



# EMPLOYMENT TRIBUNALS

**Claimant:** Iain Tait

**Respondent:** Learn @ MAT

**Heard at:** Bristol CJC via VHS **On:** 14-15 February 2022

**Before:** Employment Judge King

## **Representation**

Claimant: In Person

Respondent: Fergus Currie

**JUDGMENT** having been sent to the parties on 17 February 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Introduction

1. The Respondent is a multi-academy trust responsible for five schools, including Notton House Academy where the Claimant was employed as a residential child care officer.
2. Claimant started employment with Respondent 3 January 2017.
3. The Claimant was dismissed for Some Other Substantial Reason 19 June 2020.
4. Claim received by ACAS 6 September 2020. ACAS certificate issued 6 October 2020.
5. Claimant brought claims of Unfair Dismissal, Breach of Contract in respect of Notice Pay, Arrears of Pay, Age Discrimination and Disability Discrimination.

6. The claims in respect of Age Discrimination and Disability Discrimination were withdrawn by the Claimant on 16 August 2021 at hearing in front of EJ Bax.

Issues before the Tribunal

Breach of Conduct

7. Did the Respondent breach the Claimant's contract of employment by failing to pay Payment In Lieu Of Notice (PILON)?

Unlawful Deductions from Wages

8. Did the Respondent make unlawful deductions from the Claimant final wages payment?

Unfair Dismissal

9. The Claimant accepts that not holding a valid DBS Certificate could be a potentially fair reason under section 98 Employment Rights Act 1996 ("ERA").
10. The issues for the Tribunal to consider therefore are:

Fairness:

- a. Applying the test of fairness in section 98(4), did the Respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the Claimant?
- b. The Tribunal has to decide, in particular, whether:
  - i. The Respondent adequately warned the Claimant;
  - ii. The Respondent adopted a reasonable investigation;
  - iii. The Respondent followed a fair procedure;
  - iv. Dismissal was within the range of reasonable responses.

Remedy:

- c. What financial losses has the Claimant suffered?
- d. Has the Claimant taken reasonable steps to replace lost earnings?
- e. If not, for what period of loss should the Claimant be compensated for?
- f. Is there a chance that the Claimant's employment would have ended in any event? Should his compensation be reduced as a result?

- g. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

### Evidence

11. The Tribunal heard evidence on behalf of the Respondent from:
- a. Catherine Neale, Bursar at Notton House Academy;
  - b. Trystan Williams, Chair of Notton House Academy Council, chair of the SOSR hearing;
  - c. Eileen Flynn, appeal panel member
12. The Tribunal heard Claimant give evidence on his own behalf. The Claimant alluded to other witnesses, however no Witness Statements from any other potential witnesses have been received by the Tribunal and neither have these been shared with the Respondent. The Claimant accepted he was not entitled to call any other witnesses given that no statements had been filed or served.
13. The Tribunal has had the benefit of a bundle of agreed documents of 119 pages. Documents referred to in this Judgment are denoted by their page number in square brackets.

### Findings of Fact

14. The Claimant was employed by the Respondent as a Residential Child Care Officer.
15. It is the Respondent's policy that all staff members who carry out regulated activities have an enhanced Disclosure and Barring Service (DBS) Certificate renewed every three years. A valid DBS is a condition of employment [39 and 51], in line with statutory guidance.
16. The Claimant held a DBS Certificate which expired on 16 February 2020.
17. On 14 November 2019, Catherine Neale, Bursar at Notton House Academy, emailed the Claimant to request documents to allow for a DBS Certificate to be issued. The relevant paperwork was placed in the Claimant's in-tray.
18. The documents required are listed at [58] in the bundle. "Group 1" on the list specifies "primary identity document". These are limited to: Passport; Biometric residence permit; Current driving licence photocard; Birth certificate; Adoption certificate. This is an exhaustive list. A Student Union photocard is not an acceptable document for this purpose.

19. The Claimant did not give this request his full attention initially as he intended to sort out the documentation over the Christmas break.
20. From 13 December 2019, the Claimant was chased regularly for his documentation, usually weekly.
21. At some point prior to the Christmas break of 2019, the Claimant discovered that his passport and driving licence were out of date. He informed Catherine Neale on 18 December that he was awaiting a new driving licence.
22. On 12 February 2020, the Claimant brought a box file of documentation into the Respondent. Catherine Neale went through the supplied documents to see if the DBS Certificate could be applied for using these. The application was rejected as there was no primary identity document from the list in Group 1.
23. On 24 February, Peter Evans, Chief Executive Officer, emailed the Claimant to request that he bring in primary identity document from the list in Group 1 on his next shift. A risk assessment to cover the Claimant was put in place at this time. It was decided that the Claimant could continue to work as long as he was supervised. This put a strain on the resources of the Respondent.
24. The Claimant was suspended from work on 24 March as he had still not provided primary identity document from the list in Group 1.
25. Following an investigation, a letter from the Respondent dated 21 May invited the Claimant to a disciplinary meeting on 10 June.
26. The outcome of the 10 June meeting was that the Claimant was dismissed. He was informed of this by letter dated 6 July [86]. I accept he did not receive this letter and so went to the Respondent's address to collect a copy of this letter.
27. The Claimant subsequently appealed his dismissal but this was not upheld.
28. The Claimant's effective date of dismissal was initially 15 June, later amended to 19 June. The Claimant was entitled to one month PILON.
29. As the payroll for June had closed by 19 June, the Claimant was paid his full contractual salary for the month of June.
30. The Claimant received a further payment from the Respondent in July. This payment was his one month PILON payment, less the payment for the days from 19 June to 30 June, which the Claimant should not have

been paid for. The deduction for this period was marked as “loan”. The Respondent has accepted this is badly worded, but state this is the only label they could give it, owing to the constraints of the payroll system.

