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EMPLOYMENT TRIBUNALS

Claimant: Mrs L J Rodger
Respondent: Poppets Pre-School (Little Wakering)
Heard at: East London Hearing Centre
On: 11 July 2018 and
(In Chambers) 24 July 2018
Before: Employment Judge C Lewis (sitting alone)

Representation

Claimant: In person
Respondent: Miss H Bartlett (Committee Member)
Mrs N Aruvera (Staff Member)

RESERVED JUDGMENT

The judgment of the Employment Tribunal is as follows:-

1. The Claimant's claim for unfair dismissal succeeds.
2. The Claimant is awarded the following sums in respect of her unfair dismissal by the Respondent:-

2.1 Basic award

(A) 20 x 1½ weeks' gross pay (£222.57 x 1.5 = £333.85) =£6,677.00

2.2 Compensatory award

(B) Prescribed element:

- (i) Loss of wages to date of assessment = £7113.20
for the prescribed period 13 December 2017 to 24 July 2018
 - (ii) Uplift for failure to follow the ACAS Code @ 10% = £711.32
- Total = £7824.52

(C) Non- prescribed element (other losses)

- (i) Future loss of wages= £2328.00
- (ii) Loss of statutory rights = £500
- (iii) Uplift for failure to follow the ACAS Code @ 10% = £282.80

Total future loss = £3110.80

Total Compensatory award (B) + (C) = £10,935.32

Grand total award (A) + (B)+ (C) = £17612.32

2.3 Recoupment provisions

The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to the unfair dismissal award and the relevant information is as follows:-

- (a) Total compensation for unfair dismissal £17,612.32
- (b) The prescribed element is £7824.52
- (c) The period of the prescribed element is from 13 December 2017 to 24 July 2018
- (d) The excess of the grand total over the prescribed element is £9,787.80

3. The Claimant's claim for wrongful dismissal succeeds. No separate award is made.

REASONS

1. The Claimant brought claims of unfair dismissal and wrongful dismissal. The Respondent relied on the Claimant's alleged gross misconduct in defending both the claims.

Unfair dismissal

2. The issues the Tribunal had to decide in respect of the unfair dismissal were as follows:

- (1) what was the reason for dismissal, the reason relied upon was conduct, a potentially fair reason within section 98(2) of the Employment Rights Act 1994;
- (2) whether the Respondent had a genuine belief in the misconduct of the Claimant and if so, whether that belief was based on reasonable grounds, following such investigation as was reasonable in the circumstances
- (3) whether the dismissal was fair or unfair within the meaning of section 98(4) of the Employment Right Act 1996.

Wrongful dismissal

3. The Tribunal had to decide whether the Claimant was guilty of gross misconduct thereby entitling the Respondent to dismiss her without notice.

The Evidence before the Tribunal

4. The Tribunal was provided with a bundle which consisted of documents behind tab numbered dividers prepared by the Respondent together with another set of documents behind tabbed lettered dividers inside plastic sheets prepared by the Claimant. Both sets of documents had been provided with an index but no page numbering. The Claimant had also prepared two statements, one which set out how she felt as a result of the dismissal and the other setting out her evidence in respect of her claim of unfair and wrongful dismissal and attaching extracts from some of the documents produced by the Respondent.

5. The Respondent also produced a sheet of documents inside a plastic folder with the title "Written statements of evidence", which enclosed eight documents consisting of three emails, a signed contract, a letter from a parent, a suspension letter, a job description and a letter from the Claimant; alleged to have been given to parents by the Claimant while she was on suspension, the letter was dated May 2017 and set out the Claimant's credentials (her long history of involvement with the Pre-School) for being a staff representative on the Respondent's Management Committee.

6. The Respondent did not provide any witness statements, although Miss Bartlett who was a member of the Committee that made the decision to dismiss the Claimant, attended the tribunal hearing. Miss Bartlett was unable to say why the Claimant had been dismissed other than to refer to the reasons set out in the letter presented to the Committee by Miss V. Maitland. Mrs Maitland had taken on the role of Chair of the Committee two weeks prior to the Claimant's suspension and resigned from the Committee in February 2018. It was Mrs Maitland who suspended the Claimant, carried out an investigation and drew up a list of allegations against the Claimant but no statement was provided by her. According to Miss Bartlett it was also Mrs Maitland who decided to dismiss the Claimant although her decision was agreed to by the other members of the Committee present at the decision-making meeting on 2 December 2017 which took place after the disciplinary meeting held on 30 November 2017.

