

The appeal panel had also been presented with an appeal pack which they considered prior to the hearing. The appeal panel also viewed the CCTV footage.

56. After hearing Mr Mahoney's presentation, they also have heard submissions from the Claimant's trade union representative. The minutes of the appeal hearing are at pages 141-154.

57. The appeal panel asked questions of both Mr Mahoney and Mr Gale and they were then given an opportunity to summarise their case. The panel then adjourned.

58. The panel then considered the presentations made on the day as well as the written submissions. They decided that although they were sympathetic to the Claimant, the Claimant had been negligent and in "dereliction of her duty" and this constituted gross misconduct.

59. They agreed with the decision made by the disciplinary panel. They felt that the Claimant was an experienced and trained member of staff and had failed in her responsibility towards a vulnerable student with catastrophic consequences. She had allowed herself to be distracted away from her responsibilities and this had resulted in harm to the student. Whilst they considered the mitigation presented on her behalf it was insufficient to negate her individual responsibility. They decided it was her alone who bore one to one responsibility for supporting student A and the Claimant accepted that she had neglected that responsibility.

60. Mr Gale was told of the appeal panel's decision and a letter confirming the decision was sent to Mrs Smith on 25 January 2018 (pages 155-156).

The Law

Unfair dismissal

61. The claim of unfair dismissal is made under section 94 ERA.

62. Section 98 provides: -

“(1) In determining for the purpose of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show: -

(a) the reason (or, if more than one, the principle reason) for the dismissal, and;

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it: -

(b) relates to the conduct of the employee.

(4) 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 reasons 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.”

63. The advocates agree that the relevant test for fairness is that set out in the case of **BHS v Burchell** referred to above. That is: -

63.1 Did the Respondent have a genuine belief in the guilt of the Claimant?

63.2 Did they have reasonable grounds for that belief?

63.3 At the time they formed the belief had they carried out a reasonable investigation?

64. In determining whether dismissal fell within the band of reasonable responses I was referred to the case of **Iceland Frozen Foods v Jones**. That is the test of whether dismissal fell within the band of reasonable responses.

65. In respect of the test of fairness Mr Heard also referred me to a number of cases, namely: -

- **Sainsbury’s Supermarkets Limited v Hitt** [2003] IRLR 23
- **Post Office v Folley, HSBC Bank Plc (formerly Midland Bank Plc) v Madden** [2000] IRLR 827
- **Hadjoannou v Coral Casinos Limited** [1981] IRLR 352
- **MBNA v Jones UK EAT 0120/15/MC**

Wrongful dismissal

66. As I described at the start of the hearing the test for a case wrongful dismissal is whether the Claimant in fact committed a fundamental breach of her contract of employment entitling the Respondent to dismiss her without notice. I was referred to the case of **Adesoakan v Sainsbury's Supermarkets Limited** [2017] EWCA CIV 22. That is a case that is similar to the current case in that the Claimant was dismissed for gross negligence.

The employer

67. I was referred to section 36 of the Education Act 2002, that provides:

“This section applies to: -

- (a) Foundation schools;
- (b) Voluntary aided schools and;
- (c) Foundation special school.

(2) Except as provided by Regulations under subsection (4), any Teacher or other member of staff who is appointed to work under a contract of employment at a school to which this section applies is to be employed by the governing body of the school.

(3) The teaching staff of any school to which the section applies shall include: -

- (a) a person appointed as Head Teacher, or;
- (b) a person appointed to carry out the functions of the Head Teacher of the school.”

My Conclusions

68. I am satisfied that the Claimant was employed by the Governors of West Gate School. This is a foundation school and the employer is governed by the provisions of section 36 of the Education Act 2002. That states clearly that her employer is the governing body of the school. The proceedings therefore against Leicester City Council cannot continue and are dismissed.

69. I am satisfied that the Claimant was dismissed and that the reason for the dismissal was her gross negligence. That on 27 January 2016 she had failed to supervise a vulnerable student during a swimming session. This amounted to gross negligence in the performance of her duty.

70. I am satisfied that the decision to dismiss was fair. In particular: -

70.1 The Respondents had a genuine belief that the Claimant had committed the act of gross negligence amounting to gross misconduct

70.2 The Claimant had admitted that she had failed in her obligations both by pleading guilty in the Crown Court and in her admissions to the Respondent in the disciplinary hearing. The Respondent was correct to

understand and believe that she had been assigned one to one responsibility with student A. The Claimant knew what was required i.e. to stay in close contact with him and be watchful of him. He was severely disabled and could not swim so he was dependent on her. She had failed him.

70.3 The Respondents had reasonable grounds for that belief because of those admissions.

70.4 At the time they formed the belief they had conducted a reasonable investigation. The CCTV footage was viewed extensively. There was an independent investigation. There was a disciplinary hearing at which the Claimant could and did put forward her case. There was then an appeal hearing at which the claimant could put her case to a fresh panel.

70.5 The disciplinary panel and the appeal panel both took their own individual decisions that the Claimant's behaviour did amount to gross misconduct.

71. Bearing in mind the Claimant's admitted behaviour and its consequences for student A dismissal was well within the band of reasonable responses.

72. I am satisfied that the Claimant was not a scapegoat. Whilst there were major failings of health and safety, that did not change the Claimant's own responsibilities. She was responsible for her own actions.

73. I reject the submission by Mr Anastasiades that there was any inconsistent treatment. No one else was responsible for the one to one care of the student. Only the Claimant was responsible for him.

74. I am satisfied that all the circumstances of the case were considered including the remarks of the Crown Court Judge. They considered mitigating circumstances and whether there was any alternative to the outcome of dismissal but they reasonably decided there was none.

75. The decision to dismiss was within the band of reasonable responses. The claim of unfair dismissal therefore fails and is dismissed.

Wrongful dismissal

76. I am satisfied that the Claimant had committed an act of gross negligence which amounted to a fundamental breach of her contract of employment. She had failed to supervise a vulnerable student during a swimming session. The claimant is not therefore entitled to any notice pay and the claim of wrongful dismissal therefore fails and is dismissed.

Costs

77. At the conclusion of the hearing Mr Heard, for the respondents, made an application for costs. It was agreed though that this would be dealt with without a hearing by way of written representations that the parties would submit once they had received my written reasons.

Employment Judge Hutchinson
Date 15 August 2019

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE