CASE NO: 2603146/2020 (V)

EMPLOYMENT TRIBUNALS
By Cloud Video Platform (CVP

Claimant: Mr M Haggis
Respondent: Wellspring Alternative Academy

Heard at: Nottingham via CVP

On: 13 and14 January 2021
Before: Employment Judge P Britton
Members: Mr R N Loynes
Mr J Purkiss

Representation
Claimant: In person
Respondent: Mr S Shepherd, Solicitor

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

JUDGMENT

1. The claim based upon unfair dismissal by reason of the Claimant having taken part in trade union activities is dismissed.

2. The claim for breach of contract, namely failure to pay notice, is dismissed.

3. For the avoidance of doubt, any claim based upon unfair dismissal per se is dismissed for lack of the necessary two years' qualifying service.

4. The Respondent having indicated an application for costs, the matter is at this stage reserved in order for a formal application, together with a statement of costs sought to be presented. The Claimant then will have a right of reply. The application will then be listed before the tribunal for its adjudication.

REASONS

Introduction

1. The Claim (ET1) was presented to the tribunal on 21 August 2020. It is in the bundle before us commencing at page (Bp) 1. The Claimant had been employed by the Respondent Trust, latterly as a Key Stage 3 Leader Teacher, between 23 April 2019 and his summary dismissal, allegedly on the grounds of gross misconduct, on 10 June 2020. For the purposes of the key elements of this case, the period of material events is post the teaching complement (including Mr Haggis and the rest of the staff) moving to new build premises at what was the Springwell Alternative Academy starting with the school term in September 2019.

2. The first and primary claim was for unfair dismissal. But he could not bring this pursuant to section 98 of the Employment Rights Act 1996 (the ERA) because he lacked the necessary two years qualifying service., But it was clear from the Claim Form that the Claimant appreciated this his claim was predicated on the premise that his dismissal was automatically unfair because he had participated in the activities of an independent trade union. This would be pursuant to section 152(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA). Such a claim can be brought without two years qualifying service. We will come back to that in due course. His second claim was for failure to pay notice pay. In the Tribunal's jurisdiction this is referred to as a breach of contract claim.

3. Suffice it to say that as per the Response (ET3), the Respondent pleads that the dismissal was not because of trade union activities. It centres around an incident involving the Claimant and other members of staff with student A on 13 March 2020. Following a disciplinary investigation it was decided there was a case to answer against the Claimant for gross misconduct There was thence a disciplinary hearing at which the decision was made to dismiss the Claimant for gross misconduct and thus without notice pay. The Claimant appealed, but he raised only very limited grounds; and because he did not have two years' qualifying service, this was dealt with on the face of the papers also because he was only seeking to argue in a very short statement having been asked for the grounds of his appeal, that it: "*wasn't conducted in accordance with disciplinary policy"*. He made no mention of his allegation as per the ET1 that his dismissal was because of trade union activities.

4. The decision maker at the appeal, David Whittaker, therefore reviewed all the evidence; that is to say the investigation report and the statements taken; and thence the disciplinary hearing; and concluded there was nothing untoward about the process and therefore nothing to overturn the finding at first instance that this was gross misconduct.

5. We remind ourselves that we are not dealing with whether the dismissal was unfair pursuant to section 98(4) of the ERA. We are dealing with whether or not

the reason, or the principal reason, for the dismissal was because of trade union activities. If it was not, then unless the process was so unfair or perverse as to raise an inference that it was engaged, it is otherwise irrelevant.

6. However, when we come to deal with whether or not the Claimant should have been paid his notice pay, it is a different approach. It is for us to decide on all the evidence as to whether we can conclude on the balance of probabilities that the Claimant by his behaviour fundamentally breached the implied term of trust and confidence implicit in every employment contract thus meaning that the Respondent was entitled to treat the contract as repudiated and thus not pay notice pay.

7. Before we address the evidence, as to the claim of unfair dismissal engaged is section 152(1) of the Trade Union and Labour Relations (Consolidation) Act 1992, thus

> *"**152 Dismissal on grounds related to union membership or activities.***
>
> *(1) For purposes of [Part X of the Employment Rights Act 1996] (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—*
>
> *(a) was, or proposed to become, a member of an independent trade union,*
>
> *(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time,*
>
> *…*"

8. The next point to make is this. In such a case, therefore, where it is a claim for automatic unfair dismissal and otherwise without the two year's qualifying service required as per s98 of the ERA, the initial burden of proof is upon the Claimant to establish a prima facie case on the evidence before us to the effect that the Claimant was so dismissed because of trade union activities. Only if he does will the burden of proof shift to the Respondent to show that no part of the decision was because of that prohibited reason.

Evidence received and first observations and findings

9. All witnesses gave evidence in chief by way of a prepared witness statement.

10. First we heard from the Claimant.

11. We then heard on his behalf from Michael Jordan. He worked in this school as a Care Team Staff in effect between September and the end of November 2019.