### The Law

31. Under section 98(1) of the Employment Rights Act 1996 ('ERA') it is for the employer to show the reason for the dismissal and that it is either for a reason falling within section 98(2) or for some other substantial reason of kind such as to justify the dismissal of the employee.
32. An employee can bring a complaint of unfair dismissal to the Tribunal if they have completed at least two years continuous employment at the date of termination in accordance with section 108 ERA.
33. Section 111 ERA further provides that when bringing a complaint, the claim form must be presented to the Tribunal within 3 months of the effective date of termination, (or such further time as the Tribunal believes to be appropriate if it accepts that it was not reasonably practicable to present the claim within the 3 month period).
34. This is an SOSR dismissal, but it has been submitted by the Respondent that, in the circumstances of this case, it should properly follow a similar substantive and procedural pattern as a dismissal for a reason related to conduct.
35. The Tribunal has been referred to the test for the minimum standards to be expected in a misconduct dismissal set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379.
36. Under the *Burchell* test, the Respondent needs to show:
  - a. a genuine belief on the part of the employer that there has been misconduct, or, as in this case, a reason to dismiss the Claimant based on the Claimant's breach of contract and his inability to continue to work. This would amount to Some Other Substantial Reason;
  - b. based on reasonable grounds; and
  - c. following a reasonable investigation.
37. Where the employer does show a potentially fair reason for dismissing the claimant, or where that is conceded, the question of fairness is determined by section 98(4).
  - (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 reason 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.

38. The Tribunal will therefore assess whether the Respondent's decision fell within a band of reasonable responses. It is not for the Tribunal to substitute its own view of what the Respondent should or should not have done.

### Conclusions

#### Breach of Contract and Unlawful Deductions from Wages

39. In cross examination of Catherine Neale, the Claimant accepted her evidence that he had been paid PILON and that the calculation was correct. There is no evidence to demonstrate that the Claimant was not paid the correct PILON nor is there any evidence that the Respondent made unlawful deductions from the Claimant's final wages payment. I find that the Claimant was paid the correct PILON and no unlawful deductions were made.

#### Unfair Dismissal

40. The Claimant has accepted that not holding a valid DBS Certificate could be a potentially fair reason under section 98 ERA. In cross examination, he agreed that it was "paramount" to his job with the Respondent.

41. I accept the Respondent's submission, as outlined at paragraph 32 above, that this case should properly follow a similar substantive and procedural pattern as a dismissal for a reason related to conduct.

42. I find that following the procedure related to a conduct dismissal put a greater burden on the Respondent. The Respondent's Handbook [65] states that an investigation may not always be necessary in a SOSR dismissal, but the employee must be invited to a hearing.

43. The Respondent did carry out an investigation [68] and invited the Claimant to a disciplinary hearing on 10 June [75]. This letter made it clear that the Claimant being dismissed was a possible outcome due to his failure to provide the documentation for his DBS Certificate. Even if he had not been aware of it before, I find that, by 21 May, the Claimant was

aware that he was at risk of dismissal. I do not find his belief that he would not be dismissed at the 10 June meeting to be a reasonable one.

44. The Claimant has accepted that he did not have a valid DBS Certificate at the 10 June meeting. I find that the timescale that the Respondent had given him to obtain the documentation was reasonable.
45. The Claimant then appealed his dismissal and was invited to an appeal hearing on 14 July. The appeal panel did not uphold the Claimant's appeal. The Claimant submitted no new evidence. The appeal panel did not consider the Claimant's letter from DVLA [61] nor his receipt from Sainsbury's (not supplied to the Tribunal) confirming that photos had been taken to be sufficient proof that the Claimant had applied for the necessary documents. The appeal panel noted that the letter from DVLA [61] confirmed that the Claimant had requested a D1 Pack, but was of itself not proof of any application being made. The appeal panel also noted that the proof that photos had been taken did not prove that any application had been made.
46. It is not for this Tribunal to make a finding on whether or not the Claimant had applied for the necessary documentation. Rather, the Tribunal needs to consider, was the Respondent acting reasonably? I conclude that, based on the evidence that he had supplied, the Respondent's belief that the Claimant had not applied for the documents was a reasonable one.
47. The Claimant has said that he feels the Respondent could have done more to help him get the required documents, but accepted in evidence that there is no duty on the Respondent to do this, and that the responsibility for providing the documentation lies with him. I find that the Respondent's assistance to the Claimant, in both explaining the processes and the extra time given, was reasonable.
48. The Claimant has raised in the hearing today that he provided a copy of his birth certificate to Catherine Neale prior to either the 10 June meeting or his subsequent appeal hearing. I have seen no evidence to support this and I do not accept that the Claimant provided his birth certificate prior to either the 10 June meeting or the appeal hearing.
49. I do not accept that there was an ulterior motive to dismiss the Claimant. I find that the reason for dismissal in the mind of the Respondent was that the Claimant did not hold a valid DBS Certificate, and the Claimant's failure to supply the documentation to apply for one. I find this is a potentially fair Some Other Substantial Reason for dismissal. I find that dismissal on the grounds of Some Other Substantial Reason was within the reasonable band of options open to the Respondent.
50. In the circumstances, and taking into account the size and administrative resources of the Respondent, I find it was reasonable for the Respondent

to treat the Claimant not having a valid DBS Certificate and not providing documents to obtain a DBS Certificate as a sufficient reason for dismissing the Claimant. I find that the process followed by the Respondent was a fair and reasonable one. I therefore conclude that the Claimant's dismissal was fair.

51. The Claimant's claim for Unfair Dismissal therefore fails.

Employment Judge King  
Date: 04/03/2022

Reasons sent to parties: 22/03/2022

FOR THE TRIBUNAL OFFICE