EMPLOYMENT TRIBUNALS

Claimant: Mr D Symons

First Respondent: North Yorkshire County Council

HELD AT: Hull **ON:** 24 January 2018
4 and 5 June 2018
Reserved in Chambers 11 June 2018

BEFORE: Employment
Judge Wedderspoon

REPRESENTATION:

Claimant: In person
Respondent: Mr D Bayne, Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is that:-

The claim for unfair dismissal is not well founded and is hereby dismissed.

REASONS

Complaints and issues

1. It was identified and agreed at the commencement of the first day of the hearing that the claimant pursued a claim of unfair dismissal. The relevant issues for the Tribunal to decide in this case are as follows:

   1.1. What was the reason or principal reason for the dismissal?

   1.2. Was the reason or principal reason loss of trust and confidence in the employee (namely some other substantial reason)?

   1.3. Did the respondent genuinely believe there was a loss of trust and confidence on reasonable grounds following a reasonable investigation?

1.4. Did the respondent follow a fair procedure?

1.5. In particular was it fair that Rosemary Rayne chaired a disciplinary hearing in July 2016 as well as chairing the claimant's appeal from dismissal.

1.6. Was the sanction of dismissal fair?

1.7. Would the adoption of a different procedure by the respondent have resulted in a different outcome?

1.8. Was the claimant guilty of contributory fault?

Evidence

2. The Employment Tribunal heard evidence from the claimant who represented himself and presented witness statements submitted by David Farey, Angela Bamford, Alexandra Vipurs and Tim Machon. The appropriate weight was attached to the written representations in the circumstances that these witnesses did not attend the Tribunal hearing and their evidence was not tested by way of cross-examination. The respondent called two witnesses Mark Mikhelson, executive head teacher for Scarborough Pupil Referral Service (PRS) from April 2015 until July 2017 and the dismissing officer and Rosemary Rayne governor for Scarborough PRS who acted as a chair of the disciplinary panel on 26 July 2016 and chaired the appeal against the claimant's dismissal on 24 August 2017. I was provided with an agreed bundle of 587 pages on the first day of the hearing. On the second day of the hearing further documents were added to the bundle by agreement taking the total document bundle to 636 pages.

Facts

3. The claimant was employed from 17 November 2007 to 12 September 2017 by the respondent as an advanced teaching assistant. The claimant has a degree in social and behavioural studies and is a qualified counsellor. He worked for the respondents on a programme called REACH (Reaching Education and Challenging Horizons) and concentrated on teaching vocational training across five days and five disciplines which included construction, motor vehicle and engineering and hairdressing. The programme targeted students who found mainstream school difficult.

4. At the time of the claimant's dismissal there were approximately 25 staff including six teachers, 18 teaching assistants, Elaine Mallen the head teacher, deputy heads Kathy Boyle and Matt Crossland and an office manager Mary Mortimer. The service dealt with about 30 students. The claimant accepted in evidence it was important to have trust and confidence in the team of staff in particular where you are dealing with such a small organisation and where you were dealing with vulnerable children.

5. By way of background in December 2014, the claimant was subject to a disciplinary investigation into a number of allegations including that he had allegedly sworn at a student in a supervising capacity at Yorkshire Coast College, failed to show professional respect to others, had unjustly refused a reasonable management instruction and at a staff meeting was alleged to have squared up to the head teacher. An investigation was carried out by Alan Gaunt who left post at the end of 2014 and the disciplinary investigation did not continue. Elaine Mallen was appointed at the head teacher at Scarborough PRS from 1 September 2015.

6. In October 2015 a meeting took place between Elaine Mallen the head teacher of Scarborough PRS and the claimant to discuss the claimant's request for time off to take his pet rabbit to see a veterinary surgeon. The claimant moved Miss Mallen's handbag from the chair to another chair stating he wanted to sit face to face and that Miss Mallen's chair was a power thing. The claimant refused Miss Mallen's acceptance for him to attend the vet stating that he would not go as it was not worth the stress. At the end of the day Miss Mallen went to see the claimant who stated the reference to the chair was just a joke.

7. Following a restructure in September 2015 the claimant's contract was adjusted to a term time post only. The change was applied to all teaching assistants within the PRS as part of cost savings.

8. The claimant stated in his evidence that he had lost confidence in Elaine Mallen the head teacher within the first four months of her starting at the school (by January 2016). In particular he was unhappy with the restraint techniques on children she had introduced. He also objected to being investigated for an incident on 27 January 2016 when he left college some 10 minutes earlier. By February 2016 the claimant stated in his evidence he had lost confidence in Mary Mortimer. By December 2015 to February 2016 he told the Tribunal he had stated he lost confidence in Mr Mikhelson because he failed to impose any sanction on children who were abusive. He also believed Mr Mikhelson was dishonest in rejecting his grievance. He also told the Tribunal by February 2016 he believed he was scapegoated by Miss Mallen when he was suspended. The submission of his grievance he believed exacerbated matters.

