



EMPLOYMENT TRIBUNALS

Claimant: Mr S Mensah

Respondent: Governing Body of the Joan Roan School

Heard at: London South **On:** 1 November 2019

Before: Employment Judge Fowell

Representation:

Claimant In person

Respondent Mr N Pourghazi of counsel

JUDGMENT

1. The claimant's dismissal was not in breach of contract.

REASONS

Background

1. This is a claim by Mr Mensah, who was a science teacher at the respondent school. He was employed on a fixed-term contract for the academic year 2017/18 and so his contract was due to expire on 31 August 2018.
2. Since he did not have the two years' service needed to bring a claim of unfair dismissal, his claim is for breach of contract only. The notice period under his contract was one month. He resigned in the course of disciplinary proceedings against him, saying in effect that the school's actions in disciplining him were excessive and out of proportion to the events in question.
3. Those events concerned an incident on 7 March 2018 in a Year 7 science lesson. The children were handling magnesium, which is a soft metal. They were carrying out an experiment which involved mixing it with hydrochloric acid. The magnesium was cut into sections of 1cm, 2cm and so on in increasing lengths,

and the temperature of the resulting reaction was measured. The sections were mainly pre-prepared by a lab technician, Mr Griffin, who left Mr Mensah with a quantity of spare magnesium in a coil in case he ran out. Unfortunately, at the end of the lesson, that coil was pinched by one of the children.

4. The disciplinary action which resulted was essentially from his failure to escalate this incident to his Head of Department, Mr Kinch, or to the school's Safeguarding Lead, Ms Sumner. The school felt that he had not taken the situation seriously enough or acted quickly enough in the circumstances.
5. During the disciplinary process without prejudice discussions took place with a view to settling things, but they did not bear fruit. The respondent has waived its privilege in those discussions, and so it was all set out before me. They reasoned that the decision by Mr Mensah to resign, which he did by letter dated 11 June 2018, was inseparable from those negotiations, and that became very clear at this hearing. The essential question for me to decide is whether the school's actions were a fundamental breach of contract.
6. In deciding that question, I heard evidence from Mr Mensah during the morning and in the afternoon from three witnesses for the school: Mr Tomlin, a senior member of staff at a neighbouring school who agreed to carry out the investigation; Mr Higgins, the principal HR adviser for the local authority; and Ms Smith, the Executive Headteacher at the school. I also had a bundle of about 350 pages, a good deal of which was taken up with the school's policies and procedures. Having considered that evidence and material I make the following findings of fact.

Findings of Fact

7. Mr Mensah is a science teacher of some 30 years' experience. At the start of the lesson in question he went through the safety rules with each of the pupils, rules which included an instruction not to take away from the classroom any of the material being used. He was aware of the potential dangers of magnesium. There was some dispute at this hearing about the extent of those dangers. Mr Mensah's main point was that it is not liable to spontaneously combust and that in fact it is not always easy to light, even in the laboratory. However, there are concerns about its use. It burns with an intensely bright light which can be damaging to eyesight. And according to the Material Safety Data Sheet, which the school had, it can flare up or explode in the presence of acids or even water. Suffice to say, it can be dangerous in the wrong hands.
8. The lesson in question was just before lunch. Two children had lingered to discuss something with him and it was only after they had left the room, and he was clearing the classroom for the next lesson, that he noticed that his spare coil of magnesium was missing. He went to find the senior lab technician, Mr Griffin, to see if he had taken it but could not find him.
9. At about the same time Mr Griffin also noticed that it was missing. At 1.25 pm he sent an email to Mr Mensah asking if he had any leftover magnesium. Mr Mensah, who may well have been taken up with looking for the magnesium, made no reply that day.

