



THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Ms K Pryde

AND

KTS Academy

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: Teesside

On: 15 September 2017

Before: Employment Judge Johnson (sitting alone)

Appearances

For the Claimant: In person (accompanied by Mr R Anderson & Mr M Lindsell)

For the Respondent: Mr S Sweeney of Counsel

RESERVED JUDGMENT

The claimant's complaint of unfair dismissal is not well-founded and is dismissed.

REASONS

- 1 The claimant attended in person and gave evidence herself. She did not call any other witnesses. It was agreed that Mr Roger Anderson would act as the claimant's "McKenzie friend" and that he would ask questions of the respondent's witnesses on the claimant's behalf. Mr Lindsell would assist the claimant and Mr Anderson. The respondent was represented by Mr Sweeney of Counsel. Mr Sweeney called to give evidence Mr Kevin Thompson (Headmaster), Mr Ian Bowman (Governor) and Ms Julie Hunter (HR representative). There were two bundles of documents, one marked R1 and one marked C1. Unless otherwise stated, the documents referred to in this judgment are identified by the page numbers in the respondent's bundle R1.

- 2 By claim form presented on 20 March 2017, the claimant brought a complaint of unfair dismissal. The respondent defended the claim. In essence it arises from the claimant's dismissal on 18 January 2017 for reasons which the respondent says related to her conduct. In simple terms, the claimant is alleged to have physically manhandled one of the respondent's students to the extent that the respondent considered that to be an act of gross misconduct justifying summary dismissal.
- 3 The issues to be decided by the Tribunal were identified at the outset as follows:-
 - 3.1 What was the respondent's reason for dismissing the claimant?
 - 3.2 If misconduct, did the respondent hold a genuine belief that the misconduct had taken place?
 - 3.3 Were there reasonable grounds for that belief?
 - 3.4 Had the respondent carried out a reasonable investigation?
 - 3.5 Was the dismissal one which fell within the range of reasonable responses open to a reasonable employer in all the circumstances?
 - 3.6 Did the claimant by her culpable conduct contribute towards her dismissal?
 - 3.7 What, if any, remedy should be awarded to the claimant?
- 4 Having heard the evidence of the claimant and the three witnesses for the respondent, having examined the documents to which it was referred and having carefully considered the closing submissions of Mr Anderson and Mr Sweeney, the Tribunal made the following findings of fact on a balance of probability:-
 - 4.1 KTS Academy is a specialist school for approximately 160 pupils aged from 4 years to 19 years. The school caters for a range of special education needs disability children including those with profound and multiple learning difficulties. In its most recent OFSTED inspections in November 2011 and July 2015 the school was rated as outstanding in all respects. The school presently employs 100 staff, including 24 teachers and 76 teaching assistants. The academy employs its own team of administrative staff, lunchtime staff, catering and building staff.
 - 4.2 The claimant was employed as a Teaching Assistant from December 2012. She worked on a full time, permanent contract during term time. Her role principally was to support the teacher in planning and delivering lessons and monitoring pupils as well as providing pupil support.
 - 4.3 The claimant effectively had a clean disciplinary record, although there had been some minor concerns expressed about the manner in which she had spoken to students in May and October 2016 and again in November

2016. Those matters were dealt with informally in accordance with the respondent's disciplinary procedure.

4.4 On 29 November 2016 an incident occurred between the claimant and Student X, a 16 year old Downs child, who is not regarded as being particularly difficult and not one who would normally require physical intervention. The claimant's evidence was that Student X was prone to wandering out of the classroom from time to time and it was frequently the claimant's job to attend to the child and bring her back to the classroom. On 29 November, this is exactly what happened. Student X left the classroom and the claimant followed her with the intention of bringing her back into the classroom. Four other members of staff were present and each provided a short statement, copies of which appear at page 56 in the bundle. Three of those statements are consistent and state that the claimant had her hand or hands on Student X's shoulders or round the back of her neck and that the claimant was pushing Student X back into the main hall. All three confirmed that Student X became upset and distressed. The fourth member of staff states that she was sitting with Student X some two hours later when Student X showed the member of staff her arm and said "*Kath, Kath*". A complaint was subsequently made by the parents of Student X to the effect that Student X had informed them as to what had happened and that the claimant had been responsible.