9. On 26 January 2016 it was alleged the claimant had left three boys unaccompanied at Yorkshire Coast College. The claimant disputed this allegation stating that the boys were with a tutor. The respondent's view of a lack of supervision is that they were not supervised by a PRS member of staff namely the claimant. On 27 January 2016 the claimant left his work place early due to his mother being taken ill. Under the relevant policy there is a requirement for employees to seek permission from PRS before leaving work. On this occasion the claimant had asked the college tutor for permission to leave early. On 23 February the claimant was alleged to have failed to attend the Yorkshire Coast College to supervise students and there was no supervision arranged for the children. The respondent's case is they perceived these matters as significant safeguarding issues and were concerned the claimant was not reporting his absences in the correct way. On 12 December 2016 an attendance meeting was held with the claimant with Kathy Boyle and Steve Mortimer. The claimant explained on 26 January 2016 the students had ran away from him. On 27 January he had received a call from his mother's care home informing him that his mother had been taken ill. In the course of that meeting he accepted he was aware of the procedure that he should seek permission from PRS to leave work early but stated in the circumstances he was worried about his mother and asked the tutor for permission for leave instead. The claimant was advised that he must follow the procedures for reporting absences as detailed in the attendance management policy which was given to him with the outcome letter from his attendance management meeting and he was told his progress was to be monitored. In evidence the claimant expressed dissatisfaction with Kathy Boyle for showing no concern for him or his mother.

10. The claimant had two periods of absence for sciatica on 7 and 8 December 2015 and on 1 to 5 February 2016. The respondent was concerned about the genuine reason for the claimant's absence from work. He was a keen table tennis player and the respondent was concerned that the claimant may have been playing table tennis when he said he was ill. The claimant's photograph had been seen in a local newspaper where it indicated he was playing tennis when he was alleged to have been off sick.

11. On 29 February 2016 the claimant was suspended from duty on full pay by the head teacher Elaine Mallen on two grounds. First it was alleged he had neglected his duties and failed to follow correct reporting procedures impacting upon children under the responsibility of the Scarborough Pupil Referral Service. Secondly that he had fraudulently claimed sickness absence while engaging in sporting activities. In evidence the claimant accepted it was reasonable for the respondent to investigate him in these circumstances due to the serious nature of the allegations although he stated he was not clear exactly what the first allegation meant in the suspension letter referred to. He was interviewed on two occasions. First on 22 March 2016 and secondly on 13 May 2016. The Claimant was concerned as to the delay in interviewing him and questioned why he was not simply asked by the Respondent about further issues in correspondence; his case is that this was a deliberate vindictive step by the Respondent. The Tribunal did not hear an explanation from the respondent for this delay. However the Tribunal finds by this stage the relations between the Respondent and the Claimant were very strained indeed.

12. In the investigation meeting of 22 March 2016 he stated he had a school phone with him at the time of 27 January 2016 so could have directly contacted PRS if necessary. He said on 23 February 2016 there was a mix up. Nicky Mudd was meant to be covering him. He told Steve Mortimer he was struggling with sciatica due to the steel cap boots he had to wear which were aggravating his condition. He said Steve Mortimer knew there was a mix up. The claimant stated he did not participate in a table tennis event on 3 February whilst off sick. He said he played only for perhaps 45 minutes on this date. He accepted it was reasonable for the school to think that if he was fit to participate in the event he was likely to be fit to attend work but stated this was not really the case.

13. In the course of the investigation in May 2016 the claimant was asked about leaving early on 27 January and that a witness had stated the claimant was aware he may need to leave work early due to the fact that his mother was seriously ill at the time. In these circumstances it was suggested to the claimant he could have alerted PRS beforehand. The claimant said the evidence was fabricated and made personal comments about the head teacher Elaine Mallen. He stated at this stage he played table tennis to relieve his sciatica. Following the investigation he was invited to a disciplinary hearing on 30 June 2016 which was subsequently adjourned to 14 July 2016 to allow the claimant's trade union representative to attend.

14. On 27 June 2016 the claimant commenced a period of sickness absence for work related stress. On 9 July 2016 the claimant said he would not attend the disciplinary hearing because he was off sick from work. The claimant was invited to an occupational health appointment for 12 July which he did not attend. He was then invited to attend a further disciplinary hearing on 26 July 2016. Rosemary Rayne chaired this hearing. The claimant provided a written

representation and contended that Miss Mallen the head teacher despite his mitigating circumstances had placed him on a disciplinary which was a malicious and vindictive act. He says there was a cynical and deliberate attempt to delay the issues.

15. At the disciplinary hearing the panel heard in respect of the incident on 27 January 2016 that the claimant stated he had left 10 minutes early and accepted he did not report this to Scarborough PRS. He had spoken to the class tutor who remained in attendance who had given him permission to leave. The tutor was a staff member of Yorkshire Coast College and not the PRS. The claimant stated he had left because his mother was ill. Calling the PRS was the last thing on his mind. In respect of the incident on 23 February 2016 Steve Mortimer had given evidence to the panel that the claimant was meant to be supporting pupils from the PRS at Yorkshire Coast College. On this particular day when his line manager had noticed his car in the PRS car park and also the vehicle of Nicola Mudd. The panel were advised that the claimant usually supported pupils at the college on Tuesday and Thursdays (23 February was a Tuesday) whilst Nicola Mudd a general teaching assistant went on a Monday and Wednesday. Steve Mortimer said to the panel that he had asked the claimant why he was not at college and having told that he was unwell and thought Nicola Mudd was attending saying that he had spoken with her the previous day. Mr Mortimer gave evidence to the panel to suggest he had not been told of any change in the arrangements which was disputed by the claimant. Nicola Mudd had filed a statement but had not been called as a witness. The panel had noted that Nicola had denied agreeing to cover the claimant at the college for the date in question. Whilst the claimant had alleged that both Steve Mortimer and Nicola Mudd were aware of the cover arrangement the panel noted that this was a factual dispute and that neither person accepted they had known. One of the panel members Mr Honeysett did make reference to Nicola's comments that she thought that she may need to cover but this did not seem to extend to a formal discussion. The panel also heard from Kathy Boyle the assistant head teacher for Scarborough PRS. She also provided a witness statement. She told the panel that she had held an attendance meeting with the claimant to discuss the absences at college and try to lower these and to discuss the incident on 27 January when the claimant had left early without following the proper procedures. The panel were told that Scarborough PRS should always be contacted when there is an absence to avoid the risk of pupils being left unattended. This was affirmed in a training session delivered in October 2015.