10. He went in search of those last two children, who had by this time gone off for lunch. He found them but they said they knew nothing about it. He decided he would need to ask the whole class. After lunch, they were in Geography. He went in to interrupt their lesson and spoke to the geography teacher, who was also a Head of Department. After explaining the situation the children were questioned and searched. No magnesium was found. The other teacher insisted on continuing the lesson, and after that it was the end of the school day. No further action was taken and Mr Kinch was not informed. Nor was the Headteacher, although she was usually around in the school on the adjoining site for several hours.
11. The next morning he spoke to another lab technician, Mr Lau, about the disappearance. Mr Lau was concerned about it, about the health and safety risks, about the fact that it had not been already reported to the Head of Department. That is clear from the notes of his interview in the subsequent investigation. Mr Lau then made the report to Mr Kinch.
12. It is not clear when he did so but late on 8 March, the day after the disappearance of the magnesium, Mr Kinch sent an email to Mr Mensah asking for details about what had happened and said that they would have to decide what to do about it first thing in the morning. He said that he needed to weigh up whether to let parents know, and posed the question - "Is it a safeguarding matter for example?"
13. Mr Mensah replied the following morning. He explained when he had found out that it was missing and what he had done that day to try to get it back, adding that he had also asked their form tutor to investigate.
14. So on Friday 9 March Mr Kinch discussed matters with him and others, decided that it was a safeguarding issue and needed to be reported to the Headteacher. She was at a sister school, of which she is also Head, and her reaction when informed that afternoon was to take firm and decisive action. She informed the police and arranged for all of the parents of the pupils in question to be telephoned, which was a considerable logistical effort. That also involved explaining why they had not been contacted earlier.
15. The delay in her view was significant. The following Monday, 12 March 2018, Mr Mensah was suspended from duty pending a disciplinary investigation. The suspension letter said that there had been a serious breach of the school's Safeguarding policy, its Health and Safety policy and the school's Code of Conduct. It would have been clearer had it simply explained that the main concern was the delay in reporting it to his Head of Department, rather than leaving this to be inferred from the sections in question. I also note that Ms Smith accepted quite openly that at the time that she made the decision to report these matters to the police and parents and to suspend Mr Mensah, she was under the impression that a larger amount of magnesium had gone missing - a coil of 20m rather than, it appears, about 25 cm.
16. The investigation was then carried out by Mr Tomlin since he was from a neighbouring school and had had no involvement with the incident. That was, very sensibly, felt to be preferable to Mr Kinch carrying out the investigation. Mr Tomlin interviewed Mr Mensah on 19 April, when he was accompanied by his

trade union representative and gave his side of the story. It is fair to say that he sought to minimise the seriousness of the incident. Mr Griffin, Mr Lau, Mr Kinch and the Safeguarding Lead, Ms Sumner were also interviewed. His report went into the circumstances in some detail. It is in my view, a balanced report which, although it recommended a disciplinary hearing, listed a number of mitigating factors. These included the fact that Mr Mensah was relatively new to the school; that he did attempt to find out where the missing magnesium had gone; that there was little specific mention in the school's policies about how urgent or important it was to escalate matters; and that Mr Mensah, as well as the lab technicians and the Head of Department, had all taken the initial view that it was more of a health and safety matter than a safeguarding concern.

17. Mr Mensah was not happy about the report however. On or about 23 April his trade union representative approached Mr Higgins, the Principal HR adviser at the local authority, about a settlement agreement. Mr Higgins passed this suggestion to Ms Smith and she was open to it. In fact, the school made a generous proposal that he be paid until the end of his contract on the 31st of August, that he left by mutual consent and with an agreed reference. From a financial point of view, it is the maximum that he could have sought since there was no obligation on the part of the school to renew his contract. Nevertheless, Mr Mensah responded coolly, with some queries about the amount and the reference.
18. It is difficult to see why Mr Mensah took the step he did next but on 14 May 2018, solicitors on his behalf wrote to the school, alleging that he had already been dismissed. That letter made specific reference to the without prejudice email from Mr Higgins about him leaving under a settlement agreement and said that it was a dismissal - "an express statement terminating the employment contract". It was no such thing, and it is difficult to understand how they could characterise it in that way. Nevertheless, the letter went on to state that his employment came to an end on the date of the email from Mr Higgins - 8 May 2018.
19. Strictly speaking, that did not bring the contract to an end. It was an assertion by Mr Mensah, through his solicitors, that he had been dismissed, when in fact he had not. And so his employment continued. On any view however this brought the settlement negotiations to a halt. The school, faced with this hostile response, had no option but to recommence the disciplinary process.
20. By letter dated 16 May he was invited to a disciplinary hearing. That was to be held on 7 June. The letter set out again by reference to the school's policies and procedures what the misconduct was. The first of the obligations identified was "carrying out his duties in a conscientious manner and not wilfully neglecting his duties or causing any waste of time or productivity." In the context of this incident that is rather vague, but the substance of the allegation is that he delayed too long in escalating matters to his head of Department. The other allegations were essentially the same, couched in the terms of different provisions, and again, it would have been more helpful had the gist of the allegation against Mr Mensah been put in plain English.
21. In response to this, on 4 June 2018, Mr Mensah submitted a grievance. In his letter he requested that the disciplinary hearing be postponed and protested