4.5 The Headmaster Mr Thompson decided to conduct an investigation. He first spoke to the claimant on 29 January, immediately after the matter was brought to his attention by other members of staff. The claimant was asked to give her version of events and stated as follows:-

"I went out and I said come on (X) we have to go back in and I used caring C's and sort of leaned my leg against her to walk her back in then she sat down and that was as far as I know it."

"Caring C's" is a means of opening palms so that the forefinger and thumb form a C shape and is intended to be an open gesture to place the hands on the upper arms of a student to guide them.

4.6 Mr Thompson was not satisfied with the claimant's explanation and suggested to her that she should go home for the rest of the day and return back to school to meet with him at 8:30am the following morning.

4.7 Mr Thompson prepared some brief notes of his initial meeting with the claimant. He went through those notes with her the following morning and agreed for some changes which the claimant wished to make. Mr Thompson explained that he had asked the other members of staff who were present to write their own statements and also informed her that Student X's mother had telephoned to complain that her daughter had said she had been "*grabbed, nipped and scratched*". Mr Thompson made it clear to the claimant that she should write her own statement and thereby give her own detailed version as to what had happened. Mr Thompson made it clear that this was a potentially serious allegation

which could have serious consequences for the claimant's future employment at the academy.

- 4.8 By e-mail dated 1 December 2016, the claimant provided her only written version as to what had happened. The e-mail states:-

"I have considered the events of the said morning and consider that there is no substance to the allegations. Bearing the above in mind, it is not proper to recall events that never occurred. It is here stated that I in accordance with the student safety requirements did escort Student X back into the main hall. Being aware that Student X has for some time been somewhat stressed, I paid particular attention to Student X's welfare sitting her down in a soft chair away from the main activities. There is little to add to this description as requested of the events pertinent to the morning 29 November 2016."

- 4.9 By letter dated 2 December Mr Thompson acknowledged receipt of that statement and informed the claimant that he was still investigating the matter. The letter went on to inform the claimant that she was being formally suspended pending the outcome of any disciplinary proceedings.
- 4.10 By letter dated 5 January 2017, the claimant was invited to a disciplinary hearing on Wednesday, 18 January. A copy of the letter appears at page 68. Enclosed were copies of the statements of the other members of staff, the telephone conversation between the Headmaster and Student X's parents, the Headmaster's notes of the initial discussion with the claimant and the respondent's disciplinary policy. The letter states, *"The possible consequences arising from this meeting might be dismissal."* The claimant was advised of her right to be accompanied by another work colleague or trade union representative.
- 4.11 The claimant attended the disciplinary hearing and was accompanied by Mr Anderson, although he was neither a work colleague or trade union representative. The respondent did not object to Mr Anderson accompanying the claimant. Notes of the disciplinary hearing appear at page 74-75 in the bundle. Mr Thompson presented the evidence he had gathered, including the statements from members of staff, the note of his discussion with the claimant and the note of his discussion with Student X's parents. He also produced the claimant's e-mail of 1 December. The claimant was asked to respond and Mr Anderson simply replied, *"Well the evidence will be discussed at a different forum. We are not going backwards and forwards. Ms Pryde has stated the position that if any punitive action is taken at this meeting she will take it further. Kathryn is very definite in her position."* The claimant nor Mr Anderson challenged any of the evidence presented by Mr Thompson and neither offered any additional explanation to that which had already been given.
- 4.12 Mr Ian Bowman is the Chair of Governors of the respondent academy. It was his role to chair the disciplinary hearing. Any decision made would be

his decision and his alone. Having heard what was said by Mr Thompson and having considered the spartan response from the claimant, Mr Bowman considered that the allegation against the claimant was proven. He was satisfied that the claimant had physically manhandled Student X in circumstances where it was inappropriate to do so and in a manner which amounted to a serious act of misconduct. In the absence of any contrary argument from the claimant or any mitigating evidence, he took the view that the claimant should be summarily dismissed for gross misconduct. That decision was confirmed by letter dated 18 January, a copy of which appears at page 76 in the bundle. The claimant was advised of her right to appeal.