16. On 23 February when the claimant was supposed to be at college Kathy Boyle told the panel she had seen the claimant taking a mural at Scarborough PRS and she had reminded him to be careful of his back and he then discontinued. The panel also considered the allegation that the claimant had made a fraudulent claim for sickness absence. Mary Mortimer the office manager provided a witness statement and stated that she had known of the claimant's absence from work due to sciatica between 1 and 5 February as she conducts back to work interviews. Following this she had noticed from a local paper it appeared the claimant had been involved in a table tennis tournament on or about 2 February. She had asked the claimant for a sick note and he had informed her he didn't need one as his absences on 28 and 29 January were due to his mother being ill. He stated he only needed to give a sick note if his sickness absence didn't exceed the seven day self certification period.

17. Mary Mortimer had said she was not aware of this because the claimant had failed to report his absence in the correct manner. Mary Mortimer had advised the claimant he would be unpaid for the first two days and his sickness would be recorded as 1 to 5 February. At a return to work interview on 14 December 2015 the claimant raised he required safety boots to minimise the pain of his sciatica and that Mary Mortimer advised she would speak to Steve Mortimer the claimant's line manager to arrange this. On 24 February Elaine Mallen the head teacher had authorised Mary Mortimer to provide petty cash to Mr Mortimer to give the claimant to buy some work boots. The panel concluded that a written warning was an appropriate sanction in the circumstances. The panel did not make any adverse finding as to the fact that the claimant left 10 minutes early in January 2016 but was concerned with the absence in February 2016 when the claimant asserted Nicola Mudd would be covering him. The panel felt there had been improper reporting of the intended absence leaving the children unattended and thought this to be serious misconduct having regard to the vulnerable children involved. In respect of the allegation of a fraudulent claim of sick leave the panel decided there was insufficient medical material to establish whether table tennis could aggravate sciatica or determine whether it could be played when suffering from such a complaint. The panel did not reach a conclusion on this point. Rosemary Rayne panel of the disciplinary hearing wrote to the claimant to advise him of the outcome. Although the Claimant expressed concern that the incident of leaving early on 27th January 2016 had been dealt with and should not have been taken to the disciplinary hearing the Respondent did at this hearing dismiss that allegation. I accept the Claimant's concerns that the incident of 27th January 2016 should not have proceeded to the hearing because he had already been counselled about this matter on 12th February 2016. However the Respondent abandoned this matter at the disciplinary hearing on 26th July 2016 and the Claimant was not disciplined for this matter. On 9 August 2016 the claimant appealed the disciplinary sanction. He stated "how dare you accuse me of trying to divert claim. What possible motive would I have?" He also stated that Mr Mortimer was a liar and had lied to save his own skin and felt Nicky Mudd was omitted from attending the hearing. He said "god forbid anybody is allowed to tell the truth in this farce". He said he would write to Ofsted and submit charges of gross misconduct against Alison Oxley, Mary Mortimer and Elaine Mallen. On 30 August 2016 the claimant raised a formal grievance alleging gross misconduct by Elaine Mallen, Mr Mortimer and Alison Oxley. On 1 September 2016 the claimant was told he was not required to return to work at the start of the term in the light of the issues he had raised in his correspondence of 30 August.

18. Mr Mikhelson was appointed to investigate the claimant's grievance. He informed the Tribunal he was unable to investigate any concerns relating to Alison Oxley and suggested that this be dealt with under the local authority's procedures. The claimant's primary dissatisfaction was being subject to disciplinary proceedings and being given an outcome. The claimant stated that these issues of absence reporting should have been dealt with informally and the evidence is that he was not playing table tennis in November 2015. He was in fact visiting his sister-in-law. He stated his confidentiality had been breached during this process with information being shared between Alison Oxley and Elaine Mallen which should not have happened. He also raised a concern he had not been advised he could call his own witnesses to the disciplinary

hearing. At a meeting with the claimant on 16 September 2016 the claimant stated he felt he was a scapegoat and that there was a breakdown in trust with Elaine Mallen and individuals had lied in their witness statements. The claimant agreed to provide supporting documentation. On 10 October 2016 Jo Burnside chased the claimant for the documentation he wished to rely upon. The claimant responded to this request that he had no car at present nor any internet or landline. He requested a postal address to send documentation to and stated "where were you 7 months ago?"

19. In the course of the grievance process Mr Mikhelson did not formally interview any members of staff but did interview some witnesses personally and by phone to obtain points of clarification and confirmation on their witness statements. He rejected the claimant's grievance but was concerned with the allegations and counter allegations being made that could have led to a potential breakdown in working relationships. He wrote to the claimant on 9 November 2016 setting out there was a potential breakdown in the working relationships and would like to discuss options with the claimant.