against the decision to suspend him. In the concluding section it stated that he intended to take legal action against the investigator, Mr Tomlin, for an inadequate and biased investigation, and against the school for breach of contract by seeking to impose a disciplinary sanction which was out of all proportion to the offence. Should the school, he went on, fail to postpone the disciplinary hearing, he would seek an injunction to prevent it taking place.

22. The school took the view that this was not a grievance. Their grievance policy was quite specific on the point. It states that complaints about a decision to initiate disciplinary proceedings or to hold a hearing were outside the scope of the grievance process. In their view, understandably, those issues could be dealt with at the disciplinary hearing.
23. Nevertheless, in her response Ms Smith also indicated on a without prejudice basis that she was willing to postpone the disciplinary hearing if he wished to resume the settlement discussions. He agreed, and the school, through Mr Higgins, then made a further offer to him. They again proposed that disciplinary proceedings be terminated and that he be paid to the end of his contract. In the circumstances it is hard to see how they could have been more generous.
24. That settlement offer was sent by email at 1503 on 7 June 2018. It stated

“The school have confirmed that they are willing to cease the disciplinary process, and pay you to the end of your contract – 31-8-18 - plus an agreed reference. You would not be expected to work.”
25. In context, and, particularly given the use of the word ‘would’ - that can only mean that *if* he accepted that generous offer, he would not be expected to return to work. For reasons which are difficult to fathom Mr Mensah interpreted this as a statement unconnected with the settlement discussions and the offer in the previous sentence, to the effect that he was not to return to work from then on.
26. It is difficult to avoid the impression that Mr Mensah was looking for a reason to resign. In any event that is what he then did. The next letter he sent, on 11 June 2018 was from him personally rather than his previous solicitors, but it is very formal and professional in its structure and content. At paragraph 1.5 it quoted the email from Mr Higgins and described it as an attempt to cancel the contract, and as a repudiation of the school’s obligations under the contract, a repudiation which he accepted. He then went on to demand three months’ gross salary, his pension rights, national insurance contributions and some legal costs.
27. Indeed, he went further, and issued a claim against the school in the Central London County Court. In those proceedings he applied for an injunction to prevent the disciplinary hearing taking place. It appears from own email to Mr Higgins on 20 June 2018 that the District Judge took the view that the contract of employment had already come to an end: Mr Mensah had purportedly accepted a repudiation of contract by the school. Hence, there was no point in granting an injunction.

The Applicable Law

28. An employee will be entitled to terminate his contract without notice where the

employer is in repudiatory breach of contract, i.e. a breach going to the root of the contract; in other words, a breach of a fundamental term of the contract. Although this is not a case of constructive dismissal, the breach is the same one as relied on in the majority of such cases - the implied term of trust and confidence.