7. Twenty three allegations about the Claimant's performance or conduct are set out in the dismissal letter dated 13 December 2017, only 10 of which were relied upon in the response to the Claimant's claim (the ET3). Neither Mrs Aruvera or Miss Bartlett were able to identify which of the various allegations set out in the letter of dismissal had in fact been relied upon at the time of the dismissal as amounting to gross misconduct despite being give a number of opportunities to do so.

8. Miss Bartlett was only able to answer in the vaguest terms that Mrs Rodgers had been dismissed on the basis of Mrs Maitland's investigation and what the staff had said in their complaints and that it was felt that she could not continue. Miss Bartlett acknowledged that many of the allegations were performance issues which had not been raised with the Claimant. Neither Miss Bartlett nor Mrs Aruvera were able to clarify the grounds relied on to justify the dismissal.

9. During the course of the hearing the Respondent's representatives were provided with the Employment Judge's copy of Butterworth's marked at the section for the ACAS Code and given an opportunity to read the ACAS Code and accompanying Guidance.

Findings of fact

10. The Claimant gave evidence and answered questions from the Employment Judge and from Miss Bartlett. Very little of the Claimant's account of events was contested other than to assert that Mrs Maitland's allegations against the Claimant had been accepted.

11. The Claimant had been employed by the Poppets Nursery for 33 years having been involved with it since its inception, she had also been a staff member of the Management Committee for a number of years. She and her colleague Marian Whittaker were both managers and there was also another senior member of staff who dealt with finances, Karen Daley, whose title was Treasurer. The pre-school (nursery) was a small organisation run by an elected management committee.

12. In the period leading up to the Claimant's dismissal the nursery had moved premises and during the course of that relocation it came to the Claimant's attention that there was a very substantial electricity bill outstanding on the former premises in the sum of £14,000. At the time of the move the Chairman of the Committee was Karen Daley's son. The Claimant believed that they both knew about the outstanding electricity bill. The Claimant called a meeting on 7 June 2017 and tried to encourage Karen Daley to let the Committee know about the bill. However, when the Claimant raised it with the Karen Daley, she did not receive any satisfactory responses. Shortly after this Karen walked out, informing the Claimant that she did not know when she was coming back, and did not return.

13. Mrs Maitland had taken on the role of Chair of the Committee two weeks prior to the Claimant's suspension. By this date the Claimant's colleague Mrs Whittaker had already indicated that she would be leaving at the end of the term, that is, the end of July 2017. Mrs Maitland spoke to Miss Whittaker and informed her that she should leave on 11 June cutting short her notice period and leaving the Claimant as the only manager.

14. The Claimant had pre-arranged with Marion Whittaker that she would be in late on the morning of 12 June, at around 10am instead of her normal start time, due to a confidential matter she had to deal with that the morning. The Claimant's evidence in respect of the arrangement for her appointment on the 12th was not contested. The Claimant informed the Mrs Maitland, that she would not be in until 10am the next day and that as a result of there being insufficient staff (because Mrs Maitland had dismissed Marion and Karen had walked out) the pre-school could not safely open the next morning. The Claimant was then suspended by Mrs Maitland who sent her an email on 12 June informing the Claimant that she had given her no alternative but to suspend her pending an internal enquiry.

15. In the period when they had not had a functioning Chair of the Committee, the Claimant and her colleague, Marion, had been relying on advice from Essex County Council and had been receiving support, in particular, in respect of follow-up to an OFSTED visit.

16. Once Mrs Maitland took over she started to arrange interviews for new staff: Linda Keaton from Essex County Council advised the Claimant that a manager needed to be on the interview panel and that it was inappropriate for Mrs Maitland to interview someone that she knew, and similarly it was inappropriate to appoint to an admin position someone who was related to the Treasurer. The Claimant informed Mrs Maitland of this advice and in response received the email dated 28 June inviting her to a disciplinary on 3 July in relation to the following three things:- (1) Not conforming with a direct instruction; (2) Refusal to complete your duties; (3) Unauthorised absence.