20. On 14 November 2016 the claimant appealed this outcome stating Mr Mikhelson could not be objective as being the head of the centre was Miss Mallen's boss. He stated Mr Mikhelson was biased and could not separate fact from fiction or speculation. The claimant requested Mr Mikhelson be removed and someone genuinely impartial replace him.

21. On 21 November 2016 the claimant appealed the outcome. In his letter he stated to Mr Mikhelson "let me express my feelings over how offensive I find your assessment of this whole shameful episode. All this has proved and reinforced the fact that you should have never had anything to do with the investigation. Your persistence in omitting and distorting facts is embarrassing and blatantly bias. As I stated at our meeting I feared your objectivity would be compromised and I was right". He further stated in the same letter "your shameful efforts to ignore the truth. Can I just say that if Elaine Mallen and yourself are the bench mark of a moral compass and integrity then heaven help the students that we teach". In the same letter he described that he felt it is fair to assume that Mr Mikhelson did not consider all the facts and like Elaine Mallen your findings are unsafe.

22. On 22 November 2016 a meeting was held with the claimant "resolving issues at work" where the claimant stated that Mr Mikhelson had been biased throughout. He questioned why the investigation had taken some five months. He stated that Miss Mallen was a malicious woman who had lied, stated she cries her eyes out and shouldn't be there. He stated that he was "unable to return. There had been a complete breakdown in trust and don't know how I can ever return here". He stated that the head teacher was absolutely useless. He went on to say that when pressed if he could return "if I had to I would go back but I cannot say what I would do. I might be argumentative. I might confront them. Cannot hold myself responsible for my actions. I want EM sacked". The claimant also complained about the office manager Mary Mortimer, his line manager Steve Mortimer and Kathy Boyle the assistant head teacher at PRS at the material time and suggested poor GCSE results were due to these "incompetent" people. Mr Mikhelson suggested mediation and Jo Burnside from HR sought to organise mediation on 28 November 2016. Due to the fact that mediation could not be organised prior to the claimant's

planned phased return to work Mr Mikhelson wrote to the claimant to defer the starting of his work until a mediation session had been completed.

23. In fact work place mediation was set up for 5 January 2017 at 3.15pm. The claimant was informed by email of this appointment on 4 January. The claimant said he was unable to attend due to the short notice because he was already attending a stress management control course. This was incorrect. The claimant was not attending such an appointment. The stress management control appointment was on 4 January. I am not satisfied from the claimant's evidence this was a genuine error on his part on the basis that he was contacted by the Respondent on 4 January, the very same day as the appointment for the management stress course he was attending that day. Jo Burnside tried to arrange the mediation time with the claimant requesting him to confirm the time of his management control course. The claimant did not reply to this enquiry. Jo Burnside emailed the claimant again to meet at a changed time of 10.15am in the morning of 5 January 2016. The claimant in a latter email explained that he didn't reply because he had no car, a lack of internet access and phone communication. He was looking forward to mediation. However the mediator closed the mediation process which was confirmed on 9 January 2016 because of a lack of co-operation by the claimant. I am not satisfied there has been an adequate explanation given by the claimant for engaging with his employer and mediation at this period of time. The claimant remained an employee with the respondent being paid in full and he was duty bound to keep in touch with them. I am not satisfied that he was as enthusiastic as he made out in evidence to enter mediation with his employer. His feelings at this stage were very negative towards them.

24. On 16 January 2017 the claimant commenced long-term sickness absence for work related to stress. On 17 January 2017 the claimant was referred to occupational health or advice on whether he was fit to attend meetings. The occupational health report prepared by Paul Crosbie dated 9 February 2017 concluded that the claimant did not report any underlying illness which would make him more susceptible to workplace stress or its effects. It was stated that stress is not an illness. He further stated he did not anticipate any return to duty until there was managerial resolution of the issues Dale stated he had the Respondent aware of. He went on to state that there was no medical reason why the claimant could not attend for meetings and the claimant had informed him today that he understands the benefit of his attendance with regards representing himself and bringing the issues to a close. He went on to say it will often be the case that the worker will find the proceedings distressing but that delaying the process for a prolonged period will be likely to be more damaging to their health especially their mental health and continuing with it. He further stated that the presence of a support at the meeting would assist the claimant in remaining calm. He advised that managerial action was required and not medical action before any potential return to work was envisaged.

25. On 17 February 2017 the claimant was invited to a grievance appeal hearing to be chaired by Rosemary Rayne. On 1 March 2017 the claimant submitted evidence from the Evening News and asserted he was playing table tennis on 9 November 2016. The claimant objected to Miss Rayne chairing the appeal on the basis she had imposed previously a disciplinary sanction against him. The appeal therefore was conducted by Honour Byford. The appeal hearing took place on 3 May 2017 and the claimant's appeal was rejected. By letter of 9 May