29. In the case of **Woods v WM Car Services (Peterborough) Ltd** 1981 ICR 666, EAT. Mr Justice Browne-Wilkinson explained that: "To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."
30. The House of Lords in **Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)** 1997 ICR 606, HL described the duty as requiring that neither party will, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.
31. Mutual trust and confidence *can* be undermined by the way in which an employer carries out a disciplinary process. In **Alexander Russell plc v Holness** EAT 677/93: the employer was held to have done so by summoning an employee to a disciplinary hearing and giving him a final written warning for poor timekeeping, where he had been given a written warning for the same thing only 24 hours earlier
32. Suspension from work can also amount to such a breach. In **Gogay v Hertfordshire County Council** 2000 IRLR 703, CA, the Council was found to be in breach when it suspended a residential care worker pending an investigation into an allegation of sexual abuse made by a child in care. The question was whether there was 'reasonable and proper cause' for the Council's action in suspending the employee when it did. In that case the information provided by the child had been 'difficult to evaluate', meaning that it had been difficult to determine what she was trying to convey. The Court accepted that it warranted further investigation but to describe it as an allegation of sexual abuse at that stage was putting it far too high. They criticised the Council for a 'knee-jerk reaction'.
33. The Court of Appeal revisited this area this year in **London Borough of Lambeth v Agoreyo** 2019 IRLR 560, CA, which also concerned a teacher. There, the Court held that the teacher's suspension breached the implied term of trust and confidence. The case involved an allegation of unreasonable force in three incidents involving two children. Lord Justice Singh held that there was no test of necessity when considering whether the teacher's suspension had breached the implied term of trust and confidence, the only relevant question was whether the employer had reasonable and proper cause to suspend the employee. **Gogay** did not lay down a general principle and each case had to be decided on its own facts.
34. So the key question in considering the suspension, and by extension the decision

to hold disciplinary proceedings, is whether the school had reasonable and proper cause to do so.

35. If there is a fundamental breach of contract, it is also necessary to resign in response to it. Often there is a series of events and the last in the series is identified as the 'final straw'.
36. The Court of Appeal in **Omilaju v Waltham Forest London Borough Council** 2005 ICR 481, CA, confirmed that the final straw does not have to be of the same character as the earlier acts, and nor does it necessarily have to constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his or her trust and confidence in the employer.

Conclusions

37. The relevant breaches by the school were identified at the preliminary hearing as:
 - a. suspending him
 - b. bringing charges of gross misconduct which were disproportionate or exaggerated
 - c. not informing him which part of the safeguarding or health and safety policies he had seriously breached.
38. Of these, the first two are clearly the more serious, and are linked.
39. I bear in mind that Mr Mensah is an experienced teacher and it was not his fault that this magnesium went missing. He was clearly placed in a very difficult position and it must be exasperating, having tried to conduct the lesson in a safe way, to find that things had gone so badly wrong and that he was responsible for a potential safeguarding issue. Then to be suspended from work and summoned to a disciplinary hearing must have been extremely galling. However, from the school's point of view, their concern was not over how the magnesium disappeared but why he had not reported it sooner. The reaction of Ms Smith to call the police and the parents shows the seriousness with which it was viewed by her. Her prompt response was not in any way aimed at Mr Mensah, but one only has to imagine what would have happened if, the following week, a child had been injured through the use of this magnesium. Questions would immediately be asked about where it had come from. That question would soon lead back to the school and it would have been very difficult for the school to explain why it had taken no action to warn parents. Hence, it is entirely understandable in my view that Ms Smith felt that she had to act promptly, before the delay got any worse, and that will naturally have led to a consideration of why it had taken from Wednesday morning to Friday afternoon for the matter to get to her attention.