17. The Claimant requested evidence in support of those allegations and the meeting of 3 July was postponed. During this period of suspension, the Claimant received a formal warning letter dated 28 July warning her for misconduct in relation to the use of personal emails. It was not disputed that she had not been given the benefit of any investigation or hearing and had no opportunity to meet that allegation before the warning was issued.

18. There then followed a letter of 9 August containing a warning for refusal to follow the Chair's instruction not to discuss personal matters with officers of the Council and also on 9 August the letter setting out a large number of allegations, including general allegations of failing to have a positive attitude, a list of statements of complaints by other staff members and allegations in respect of some of the failings that make their way into the dismissal letter. The letter referred to the warning for misuse of personal emails which was also relied on in the dismissal letter. This was the only written warning the Claimant received in 33 years of employment. Mrs Maitland also refers to an oral warning which was given by her to the Claimant for the Claimant's alleged refusal to collect fees, this was given within two weeks of taking up the role of Chair. This oral warning was given without any disciplinary procedure having been followed. The Respondent did not give the Claimant an opportunity to answer that allegation either.

19. The minutes of the meeting at which the decision to dismiss was made had not been provided to the Claimant until over 119 days after the hearing. When it was produced by Miss Bartlett, the vast majority of the allegations against the Claimant were not recorded as having been addressed at the disciplinary hearing, Miss Bartlett could not recall anything else being discussed other than that set out in the minutes. However, Miss Bartlett also referred to a document called "a report" which was produced by a Mr Wheeler. Miss Bartlett described Mr Wheeler as a former police officer, now retired, who had been brought in as an independent person. He had produced a report for the committee setting out his opinion in respect of the allegations against the Claimant. Mr Wheeler was present at the disciplinary hearing on 30 November, although apparently as an observer only, he is not recorded in the minutes as saying anything. He produced a report dated 2 December 2017 titled "Review of Poppet's Pre-School Group Disciplinary Meeting 30th November 2017". In his report Mr Wheeler concludes that based on the allegations raised at the disciplinary hearing the Claimant had displayed "extreme poor judgement given her experience and managerial position within the Poppets Pre-School Group".

20. Mr Wheeler made two recommendations for possible sanction, one being demotion and the other being dismissal:

“Demotion of Mrs Rodger from her current salaried managerial position to one of a lesser role without responsibility with commensurate loss of pay to reflect her revised position” and

“Dismissal of Mrs Rodgers from her current role due to being unfit to fulfil the role concerned, having displayed poor judgement consistently over a period of time and having lost the confidence of her fellow staff members.”

21. The Respondent did not seek to suggest that any of the matters set out in the dismissal letter had ever been raised with the Claimant prior to the disciplinary hearing, except for the use of personal email for which she received a warning whilst on suspension. The allegations ranged from failing to arrange fire risk assessments, failing to implement recommendations following an OFSTED visit, record keeping, updating records, carrying out risk assessments, requesting that nappies be used for the infants instead of pull-ups and failing to fully cascade training, to complaints from staff. There was no evidence of these ever having been raised as a concern with the Claimant nor of any coaching, performance management, reference to policies such as those on confidential information and the use of personal email, fire risk assessments and health and safety matters.

22. The minute of the disciplinary hearing records that the Claimant was asked about some of the allegations against her but not all of them. The Claimant did not accept that she was solely responsible for all the matters that she was alleged to have failed to have done. The Claimant was at pains to point out she did not receive the minutes for the disciplinary meeting until at least some 119 days after the meeting took place. The minute records that the Claimant was shocked at the letter she received in August 2017 and that she disagreed with all the allegations that had been made against her.

23. The Claimant produced her own documentation at the tribunal with which she sought to counter the allegations against her and to show that they were not based on proper grounds. She produced records of supervision meetings, of risk assessments, of high-risk assessments, action plans and minutes of staff meetings setting out action items and ticking off those that had been completed.