2017 the claimant stated Miss Byford's finding was unsafe and corrupt. On 8 May 2017 the claimant attended a long-term sickness review meeting with Mr Mikhelson and Paul McPherson. The claimant stated his return to work was inhibited by the fact his grievance about EM which had been put on the back burner. He also stated the way that he had been treated by Alison Oxley keeps him up at night. He said the respondent couldn't justify this no matter how much "you hide behind the policy". On 12 June 2016 the claimant emailed his trade union representative and was critical of the trade union's representation of him. On 13 June Unison withdrew support for the claimant. On 14 June 2017 the claimant was invited to a hearing on 26 June 2017 to consider whether there had been a breakdown in trust and confidence. This hearing was adjourned when the claimant did not attend and was adjourned to 4 July 2017. He was informed by the respondent that frequent breaks would be made to facilitate the claimant's attendance. Alternatively the claimant was offered the option of sending a work colleague or trade union representative to represent him or he was invited to participate by telephone or submit written representations. The claimant did not attend the hearing on 7 July 2017 and Mr Mikhelson took the decision to dismiss the claimant. In his letter dated 7 July 2017 he stated he was disappointed that the claimant was unable to attend or provide information which the respondent would have liked to have taken into consideration in reaching a decision. He set out a number of points which were not challenged by the claimant in cross-examination of Mr Mikhelson in evidence namely despite being given a number of opportunities to do so the claimant did not show signs that he wanted to resolve any matters. The claimant had continued to raise complaints and does not accept any outcomes from investigations. At the appeal hearing on 3 May 2017 there were two areas that were barriers for the claimant's return to work, an outstanding complaint against Alison Oxley and an outstanding complaint against PRS arrangements at Yorkshire Coast College. It was stated the claimant had an opportunity to progress complaints against Alison Oxley but he did not do so. On 16 September he attended a meeting and was asked for details of his complaints for investigation but again the claimant did not bring this forward until the appeal. The claimant's complaints had been investigated and found to have no substance. The respondent was satisfied that investigations had been carried out and there was documented evidence of actions taken. The claimant had made derogatory remarks about all line managers at the PRS. The claimant was not available for mediation and couldn't be contacted. The claimant was not available for attendance management and other meetings. He had not maintained contact and the occupational health report had stated management issues should be resolved to allow a return to work. In the circumstances Mr Mikhelson reached the conclusion that the claimant would be dismissed on grounds of some other substantial reason in that the working relationship between the claimant and Scarborough PRS had irrevocably broken down. It was stated the last day of employment with North Yorkshire County Council would be the date given by the council in its letter to him.

26. By email dated 19 July 2017 the claimant appealed. He described Honour Byford's approach to his appeal as perverting the course of justice. The appeal points were summarised in the appeal hearing of 24 August 2016 as concerning a complaint against Alison Oxley who was not investigated and had not received any communication from HR North Allerton. Secondly his concerns were not investigated regarding his grievances and Mr Mikhelson did

not provide evidence to support his claims that he did investigate grievances and Honour Byford ignored evidence. Remarks made by the Claimant regarding line managers were true. He stated he always respected line managers especially those at college who are people of honour. With regard to mediation he stated that his first attempt was cancelled due to availability of the mediator. The next appointment was at very short notice. He had no landline and no internet at home and requested postal invites. He also raised concerns about other individuals not co-operating with his mediation and he requested for more time to recover with regard to his mental health and that had been refused by the respondent.

27. On 24 August 2017 Rosemary Rayne chaired the appeal panel. The claimant accepted in evidence he was given a proper opportunity to put all his points relevant to his grounds of appeal. It is clear from the notes of that meeting that he objected to the presence of Jo Burnside due to the fact that she was present in that meeting. The Respondent rejected his objection to Jo Burnside and she was not excluded on the basis that Jo Burnside had not been a decision maker. I do not accept the claimant's evidence that he objected to Rosemary Rayne's presence. This is not indicated in the notes of the appeal hearing. Furthermore I accept that in a small organisation like the Respondent's there are a limited number of individuals who can chair such hearings. Rosemary Rayne's role in the previous disciplinary hearing did not prevent her from hearing the Claimant's dismissal appeal nor could it be considered to be unreasonable in the context of a small employer. In the course of the appeal hearing the claimant was given an opportunity to develop the grounds of his appeal and in summary he suggested that "they cheated and everyone has cheated". By letter dated 31 August 2017 Rosemary Rayne set out reasons why she rejected the claimant's appeal and concluded that the decision to dismiss the claimant on grounds of some other substantial reason namely that the working relationship between the claimant and Scarborough PRS had irrevocably broken down. In dealing with points the panel found that Julie Boucher from HR had sent the claimant a letter and an email on 14 September 2016 requesting the claimant send background information to progress the complaint against Alison Oxley. Nothing was received from the claimant and the claimant stated he had not received any correspondence from human resources. The panel concluded it would be unusual for the claimant not to receive both letter and the email. The claimant was aware the complaint had been passed on to human resources and had been in regular email communication with Jo Burnside then and had not raised not being contacted by human resources with her. At the attendance meeting on 8 May 2017 the claimant's issues with Alison Oxley were raised as a barrier to his return to work. The claimant's trade union representative stated that he could send further information through in relation to this but nothing was received. It would appear that reasonable attempts were made by the Respondent to engage in the complaints process but to no avail. In respect of the resolving issues at work complaint being investigated the panel accepted that the panel had sought to investigate the claimant's complaint in line with the school's policy and procedure and would have reached the same conclusion. In respect of Honour Byford the claimant agreed that he had provided evidence and the notes of the hearing show there was a discussion around this evidence. In the appeal outcome of 5 May it states that new evidence the Claimant provided would not have changed the outcome of the original investigation and it was concluded by the appeal panel

