Case No: 1300916/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs Sonya Shepherd	-v-	The Corbet School

FINAL HEARING

Heard at: Telford **On:** 6, 8 & 14 December 2016
(14 December deliberations only)

Before: Employment Judge Camp (sitting alone)

Appearances
For the claimant: in person
For the respondent: Mr M Davies, solicitor

RESERVED JUDGMENT

The claimant was not unfairly dismissed and her claim fails.

REASONS

1. To my mind, this is a most unfortunate and sad case. The claimant, Sonya Shepherd, is a very experienced secondary school science teacher. She had worked at the respondent school in Baschurch, near Shrewsbury – a stand-alone academy school – for over 25 years when, in December 2015, she was dismissed for misconduct. Her sole complaint is of unfair dismissal under section 98 of the Employment Rights Act 1996 ("ERA").

2. Everyone accepts the claimant was a good classroom teacher; her dismissal had nothing to do with her competence. Sadly, what she was not good at was doing what the school's Head Teacher, Philip Adams, and other senior members of staff, instructed her to do, if she disagreed with their instructions. At the most basic level, she was dismissed because she was unwilling or unable to do as she was told by her employer. She was given numerous formal and informal warnings and opportunities to mend her ways – including two final written warnings, the second of which was still in place when the claimant did the things for which she was dismissed – and the respondent could, had it wanted to, have fairly dismissed her well before it did.

3. One particular feature of this case is how little real, relevant factual dispute there is (and was at the time of dismissal), not just as to what happened during the disciplinary process, but also as to what the claimant did that led to her being in that process. The difference between the parties was, in my judgement, not about what happened, but about whether what happened was misconduct. It became increasingly clear to me, as the hearing progressed, that the only substantial argument the claimant had was her assertion that she was not guilty of misconduct. As I attempted to explain to her several times during the hearing, whether she was in fact guilty or innocent was not one of the issues in the case. She raised very few points indeed that were relevant to it.

4. I have made a decision about only two issues. This is because there were only two issues I had to decide.

   - What was the principal reason for dismissal and was it a reason relating to the claimant's conduct?
   - Was the dismissal fair or unfair in all the circumstances, in accordance with equity and the substantial merits of the case, pursuant to ERA section 98(4)?

   Deciding those two issues has involved me looking at the following subsidiary issues:

   4.1 did the respondent genuinely believe the claimant guilty of the misconduct alleged?

   4.2 did the respondent have reasonable grounds on which to sustain that belief?

   4.3 had the respondent carried out as much investigation into the matter as was reasonable in the circumstances at the final stage at which it formed that belief?

   4.4 did the respondent, in deciding that dismissal was the appropriate sanction and in relation to all other matters, including the procedure followed, act as a reasonable employer might have done, i.e. within the so-called 'band of reasonable responses'?

   Because I have resolved these issues in the respondent's favour, there has been no need to consider, and I have not considered, anything else.

5. The essential relevant law appears in the issues as set out above. My starting point has been the wording of ERA section 98 itself. I have also had in mind the well-known 'Burchell test', originally expounded in British Home Stores Limited v Burchell [1978] IRLR 379. I note that the burden of proving "*whether the dismissal is fair or unfair*" under ERA section 98(4) is not on the employer as it was when Burchell was decided; the burden of proving a potentially fair reason under subsection (1) is [on the employer], but the burden is neutral under subsection (4).

6. In relation to ERA section 98(4), I have considered the whole of the well-known passage from the judgment of the EAT in Iceland Frozen Foods v Jones [1982] IRLR 439 at paragraph 24, which includes a reference to the "*band of reasonable responses*" test. That test, which I shall also call the "*band of reasonableness*" test, applies in all circumstances, to both procedural and substantive questions: see Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588.

7. Hand in hand with the fact that the band of reasonableness test applies is the fact that I may not substitute my view of what should have been done for that of the reasonable employer. I have to guard myself against slipping "*into the substitution mindset*" (London Ambulance Service NHS Trust v Small [2009] IRLR 563 at paragraph 43) and remind myself that only if the respondent acted as no reasonable employer could have done is the dismissal unfair. Nevertheless (see Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677): the 'band of reasonable responses' test is not infinitely wide; it is important not to overlook ERA section 98(4)(b); Parliament did not intend the tribunal's consideration of a case of this kind simply to be a matter of procedural box-ticking.