- 4.13 By letter dated 23 January (page 79) the claimant submitted a formal appeal, although no formal grounds of appeal were set out. The claimant received a copy of the minutes of the disciplinary hearing and by letter dated 25 January was invited to attend an appeal hearing before Julie Hunter (HR Consultant) at the school on 2 February. Again the claimant was told she had the right to be accompanied by a friend or work colleague or trade union representative.
- 4.14 Minutes of the appeal hearing appear at page 82-83 in the bundle. Mr Anderson again attended with the claimant and stated that the appeal was on two grounds:-
- (a) the decision to terminate the claimant's contract was unsafe;
 - (b) the procedure followed by the disciplinary committee was improper.
- 4.15 At the appeal hearing Mr Anderson was asked to explain those grounds. Mr Anderson's response was that the Headteacher should not have been involved in the disciplinary committee as guidelines from the Department of Education specifically prohibited that. Mr Anderson was asked to provide a copy of any documentation to support that submission, but was unable to locate it. Mr Anderson also said that the respondent's disciplinary policy was itself subject to other principles of law and that he had in fact received two conflicting versions of the disciplinary policy. Again, he was unable to produce either copy. Ms Hunter suggested a 10 minute adjournment to enable Mr Anderson to find the documents to which reference had been made. Unfortunately Mr Anderson was unable to find any of the documents during the short break. Ms Hunter then proposed that the entire hearing be postponed to another date so as to enable Ms Pryde to consult with ACAS or to take other advice. By letter dated 3 February (page 86), the claimant was given a further 5 days "to re-appeal in writing to Julie Hunter". The claimant did not submit any further documents. By letter dated 7 February, the claimant was invited to attend the reconvened appeal hearing on Friday, 24 February. By letter dated 8 February (page 95) the claimant applied stating:-

"By your continued distortion of the appeal proceedings and your failure to address issues raised in my correspondence, you have

forfeited the right to any further consideration from me. I therefore as a result of your obfuscation, withdraw my appeal and notify you that I will seek a fair and just hearing at arbitration or an industrial tribunal. I require no further communication from you."

- 4.16 The claimant submitted her claim form to the Employment Tribunal on 20 March, having first approached ACAS by way of early conciliation on 10 February.
- 4.17 The Tribunal found that Mr Thompson's investigation of the allegation against the claimant was fair and reasonable in all the circumstances. He promptly invited the claimant to attend an investigatory meeting at which she was given a full opportunity to give her own version of events. Mr Thompson promptly obtained statements from those other members of staff who had been present and invited those members of staff to prepare their own witness statements. Mr Thompson kept a note of his meeting with the claimant and also of his telephone conversation with Student X's parents. All of those documents were disclosed to the claimant well in advance of the disciplinary hearing. At both the disciplinary hearing and the appeal hearing the claimant was allowed to be accompanied by her chosen representative, Mr Anderson. At both the disciplinary hearing and the appeal hearing, the claimant was given a full opportunity to respond to the allegations made against her. She chose not to do so, relying simply upon a bare denial that anything had happened between herself and Student X other than that which is described in the claimant's e-mail of 1 December. The claimant's attitude to the disciplinary process and indeed to these Employment Tribunal proceedings simply that nothing untoward had happened between herself and Student X and that it was therefore impossible for her to produce any evidence to prove a negative. In terms of the claimant's challenge to the investigation, she could suggest nothing that had been done which should not have been done, nor could she suggest anything which had not been done but which should have been done.
- 4.18 In his re-examination of the claimant, Mr Anderson put to her that Student X may have been "*imaginative*". That explanation was never suggested by the claimant at any time in the investigation, disciplinary process or appeal process. It did not appear in her claim form, does not appear in her witness statement and was never put to the respondent's witnesses. Mr Anderson challenged whether Mr Thompson as the Headmaster should have carried out the investigation. The Tribunal found nothing which could or should have prevented him from doing so. Mr Anderson challenged whether Mr Thompson should have attended the disciplinary hearing. The Tribunal found that it was reasonable for him to do so in his capacity as the investigating officer. The Tribunal found that Mr Thompson played no part in the decision to dismiss the claimant. That decision was made by Mr Bowman alone. Mr Anderson's suggestions that the policy followed by the respondent was in breach of some other written policy or procedure, approved by the Department of Education, was wholly unsubstantiated. No such documentation was produced.