40. When it was reported to Mr Kinch, he contacted Mr Mensah about it, and discussed with him how best to proceed. He also carried out his own initial investigation. It was not therefore a knee-jerk reaction to suspend Mr Mensah. It is not clear to me that it was necessary for the school to suspend him but that is not the relevant test. The question is whether or not the school had reasonable and proper cause to do so. I am satisfied that they had, given that this was a serious matter, that they needed to show that it was being treated as such and that a disciplinary investigation was required which involved interviewing those with whom Mr Mensah worked closely. The fact that the investigation was to be carried out by a senior figure from another school also shows the seriousness with which the investigation was taken.
41. Turning to the decision to initiate disciplinary proceedings, that followed the investigation and as already noted, Mr Tomlin's report was in my view careful, thorough and balanced. He addressed the mitigating factors, which is an unusual feature of such reports. But those mitigating circumstances did not affect his view that a disciplinary hearing was appropriate, and that conclusion also appears to me to be entirely justified given the serious position in which the school had been placed by and the delay. The view he expressed in the report was essentially that Mr Mensah had hoped to avoid reporting this at all so that it would not come to light and count against him. Mr Tomlin's view, having spoken to the Safeguarding Lead, was that this was a safeguarding issue since children were at risk of harm, including at risk because of the delay, and in those circumstances disciplinary proceedings appear to be justified.
42. As an aside, it is far from clear that the outcome of those proceedings would have resulted in Mr Mensah's dismissal. Ms Smith, in her witness statement, understandably did not wish to go so far as to state what the outcome would have been, but she suggested it may well have fallen short of dismissal. The mitigating factors relied on by Mr Tomlin, including the relative vagueness of the schools policies and procedures and the fact the Mr Mensah not been there long, would have made a finding of gross misconduct and a dismissal very difficult to justify. Indeed, it is clear from the without prejudice correspondence that the school were happy to continue to pay him until the end of his fixed term contract, even if he did no work. The outcome of a disciplinary hearing which gave him a warning and allowed him to continue in work would have been more favourable from their point of view, since at least they would have an experienced science teacher until the summer holidays. The fact that they made such generous offers strongly suggests that there was no agenda to dismiss simply in order to save on his wages.
43. The third alleged breach concerning the vagueness of the allegations against him as more substance but is not in my view a fundamental breach. As already noted, it would have been preferable had the allegation been framed in simpler terms, but I am satisfied that Mr Mensah understood the gist of the allegation against him from his investigation meeting and other discussions, and the fact that these allegations are framed in a vague way cannot in my view be said to go to the root of the contract and hence to justify his resignation.
44. Accordingly, I find that the actions of the school, individually or collectively, did not amount to a fundamental breach of contract.

45. If that conclusion is wrong for any reason, it is also necessary to consider whether Mr Mensah resigned in response to any of these breaches. The immediate cause of his resignation was the without prejudice email from Mr Higgins. There was, in my view, nothing in that email which entitled Mr Mensah to resign. It was entirely innocuous, and indeed he might have expected that Mr Mensah would welcome the offer with open arms. Construing the words that he used in that email, it was not a dismissal, nor an instruction to remain at home, it simply stated quite clearly that if he accepted the settlement agreement he would not be required to do any more work but would be paid in any event. He cannot be said therefore to have resigned in response to this final straw.
46. The date of his resignation was 11 June 2018, whereas the invitation to a disciplinary hearing was on 16 May (the date of the second and third alleged breaches) and the suspension was on 12 March 2018, about three months earlier. Without extending this decision any further, the delay in resigning for three months is too great. In any event, his action in attending the investigation meeting also amounted to an affirmation of the contract, without considering later events. The delay from 16 May 2018 is much less extreme, but he continued in employment for several weeks after that, and his action in submitting a grievance on 7 June also in my view amount to an affirmation of the contract.
47. Accordingly, and for all the above reasons, the claim must be dismissed.

Employment Judge Fowell

Dated 15 November 2019

48. It is also clear from the Staff Code of Conduct that any such safe 3.1, 3.2, 6.1, 6.2. That it should be discuss with the Safeguarding lead, Tracey Sumner.
49. The school therefore took the view that this material falling into the hands of children was not only a health and safety issue, but also a safeguarding matter, since it involved a risk of harm to children. Mr Mensah did not agree with that second description, but in my view, that must be correct.
50. In any event, the staff handbook provides that when dealing with health and safety incidents, including any incident when first aid is required, it should be reported to the Head of Department in writing (Mr Kinch). A verbal report is only acceptable in cases of urgency. When Mr Mensah discovered the missing magnesium, over lunch on the day in question (the lesson having been just before lunch) Mr Kinch was on a different site, about five or 10 minutes' walk away. For that reason, he said, he did not go straight to report the matter to him.