24. Following the hearing, the Chair of the Committee, Miss Vicky Maitland, wrote to the Claimant on 13 December 2017 informing her that the unanimous decision of the Committee was to terminate her contract without notice with effect from 13 December 2017. The dismissal letter repeated the allegations in the invitation to the disciplinary meeting. It is apparent from the wording of the letter that Mrs Maitland not only carried out the investigation and presented the case against the Claimant at the disciplinary hearing but that she took part in the decision making as well. This was confirmed by Ms Bartlett who was present at the Committee on 2 December where the decision was reached. She told the tribunal that Mrs Maitland had reached the decision that the Claimant should be dismissed and the Committee simply agreed with Mrs Maitland's decision.

25. The Claimant was informed of her right to appeal which she duly exercised. The Claimant did not receive any response to her appeal letter and no appeal hearing was arranged.

The relevant law

26. It is for the employer to show the reason for the dismissal and that it is a

potentially fair one that falls within the scope of section 98(1) and (2) of the Employment Rights Act 1996 capable of justifying the dismissal of the employee. The reason for the dismissal is the set of facts known to the employer or the beliefs held by him which caused him to dismiss the employee (*Abernethy v Mott, Hay and Anderson* [1974] ICR 323, CA).

27. It is sufficient that the employer genuinely believed on reasonable grounds the employee was incompetent or guilty of misconduct depending on which reason they rely upon.

28. Where the employer fails to show a potentially fair reason for dismissal Tribunals are not obliged to ascertain the real reason for dismissal if there is insufficient evidence to do so (*Hertz (UK) Ltd v Ferrao* EAT 0570/05). In these circumstances the dismissal will be unfair.

29. Where the employer has made a genuine mistake in the label it attaches to the reason and the facts or beliefs that led the employer to dismiss were known to the employee at the time of dismissal those facts or beliefs was fully aired in tribunal proceedings the tribunal may ignore the wrong label; see *Abernethy v Mott, Hay and Anderson*. However where the employee has not been confronted with the full and true nature of the allegations against him or her nor had adequate opportunity to consider and answer those allegations the dismissal is likely to be unfair. See *Hotson v Wisbech Conservative Club* [1984] ICR 895, EAT. In that case a change of reason for dismissal from gross inefficiency to suspected dishonesty went to the very substance of the allegation leading to the dismissal and was not simply a matter of changing the label from capability to conduct since there was also a fundamental shift on the facts and beliefs leading to dismissal.

30. Employers may have more than one reason for dismissal, they may have several. However they are required to show the reason or if there is more than one reason the principal reason for the dismissal (section 98(1)(a)).

31. Once the employer has shown a potentially fair reason for dismissal the Tribunal then has to decide whether the dismissal for that reason was fair or unfair within the meaning of section 98(4) of the Employment Rights Act 1996 and whether the employee acted reasonably or unreasonably in all the circumstances in treating it as sufficient reason for dismissing the employee. The Tribunal must not substitute its own view for that of the employer in deciding whether the employer acted reasonably but consider whether the employer's actions fell within the band or range of reasonable responses open to an employer (*Iceland Frozen Foods Ltd v Jones* [1983] ICR 17, EAT. The case of *Polkey v AE Dayton Services Ltd* [1988] ICR 142 HL established that procedural fairness is an integral part of reasonableness under section 98(4). In a case of misconduct the steps that would usually be necessary in order for the employer to be considered to have acted reasonably in dismissing include investigating fully and fairly and hearing what the employee wants to say in explanation or mitigation. This is reinforced in the case of *BHS v Burchell*. The employer must show that it believed the employee was guilty of the misconduct, it had in mind reasonable grounds upon which to sustain that belief and at the stage at which the belief was formed on those grounds that it carried out as much investigation as was reasonable in the circumstances. The test of reasonableness applies throughout the procedure, *Sainsbury's Supermarkets v Hit*. [2002] EWCA Civ 1588.

Conclusions

32. From the evidence before me I am satisfied that Mrs Maitland did not carry out a fair or even-handed investigation. Rather than carrying out a fair investigation to establish the facts of each allegation she appears to have trawled for every possible criticism against the Claimant. The Claimant was not provided with any evidence in support of those allegations, apart from the complaints made by junior staff which were reported by Mrs Maitland. Having seen the notes of the disciplinary hearing the Claimant was not given an opportunity to properly address the vast majority of the allegations against her and she was not given an opportunity to put her side in any detail: as was pointed out by Mr Pennington, who represented her at the meeting, the vast majority of the documentation on the allegations was not available at that meeting.