8. In relation to the issue of fairness under ERA section 98(4), I have also taken into account the ACAS Code of Practice on Disciplinary and Grievance procedures. I note that compliance or non-compliance with the Code is not determinative of that issue.

9. Finally, in terms of the law, I note that this is a case where a major part of the reason for dismissal was that the claimant was already on a final written warning for similar conduct when she did the things the respondent decided merited dismissal. In such a case, it is rarely, if ever, necessary for the tribunal to examine the decision to impose the final written warning in any detail. The question is simply whether it was fair and reasonable, in accordance with ERA section 98(4), for the employer to have taken the final written warning into account in deciding to dismiss. It almost always will have been if the warning was issued in good faith, if there were at least *prima facie* grounds for issuing it, and if it was not manifestly inappropriate to issue it. See: Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374 CA, *per* Mummery LJ at paragraphs 19 to 24.

10. My decision, in summary, is:

    10.1 the reason for dismissal was a reason relating to the claimant's conduct, i.e. was that the respondent's decision-makers genuinely believed the claimant to be guilty of misconduct that merited dismissal. Indeed, at no stage during the case, including when cross-examining the respondent's witnesses, has the claimant suggested otherwise;

    10.2 the decision-makers' genuine belief in the claimant's guilt was based on

reasonable grounds and was formed following a reasonable investigation;

10.3 the procedure adopted was reasonable and dismissal as a sanction was within the band of reasonableness;

10.4 in reaching the above conclusions, I have also decided that the final written warning was issued in good faith (again, there was no suggestion to the contrary), that there were at least *prima facie* grounds for issuing it, and that it was not manifestly inappropriate to issue it.

11. I shall now explain the above decision in more detail, making any necessary findings of fact along the way.

12. By way of background, the claimant has a history of bi-polar affective disorder. However, it has never been part of her claim – and was not part of her case at trial – that her dismissal, or her conduct that led to it, had anything to do with her condition. Moreover, the respondent, evidently concerned that it might be relevant, commissioned reports on the claimant from two occupational health physicians, in May and October 2015, and the conclusion of both reports was that her behaviour was not caused by her bi-polar disorder.

13. In December 2009, the claimant was given a two-year final written warning for allegedly making inappropriate comments to pupils. The warning was imposed following an investigation and a hearing and was not successfully appealed. Throughout this disciplinary process, as with every other to which was subjected during her employment, the claimant had trade union advice, assistance and representation. From the school's point of view, her behaviour improved for most of the duration of that warning, but subsequently deteriorated.

14. The ongoing issue the school had with the claimant was her apparent desire to involve herself in things to do with pupil welfare, behaviour, dress and appearance: that she had been told not to involve herself in and/or; that were either not really any concern of hers, or that (if they were her concern to an extent) were much more someone else's concern and it was much more appropriate for that someone else to deal with them. Most of what the school viewed as misconduct by the claimant between 2012 and her dismissal fell into these categories.

15. The school employs a team of people – a 'pastoral team' – whose job it is to deal with pupils' pastoral issues, i.e. matters not directly to do with their learning. A major cause of friction between the claimant and the school, and in particular between the claimant and the pastoral team, was that if she believed an issue had not been, or was not being, dealt with correctly by the individual who it was most appropriate should deal with it, she was unable simply to 'let it go', i.e. to say to herself, "I would not deal with it that way, but someone else – whose job it is to decide such things – has decided that that

is the way it should be dealt with, so I shan't interfere".

16. Much – not all – of what the respondent deemed the claimant's inappropriate behaviour was relatively innocuous in and of itself. This is something the claimant seemed to be relying on at trial before me. What the claimant finds difficult to grasp is that some of it became serious misconduct in the school's eyes, and legitimately so, because she was acting contrary to express instructions she had been given by those in authority above her at the school. Also, what might in other circumstances be classified as a minor misdemeanour can properly be classified as something more where it is the latest in a long line of similar 'offences'.