Finally, Mr Anderson argued that the incident between the claimant and Student X should have been reported to the local authority designated officer. Mr Thompson did not do so as he considered it to be unnecessary. Mr Anderson could not show how any failure to report the matter to LADO impacted in any way upon the fairness of the investigation or disciplinary process or its outcome. No meaningful explanation was given by the claimant or put forward on her behalf by Mr Anderson as to why she had abandoned her appeal.

The law

5 The relevant statutory provisions engaged by the complaint of unfair dismissal are set out in sections 94 and 98 of the Employment Rights Act 1996:-

“94 The right

- (1) An employee has the right not to be unfairly dismissed by his employer.
- (2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

98 General

(1) In determining for the purposes 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 principal 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--

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
- (b) relates to the conduct of the employee,
- (c) is that the employee was redundant, or
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)--

- (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(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."

6 Interpretation of those statutory provisions may be fairly described as "*encrusted with case law*". A useful summary of the factors which are relevant to cases such as these is set out in the judgment of Lord Justice Aikens sitting in the Court of Appeal in **Trevor Orr v Milton Keynes Council [A2/2009/2700:-**

"The relevant principles established by the cases are as follows:-

- (1) The reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss the employee.*
- (2) The employer cannot rely on facts of which he did not know at the time of the dismissal of an employee to establish that the "real reason" for dismissing the employee was one of those set out in the statute or was of a kind that justified the dismissal of the employee holding the position he did.*
- (3) Once the employer has established before the employment tribunal that the real reason for dismissing the employee is one within what is now section 98(1)(b), ie that it was a valid reason, the employment tribunal has to decide whether the dismissal was fair or unfair. That requires first and foremost the application of the statutory test set out in section 98(4)(a).*
- (4) In applying that subsection, the tribunal must decide on the reasonableness of the employer's decision to dismiss for the real reason. That involves a consideration, at least in misconduct cases, of three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.*

- (5) *If the answer to each of those questions is “yes” then the tribunal must then decide on the reasonableness of the response of the employer.*
- (6) *In doing the exercise set out at (5) the tribunal must consider by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a “band or range of reasonable responses” to the particular misconduct found of the particular employee. If it has, then the employer’s decision to dismiss will be reasonable. But that is not the same thing as saying that the decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.*
- (7) *The employment tribunal must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.”*

- 7 In the present case the tribunal found, as set out above, that the investigation carried out by Mr Thompson was reasonable in all the circumstances. Evidence from witnesses was quickly gathered and noted. The claimant was quickly interviewed and given a fair opportunity to provide her version of events. She was given additional time in which to provide a written response. She was given a further opportunity to provide an explanation at the disciplinary hearing and again at the appeal hearing. The tribunal found that the investigation carried out by Mr Thompson was entirely reasonable in all the circumstances and certainly one which fell within the range of reasonable responses open to a reasonable employer in the circumstances. (**Sainsbury Supermarkets v Hitt**).
- 8 The Tribunal found that Mr Thompson, Mr Bowman and Ms Hunter all genuinely believed that the claimant had physically manhandled Student X to such an extent that it amounted to an act of serious misconduct. Belief was based upon the evidence obtained by Mr Thompson and the lack of any meaningful explanation from the claimant.
- 9 The three stage test set out in **British Home Stores v Burchell [1978] IRLR 379** was established at all stages. The Tribunal found that the respondent held a genuine belief on reasonable grounds after a reasonable investigation that the claimant had committed an act of gross misconduct.
- 10 The Tribunal then had to decide whether the decision to dismiss was one which fell within the range of reasonable responses open to a reasonable employer in those circumstances. The Tribunal found that some reasonable employers would have dismissed the claimant in these circumstances. Accordingly the decision to dismiss fell within the range of reasonable responses.

- 11 For those reasons, the claimant's complaint of unfair dismissal is not well-founded and is dismissed.

EMPLOYMENT JUDGE JOHNSON

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON**

5 October 2017

JUDGMENT SENT TO THE PARTIES ON

6 October 2017

AND ENTERED IN THE REGISTER

P Trewick

FOR THE TRIBUNAL