that the claimant's evidence was considered at the appeal hearing on 3 May 2017. In respect of derogatory remarks made by the claimant about his line managers Mr Mikhelson listed a number of comments that the claimant had made and the claimant in the course of the hearing stood by all the derogatory comments made. The Claimant openly admitted that he disrespected Mr Mikhelson and Elaine Mallen. In respect of the issue of mediation the claimant admitted he was confused about emails sent on 24 November 2016 and agreed in the hearing it was not a cancellation email. The panel took the view there had been attempts to make contact by phone and email and messages left for the claimant but he had not engaged in the process. The claimant had stated in the hearing that one of the reasons he was unable to attend was that there was a clash with stress management course but the evidence showed that in fact that was untrue. The occupational health advised that the claimant's absence from work was not a medical reason. At the resolving issues at work meeting on 22 November the claimant stated he was unable to return to work and he said he could return but he couldn't be held responsible for actions he would take. Despite that attempts had been made since then to support the claimant's return it was concluded that he had been invited to a number of meetings to discuss his continued employment and the possibility that he may be dismissed from the role despite being scheduled and adjustments being made and he did not engage in the meetings.

28. By email dated 13 September 2017, addressed to Rosemary Rayne, the claimant described the letter as a biased assessment of his dismissal meeting. He went on to say with regard to derogatory remarks this concerned managers. It seems the truth does hurt. He went on to say "what is disturbing is that I gave the panel serious and valid reasons why I had lost all respect for Mark Mikhelson and Elaine Mallen which again you have chosen to ignore i.e. his failure to impose sanctions on three students who verbally abused him and then he witnessed them leaving site at Yorkshire Coast College and crossing one of the busiest roads in Scarborough risking their lives and not being insured returning an hour and a half later. He went on to say about Elaine Mallen; "I told the panel that a student had confronted her about not being able to smoke at college. Instead of asserting her authority again she took the path of least resistance and came to me and asked me to break the college and PRS agreement to escort the students off site in breaks so that they could smoke". He stated at the end of that that in conclusion "the only reason this whole shambolic event was able to destroy my career reputation life is a self policing and regulating by a management HR and governors who have been complacent throughout. I also believe that the overall management of North Yorkshire Coast College HR department should look at the moral and ethical standards of their staff especially Jo Burnside and Alison Oxley who I believe has left".

Submissions

29. The respondent provided a written submission and added to the submissions orally.

30. In submissions the respondent stated that the burden rested upon the respondent to establish the reason was a potentially fair one and that the Tribunal should examine the reason of the person deputed by the employer to decide whether or not to terminate the employer (Orr v Milton Keynes Council [2011] ICR 704). He submitted that Mr Mikhelson's evidence was not seriously

challenged by the claimant namely that his dismissal was the set of facts set out in the letter of 7 July 2017. The respondent invited the Tribunal to accept that reason was genuine. He went on to submit that the appropriate way of dealing with a some other substantial reason for dismissal following the case of **Perkin and St Georges Healthcare NHS Trust [2005] EWCA Civ 1174** is as Lord Justice Wall described "whether on the facts of a particular case a manifestation of an individual's personality result in conduct which can fairly give rise to the employer's dismissal or whether they give rise to the some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held the employer has to establish the facts that justify the reason or principal reason for the dismissal. Provided the employer can do so section 98 (4) then kicks in so much is I think obvious".

31. In terms of fairness it was submitted that the Tribunal should take into account whether the belief that there had been a breakdown in trust and confidence was based on reasonable grounds following a reasonable investigation and whether that fell within the range of reasonable responses following the decision of **BHS Limited and Burchell [1978] IRLR 379 and Iceland Frozen Foods Limited v Jones [1983] ICR 17.** It was stated that the Tribunal must not substitute its own view for that of the employer and it is only where the employer's decision is so unreasonable to dismiss as to fall outside the range of reasonable responses that a Tribunal can interfere (**J Sainsburys Plc v Hitt [2003] ICR 111)**.

32. In considering whether the respondent's response was within the range of reasonable responses the Tribunal must base its assessment on the material before the respondent at the time of dismissal. The Tribunal must consider the fairness of the whole procedure in the round including the appeal and in respect of Rosemary Rayne chairing both the disciplinary panel in July 2016 and the dismissal appeal panel in 2017 it was submitted that the function of the PRS board of management was small. Mrs Rayne did consider whether she could fairly hear the appeal and reasonably concluded that she could and should. The reasonableness of that decision is underlined by the fact that the panel which Mrs Rayne had previously chaired had been lenient towards the claimant in circumstances in which they could have dismissed him for playing table tennis whilst on sick leave. The claimant who is not shy about raising objections and had previously objected to the involvement of Mrs Rayne but on this occasion failed to do so. The claimant objected to the presence of Jo Burnside at the appeal hearing but made no complaint about Mrs Rayne during the panel. At the time of his dismissal the claimant had been absent for a period of 16 months and it was exactly 12 months since the disciplinary hearing. His strength of feeling about the way he had been treated was showing no signs of abating. The PRS was a small undertaking. It was a costly burden to pay the Claimant in full for any longer period whilst no attempt was made by the Claimant to resolve his issues with management. Dismissal was well within the band of reasonable responses.