17. The claimant suggested to me she found it confusing where there was what she perceived as a contradiction between, on the one hand, written rules and policies, and, on the other, oral instructions given to her. For example, she relies on the fact that in September 2014, an email sent on behalf of Mrs Millward made tutors responsible in the first instance for enforcing the school's rules on uniform and make-up. (Mrs Millward was, I think, a Deputy Head and/or in charge of, or a senior member of, the pastoral team; and, in any event, was someone above the claimant in the school's hierarchy). Whether or not the claimant genuinely did not understand what was being said to her at the time, this is a red herring. It is a red herring mainly for two reasons.

    17.1 First, I am, on the evidence, entirely satisfied that, at all relevant times and in all relevant respects, the position was, objectively, clear. Perhaps more importantly, the respondent at the time reasonably believed that the position was objectively clear. The position was that whatever the written rules might say about the situation generally, the claimant was being given special instructions, which applied just to her, to behave in a particular way; and all she had to do was do as she was told.

    17.2 Secondly, this is an unfair dismissal case and in such cases (as already mentioned) fairness is to be judged by the standards of the reasonable employer, not subjectively and from the employee's perspective. Having given the claimant objectively clear instructions, it was well within the band of reasonableness for the respondent school to assume that the claimant, as an intelligent professional woman: had understood them; was wilfully disobeying those instructions when she did not follow them.

18. In November 2013, the claimant was given a further two-year final written warning. It was for persisting in questioning a pupil, in front of other pupils, about the length of her skirt, which the claimant believed to be too short, in circumstances where:

    18.1 Mrs Millward had taken the view that the skirt was acceptable and that no action should be taken about it, had written a note to that effect, and

told the pupil to show it to the claimant if she raised the issue again, and the claimant knew this;

18.2 subsequently, after the claimant had effectively ignored the note, Mrs Millward had spoken to the claimant, making her views clear;

18.3 the pupil's parents had complained because, amongst other things, of what they saw as the claimant contradicting Mrs Millward;

18.4 ultimately, the pupil had to be moved out of the claimant's tutor group;

18.5 following previous similar incidents, the claimant had been informally warned, in writing, in February 2012, that if she had any serious concerns about a pupil's uniform, she should not deal with it herself but should instead refer it to the relevant line manager – and that disciplinary action might follow if she carried on dealing with such things herself.

19. The relevant facts were not, I find, substantially in dispute at the time; whatever the claimant may believe now. No significant criticisms can legitimately be levelled at the respondent in relation to the imposition of this final written warning, in terms of procedure or of substance; certainly nothing approaching manifest 'inappropriateness'.

20. On 26 March 2015, there was a meeting between the claimant and Mr Adams to review the final written warning. The gist of that meeting was set out in a letter of 31 March 2015. The main point of the letter was to inform the claimant that the final written warning, due to expire in November 2015, was being extended to April 2016. In the letter, Mr Adams referred to there having been, "*over 12 pastoral incidences involving examples of inappropriate conduct dating from 21 January 2014 to date. … Most of these have involved matters that did not concern you and should have been passed to other members of staff or to myself to deal with.*". The letter went on: "*any further incidences of this behaviour are likely to lead to a further disciplinary hearing. Also, your contract of employment will be at risk given that you are in a final warning period.*" It concluded: "*… you are a good and capable teacher and a valued member of staff. I do hope that you have reflected on our meeting and this letter so that there will be no repeat of this behaviour*."

21. The contents of that letter should not have come as any surprise to the claimant. Similar warning letters had been sent to her in January, March, May, July and November 2014 following particular incidents.

22. In early May 2015, the claimant was given some emotional management training, in an attempt to help her with her behaviour. There were, though, further incidents in or around late May / June 2015. It is worthwhile for me to describe one of them, because it is a good example of the claimant believing she has done nothing wrong when, viewed objectively, what she did was completely inappropriate, or, at the very least, the respondent reasonably

believed it was.