33. The Claimant was informed that she would have a right of appeal but when she tried to exercise that right she did not receive a response. No explanation has been provide by the Respondent for this failure.

34. I am satisfied that no reasonable employer would have reached the decision to dismiss the Claimant in the circumstances and on the evidence before this Respondent. No proper or fair investigation was carried out and the Claimant was not provided with a fair hearing, nor was she provided with an appeal. I find that the dismissal was unfair within the meaning of s98(4) of the Employment Rights Act 1996.

Wrongful dismissal

35. The Respondent has failed to establish that the Claimant was guilty of gross misconduct justifying dismissal and the Claimant succeeds in her claim for wrongful dismissal.

Remedy

Unfair dismissal

36. The Claimant seeks compensation only. She has provided a schedule of loss in which she sought an uplift for failure to follow the ACAS Code of 10%. The Claimant's effective date of termination was 13 December 2017. She was aged 69 on that date and had accrued 33 years' service with the Respondent. Her gross weekly pay was £222.57. These figures were not disputed by the Respondent.

Basic award

37. Based on her age and length of service the Claimant is entitled to a basic award of £6,677.00 calculated by applying the maximum of 20 x 1½ weeks' pay (£222.57 x 1.5 = £333.85) in accordance with section 119 of the Employment Rights Act 1996.

Compensatory award

Losses to date

38. The Claimant's average net take home pay per month was £840.65 (£194.00 per week) and she had been out of work for eight months by the date of the hearing on 11 July 2018. Her loss to that date according to her schedule is £6,725.20. The figures in

schedule of loss being undisputed. This being a reserved judgment the date of the decision is 24 July 2018, amounting to a further 2 weeks, being £388.00, the losses to date are £7113.20. (£7,824.52 after uplift of 10%, this is the prescribed element for the purposes of the recoupment regulations).

Future loss

39. The Claimant is awarded £500 to reflect her loss of statutory rights.

40. The Respondent submitted that the Claimant ought to have been able to mitigate her losses within a period of 2 to 3 months by taking up shop work or cleaning work. The Claimant gave evidence that she had been unable to look for any work due to the effect the dismissal had on her after 33 years of working at Poppetts. She had been unable to look for work in childcare as she had been dismissed for gross misconduct.

41. In considering the amount of loss sustained by the Claimant in consequence of the dismissal, in so far as that loss is attributable to action taken by the Respondent, I am satisfied that it is just and equitable to award the Claimant a further 3 months (12 weeks) amounting to £2,328.00, for loss of income after which time she can reasonably be expected to mitigate her losses through finding other work. She will by that time have the benefit of having a decision that she was unfairly dismissed which should go some way towards mitigating the effect of the dismissal for gross misconduct.

Total compensatory award before uplift

42. The total compensatory award is therefore £9,941.20 before any uplift.

Uplift for failure to follow the ACAS Code – s207A Employment Rights Act 1996

43. The Claimant is awarded an uplift of 10% on her award for the Respondent's failure to follow the ACAS Code. The respondent did not follow a fair procedure in accordance with the provisions of the ACAS Code, nor did it provide the Claimant with a right of appeal. There has been no explanation put forward for the failure to respond to the Claimant's appeal letter and I am satisfied that the failure was unreasonable. The Respondent is a small organisation but had access to advice from the local authority and from ACAS should it have chosen to seek it.

44. The amount of the uplift on the compensatory award is £994.12. Her total compensatory award including the uplift is £10,935.32

45. The grand total of basic and compensatory award including the uplift is £17,612.32.

Recoupment provisions

46. The Claimant has been in receipt of relevant benefits since her dismissal and the *Employment Protection (Recoupment of Benefits) Regulations 1996* apply to the unfair dismissal award and the relevant information is as follows:-

- (a) Total award for unfair dismissal £17,612. 32
- (b) The prescribed element is £ 7,824.52
- (c) The period of the prescribed element is from 13 December 2017 to 24

- July 2018.
(d) The excess of the grand total over the prescribed element is £9,787.80

Wrongful dismissal

47. The Claimant had also claimed 12 weeks' notice pay but as is acknowledged in her schedule of loss that amount is subsumed into her compensatory award.

Employment Judge Lewis

8 October 2018