33. In any event the respondent submitted that there was significant contributory fault on the part of the Claimant, taking into account section 123 (6) of the Employment Rights Act 1996 and relying on the case of **Steen and ASP Packaging Limited UK EAT 0023/13.** Mr Justice Langstaff had stated that the Tribunal first must identify the conduct which is said to have given rise to

possible contributory fault having identified that it must ask whether the conduct was blameworthy; it must ask if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did cause or contribute to the dismissal to any extent then to what extent should the award be reduced and to what extent is it just and equitable to reduce it.

34. In the circumstances it was submitted that the claimant's refusal to accept the outcome of the disciplinary or the resolving issues at work processes, his vociferous attacks on the character and competence of the PRS management both in correspondence and during hearings and a failure to seriously engage with attempts to return him to the work place amounted to blameworthy conduct to the extent of a reduction of at least 50%. Mr Bayne wanted to reserve his position on Polkey but his preliminary submission would be in any event if the claimant's dismissal was procedurally unfair the respondent states that adopting a different process would not have resulted in a different outcome.

35. The claimant also provided a written representation. He stated that the management had alleged his conduct was in part because of his aggressive and confrontational behaviour in an effort to explain why they could not resolve the issues resolving staff. The claimant argued that the breakdown in trust originated when a respondent moved him to disciplinary for issues that previously had been explored and resolved. Management took me through a disciplinary procedure that could have and should have been investigated and managed informally as suggested by the policy. The decision against himself to impose a warning of 18 month sanction for what in effect was a staff mix up and simply down to communication as human error was disproportionate and upsetting. He stated that he attended work at the wrong location with no intent to deceive. He suggested that given his years of service and qualifications he should have been afforded the courtesy of an informal hearing. He further submitted that evidence he produced was ignored or misplaced. He did not believe that the management was being a supportive employer in respect of the bereavements and ill health he suffered. He submitted he felt they were moving him through a process in the absence of compassion and sound reasoning reinforced by a constant battle to matters resolved. He submitted he felt constantly overwhelmed at managements lack of responsibility regarding the duty of care towards his mental health and well being culminating in submitting sick notes for stress. He received counselling and a stress forum as a coping mechanism. He has admitted his commitment to the welfare of all his students over the years has been supported by the testimonials of tutors. He has worked there since 2007. His attempt to return to work in September 2016 was denied because of a grievance he submitted leaving the claimant feeling disengaged and isolated. He said he felt the reasons given for appointment of chairs for disciplinary and grievance appeal and dismissal appeal lacked credibility.

Relevant law

36. Pursuant to section 98 of the Employment Rights Act 1996 an admissible reason for dismissal can be "some other substantial reason". Some other substantial reason can include an irrevocable breakdown in the working relationship **Perkin and St Georges Healthcare NHS Trust [2005] EWCA Civ 1174**. The burden rests upon the respondent to establish that the dismissal was by reason of an admissible reason. In terms of fairness the test is set out

at section 98 (4) of the Employment Rights Act 1996. It provides "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 of the administrative resources of the employer's undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employer and;

b. Shall be determined in accordance with equity and the substantial merits of the case.

37. The burden in respect of the fairness of a dismissal is a neutral one and it does not rest on either party. In apply the test of reasonableness the Tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the Employment Tribunal can interfere. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself; **J Sainsbury's Plc and Hitt [2003] ICR 111.**

38. In the circumstances when considering fairness on the basis of the alleged admissible reason, some other substantial reason, the Tribunal needs to consider whether the respondent had a genuine belief on reasonable grounds following a reasonable investigation that the working relationship had irretrievably broken down.

Contributory fault

39. By section 123 (6) of the Employment Rights Act 1996 where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant it shall reduce the amount of compensatory award by such proportion as it considers just and equitable having regard to that finding. The Tribunal takes into account the authority of **Steen and ASP Packaging Limited** as set out above.

Polkey

40. In addition the Tribunal can also consider if the dismissal was procedurally unfair whether if the Respondent adopted a different procedure would it have resulted in a different outcome.

Conclusions

41. I am satisfied on the balance of probabilities that the respondent dismissed the claimant for an admissible reason namely some other substantial reason, a loss of trust and confidence by the employer, the respondent in the employee, the claimant. The burden rests upon the respondent to establish this reason and I am satisfied with the material before me that this indeed was the principal reason for the claimant's dismissal. In making this finding I take into account that from a period of 9 November 2016 the respondent considered that the employment relationship had irrevocably broken down. This was in the context of the counter allegations made by the claimant which were critical of management. I also take into account that the claimant himself made a number of concessions in his oral evidence as to the lack of trust and confidence that he had in senior management from within a four month period of Elaine Mallen taking the headship of PRS (by January 2016). The claimant accepted in evidence that it was reasonable for an employer to investigate potentially serious allegations concerning failures to supervise vulnerable students, a failure to

follow reporting procedures and fraudulently taking sick leave. However he suggested that this should only be dealt with in an informal manner. The Tribunal does not agree with the Claimant. It is reasonable for an employer faced with potentially serious allegations to investigate them and it was reasonable for the Respondent to discipline the Claimant for an issue of safeguarding.