23. One of the pupils had emotional and behavioural difficulties. To help him deal with them, and to avoid problems and disruption, the pastoral team had, having discussed the matter with his parent(s), issued him with a 'time out' card. The card allowed him to leave a lesson at any time, without having to ask permission or explain himself, if he felt he couldn't cope. The teaching staff knew he had the card, but his class mates didn't know this. The first time after he had been issued with the card that he was in the claimant's lesson, she said to him, in front of all of his classmates, something to the effect that he wouldn't be using the time out card in her lesson because she didn't think he needed it. This was doubly inappropriate from the school's point of view. First, the claimant was discussing something that was confidential to the pupil in front of his classmates. Secondly, she was effectively undermining and contradicting a decision that had been made in relation to a pupil's pastoral issues by the pastoral team.

24. Mr Adams had a meeting with the claimant about the further incidents on 25 June 2015 and followed it up with a letter dated 3 July 2015. The letter was in the clearest possible terms, warning the claimant of the severe risk of dismissal if she persisted in her misbehaviour. In revealing evidence during cross-examination, the claimant told me that because she disagreed with the respondent about these incidents, she did not take the threat seriously.

25. Further incidents soon followed. The most objectively serious one was where the claimant said to a pupil, whose father was prohibited from contacting her by an order of the family court, in front of the pupil's mother, something to the effect that he was still her father and it was up to her whether she contacted him.

26. On 11 September 2015, Mr Adams again met with the claimant. The main point of the meeting was to praise the claimant for her exam results and to look positively towards the future, but that involved expressing the hope that she would concentrate solely on teaching, i.e. would not involve herself in pastoral matters in an inappropriate way, something that would in all likelihood have severely adverse consequences for her.

27. In the last days of September 2015, there were three incidents, two of which led to the claimant's dismissal. In summary, what happened in those two incidents was:

    27.1 in the first incident, for legitimate and understandable reasons, Mr Adams had instructed the claimant to remain in the science department for the duration of a school open evening and (it appears) for no better reason than that she disagreed with the instruction, she disobeyed it;

    27.2 the second incident was the culmination of an ongoing disagreement between the claimant and (it appears) everyone else as to how the school's policy on make-up was to be interpreted and enforced. On 28

September 2015, Mr Adams told the claimant that if she thought a pupil was wearing make-up in breach of the policy, she was not to deal with it herself but should instead refer it to him or to other designated people. The very next day, the claimant believed three girls from her tutor group were wearing make-up in breach of the school's policy. She escorted them into the school lavatories and then supervised the removal of the make-up using wipes that she herself provided.

28. There is not very much more that needs to be noted about what took place, beyond the fact that the school, in good faith, investigated these incidents, and then subjected the claimant to a disciplinary process, in accordance with its written procedures, which themselves conformed with the ACAS code. There was in practice little to investigate because little of importance was in dispute. There was ample evidence to support the respondent's conclusions that the claimant was guilty as charged. As already mentioned, the claimant was assisted and represented throughout by her trade union. She was interviewed twice in advance of the disciplinary hearing and had every opportunity to put her case forward.

29. Notes of all relevant meetings were taken by the respondent and the claimant and her trade union representatives were always given the chance to suggest amendments and additions to the respondent's notes. The claimant did not at the time, and does not now, accept the accuracy of some or all of the respondent's notes, particularly those of her first investigatory interview. However, to this day, neither she nor her trade union representatives have produced their own versions of the notes, nor even identified in what ways any important parts of the notes are wrong. In her oral evidence before me, the claimant mentioned a couple of specific things in some of the notes that she believed were incorrect, but none of the things she mentioned seemed to me to be remotely likely to have affected the outcome of the disciplinary process. Anyway, given that the claimant had not taken the opportunity given to her specifically to comment in writing on the respondent's notes, it was within the band of reasonableness for the respondent's decision-makers to treat those notes as the best available evidence of what had been said.

30. The decision to dismiss was taken by the school's Staff Dismissal Committee, chaired by John Golland, one of the Governors. The disciplinary meeting was on 4 December 2015 and the decision was taken on or about 8 December 2015, on grounds clearly set out in letters to the claimant dated 9 December 2015, which, together with the notes of the meeting on 4 December, speak for themselves.

31. The claimant appealed the Committee's decision. Her appeal was dismissed by an Appeal Committee chaired by Roger Ford, the Chair of Governors, following an appeal meeting on 21 March 2016. The appeal was a full re-hearing and not just a review of Mr Golland's decision. Again, the notes of

the meeting, taken together with the letter (of 23 March 2016) confirming the decision, speak for themselves.

32. Both Mr Golland and Mr Ford, in response to questions from me, confirmed in their oral evidence that they had considered alternatives to dismissal, and they provided a reasonable explanation for why they felt that was the right sanction. The gist of what they told me was that as the claimant was already on a final written warning, which had been extended, and given the history, they had no confidence at all that if they gave the claimant another chance, her conduct would improve.

33. During cross-examination, the claimant challenged the substance of Mr Golland's and Mr Ford's evidence to only a very limited extent. The two main points she seemed to want to make were:

    33.1 in relation to the first incident (the open evening incident) she ought to have had the same rights as pupils to wander around the school as she wished. Mr Golland's and Mr Ford's more-than-adequate responses to that were that she was not a pupil but a member of staff who had been given clear instructions to do something which she had then disobeyed;

    33.2 in relation to the second incident (the make-up incident), they wrongly believed she had attended a meeting shortly before the incident at which a change of policy about uniform and make-up was outlined; in fact she had not attended the meeting and, anyway, it took place after the incident. It is true there was a relevant meeting at which uniform and make-up were discussed and which the claimant did not attend and which took place on 1 October 2015, after the second incident. The answer to the claimant's point is that there was, in fact, no significant change in the policy, and that she was not being disciplined and dismissed for failing to follow the policy but, primarily, for failing to comply with a specific instruction.

34. Towards the end of her oral evidence, because I was finding it difficult to ascertain what criticisms of the respondent's decision-making the claimant was making, I asked her in terms to tell me.

    34.1 She accepted the respondent had followed its procedures and processes in relation to dismissal.

    34.2 She criticised its note taking, as just explained; I have already – above – considered that criticism and decided it is misplaced.

    34.3 She accepted the decision-makers genuinely believed she was guilty of the misconduct alleged.

    34.4 She alleged that the children that had complained about her – in relation to make-up – had been "*triggered*" into making the statements that they had made. That was not, though, so far as I am aware, an allegation that had ever been made before and it certainly had not been

put to any of the respondent's witnesses. Further, it doesn't really matter if they were encouraged to make statements against the claimant when the important parts of the allegations against her were not based on anything in their statements that was in dispute and where the decision-makers are not accused of bad faith.

34.5 She complained that she was not allowed to talk to staff or pupils during the investigatory and disciplinary process, and that this inhibited her ability to obtain supportive witness evidence. It is true that, as is usual in such circumstances, the claimant was told she should not contact people. However, she agrees that neither she nor her trade union representatives ever asked the respondent for permission to contact anyone in particular, let alone made such a request and had it refused. She also has not explained what potentially significant evidence she wanted to obtain and from whom that she was prevented from obtaining.

34.6 She told me that she would have liked the choice of having meetings and hearings recorded, rather than minuted. However, at the time no request was ever made in advance of any specific meeting or hearing for it to be recorded; and there would have been no discernible good reason for any such request and the respondent would have been within its rights to say "no".

35. In conclusion: none of things the claimant is relying on as sources of unfairness in relation to her dismissal have any substance; I can't see anything else that might have made it unfair.

36. For all these reasons, I have decided that: the reason for dismissal was a reason relating to the claimant's conduct; in all the circumstances, in accordance with equity and the substantial merits of the case, the respondent acted reasonably in treating in the claimant's conduct as a sufficient reason for dismissing her, and the dismissal was fair.

Employment Judge Camp

15 December 2016

Date Sent: 20 December 2016