42. The claimant proceeded to make derogatory remarks against management accusing them of lying and cheating. The claimant's vocal resistance to management led to a situation where the claimant was simply unmanageable within this organisation. In terms of the investigation the employer had taken the claimant through a formal process as it is permitted to do where there were allegations made that he had failed to supervise students. The claimant objected to this by a reason of his long service with the respondent and because he says there was a genuine mix up. However the respondent who deals with a vulnerable group of students could reasonably investigate circumstances where it appeared that students had been left unsupervised. It is also reasonable for an employer to consider a safeguarding issue a matter of serious misconduct requiring a formal investigation. Similarly the allegation of fraudulently taking sick leave whilst there was a concern the claimant had been engaging in sporting activity was a matter which could be potentially serious misconduct which an employer can reasonably investigate. I reject the Claimant's contention that there was bad faith in the imposition of a written warning for an 18 month period on the basis of a failure to supervise students. The investigation into this allegation was reasonable and established that there had been no formal cover agreed for the claimant's absence from work on 27 February 2016 and therefore the students were left unsupervised by the claimant or another member of staff. In the context of this case, dealing with vulnerable students, the respondent reasonably concluded that it was appropriate to impose such a sanction on the claimant's disciplinary record. The claimant exercised his right of appeal. However the manner in which he sought to do so demonstrated a complete lack of respect and confidence he had in his employer. The manner in which he challenged the sanction namely describing it as bias and describing witnesses as lying led the respondent reasonably to the conclusion that there was a loss of trust and confidence between employer and employee. The respondent in the resolving issues at work meeting on 22 November 2016 sought to obtain from the claimant ways in which he might be able to return to work. The claimant told the employer that he did not believe that he could return to work. He was derogatory about senior management. When pushed he said that he could return but he didn't know really what he would do if he did return to work. A reasonable employer could conclude that there was a significant diminution in any trust and confidence between employer and employee. Furthermore I take into account the fact that the respondent did make efforts to undertake mediation with this claimant to see if there was any way forward in the relationship. I am not satisfied that the claimant was legitimately interested in mediation or in fact that mediation could have been a success in the circumstances where the claimant was so critical of senior management. I am not satisfied that the claimant was willing to engage in this process. His explanation for failing to engage on 5 January was that he was attending a health stress course was incorrect. The day, 4 January 2017 when he was contacted about mediation to take place on 5 January, was the very same day he had planned to go to an appointment for his management at stress course. It is not credible that he could have mixed up this particular date with 5 January and on attempts to rearrange this meeting he did not respond. He provided an explanation that he did not have internet connection or mobile phone or a car. However the claimant remained an employee of the

Respondent, was on full pay and was expected to keep in contact with his employer. The claimant failed to engage with his employer and was not co-operative with the attempts by the employer to alleviate the situation.

43. When invited to a disciplinary meeting the occupational health evidence was clear that management issues needed to be resolved. The Claimant's absence from work was not a result of a medical reason and it was in the best interest of the claimant that the meeting go ahead. The respondent had agreed to provide reasonable adjustments as necessary including breaks, allowing the claimant to send a friend or trade union representative or written representations. The claimant did not attend. The reasons set out in the letter of 7 July 2017 were in my view conclusions reached following a reasonable investigation, on reasonable grounds and the respondent reasonably concluded that the employment relationship had irrevocably broken down. I also take into account that under cross-examination, the claimant did not challenge Mr Mikhelson's view in this regard.

44. The claimant was given a further opportunity on 24 August 2017 to challenge the findings of the dismissal. All of those grounds were considered by the appeal panel. The claimant, was given a proper opportunity, on his own admission, to develop those points but in conclusion at that hearing he stated there was no investigation, the appeal was a farce, it was a simple mix up I got the blame for. It was a complete cover up. I never lied. I was found guilty. The truth will come out eventually. A cheated and everyone here has cheated and that is why I am here now. The claimant himself had no trust and confidence in his own employer and this relationship had broken down and had done so some time before.

45. In all those circumstances I accept that the reason for the Claimant's dismissal was some other substantial reason namely that the trust and confidence between employer and employee had irrevocably broken down.

46. In respect of fairness, I conclude that the dismissal was a fair dismissal because the employment relationship had irrevocably broken down. The Claimant had become unmanageable; unwilling to accept any decision made by his employer and had been highly critical, disrespectful and derogatory to managers in the organisation. I take into account the size of this organisation and its context; it was concerned with working with vulnerable young people. It is imperative in such a working environment that managers and employees have trust in one another. This no longer existed between the Claimant and the Respondent by January 2017.

47. I consider in the alternative, Polkey. I find there is sufficient material evidence before me to decide this issue. Even if a different procedure had been adopted by this employer, there is significant material for me to find that the claimant would have been dismissed in any event. The claimant's attitude was one of being unmanageable within this organisation because of his reluctance to accept findings in the process and to follow reporting procedures. His approach was one of attack and challenge rather than following management instructions. He at an early stage had already formed the view that he had a lack of trust in the head teacher. In the circumstances, whatever this respondent would have done in this case it would not

have been mediated to a satisfactory state whereby this claimant could have returned to work. Even in November 2016 the claimant was suggesting if he came back to work he didn't know what he would do.

48. Further, in the alternative I consider the issue of contributory fault. I consider there is blameworthy conduct in this particular case; the claimant's failure to recognise that he had to follow a particular reporting process in the context of vulnerable students. There was a necessity for him to report any absences to the PRS and there was a failure by the claimant to acknowledge that a management team has to manage him. His blameworthy conduct was also the derogatory manner in which he described his management team and any decisions they made within the process; the Claimant was unmanageable within this organisation. I therefore find in the particular circumstances of this case that the claimant was 100% to blame.

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Employment Judge Wederspoon

05/07/2018