12. We took note of the statement put in by the Claimant of Dean Bratherton (DB). He was a team assistant working to the direction of the Claimant at the material time. He left the school in July 2020. He has not attended to give evidence. We understand that this is because has got himself a new job. If follows that we only give the statement limited weight as it is in some respects controversial conflicting as it does with the evidence obtained by the Respondent.

13. First for the Respondent we heard from Sarah Jorgensen (SJ). She is an Executive Vice Principal within the Respondent Trust with responsibilities primarily for one of its schools in Lincoln but with management involvement in some aspects of the Springwell Alternative Academy. She did play a more involved role in the first term since the move because she was assisting Steve Cumberworth (SC) to bed in as the new Principal of the school.

14. Stopping there, it is a very special type of educational establishment. It has a high staff to pupil ratio. There are about 34 staff (certainly at the material time) and there are only 30 students. They are in the main troubled souls who have been excluded from other schools. Placing them at this establishment is in many ways the last resort. They often present profound behavioural problems as well as learning difficulties, and therefore there are policies in place, inter alia as to how to de-escalate situations or prevent them from escalating and as to what to do as a policy of last resort when manhandling by way of physical control may be required.

15. The Tribunal is acutely aware of how much these types of establishments are these days under the microscope so to speak and in terms of engagement by the media if anything untoward comes out. It is implicit that any senior teacher (as to which read Mr Haggis) has uppermost in their mind, the do's and don'ts of that regime. Mr Haggis does not dispute that this is the case.

16. Anyway, Miss Jorgensen took on the task of acting as investigation officer (IO) in relation to matters which we shall come to, the task having originally been with SC as the Head of the school. The Claimant and his trade union representative objected on the basis that SC, having been a witness to events to which we shall turn, was therefore conflicted. The Respondent did not agree SC only having arrived at the tail end of the incident, but nevertheless, albeit it was not prepared to write off his evidence gathering efforts by then including interviewing the student witnesses, it substituted Sarah Jorgensen as the investigating officer.

17. So, we heard her evidence and as to the investigation that she undertook. This was completed with appendixes thereto by 14 May 2020[1]. She concluded there was a case to answer. The Claimant was sent a copy of the investigation report prior to the disciplinary hearing. As per the disciplinary policy (Bp 41) , she

[1] Her report commences at Bp 129.

presented the management case as the IO at the disciplinary hearing, which was heard virtually because of Covid restrictions, on 11 June 2020. Her investigation, other than possibly the use of statements obtained from students as to the incident, to which we shall return, cannot be faulted. There is an issue in relation to an accusation that the Claimant made in relation to a colleague, Paul Jervis, who was also involved in the incident with Student A, to which we shall come.

18. In passing, overall we found Ms Jorgensen to be a credible witness. We did not find any contradictions in her evidence, despite the cross-examination by the Claimant, and we have no reason to disbelieve the evidence that she has given.

19. We then heard from Phillip Willott. He is based at the Wellspring Alternative Academy, Grantham (part of the Trust empire so to speak) and he was brought in to act as Chair of the disciplinary hearing on 11 June 2020. The reason he was brought in was because the Claimant and his trade union representative had shortly prior thereto sought to argue that the intended person to hear this disciplinary, namely Lisa Ashcroft-Day, who is the Executive Principal with senior management responsibility for Wellspring, should not be because she had been involved in issues relating to the SLT at the school, that is the Senior Leadership Team, which the Claimant says meant that she was biased. They raised the same point about SJ.

20. The Trust decided that it would not remove her because it did not agree with what the Claimant said but, on the other hand, to ensure fairness, it would bring in Mr Willott who had the most limited knowledge of the Claimant and was independent. We heard the evidence of Mr Willott. Suffice it to say that as with SJ again we found the evidence of Mr Willott throughout to be creditable.

21. We then heard from Lisa Ashcroft-Day. As we say, the Claimant has suggested that she was biased, as per SJ, which will bring us back to what is called the SLT issue.

22. In passing, and which goes very much to credibility, the Claimant sought during the hearing and in cross-examination of her, to say that an example of her hostility to his being a trade union activist was that she had raised with him the integrity of the process by which he had been appointed as a TU rep at the school circa January 2020.

23. SC had reported to her a complaint he had received from a member of staff who was a member of the same union as the Claimant (namely the National Education Union) that she, being part of that union, had been unaware of Mr Haggis's appointment to the role and there had been no ballot. So, the Claimant says that her having raised it with him and him having explained that nobody else wanted the role, that she had consequently, in email or conversation, said to him: "*Had I known about this, I would never have permitted you to go on a trade union training course*". Mr Haggis's contention about this flies in the face of his paragraph 9 in his sworn witness statement. It is absolutely clear from that paragraph that the issue about the process, viz the ballot, must have

occurred (because his statement puts it in that sense sequentially) before he raised with Lisa Ashcroft-Day as to whether he could go on a TU course. She had initially said he had given her too little notice so he could not go on the date planned but, if he could find a later date, she would let him go. He did and Mr Haggis went on that course circa the beginning of February 2020. He became the trade union rep for the NEU in the school only a matter of weeks before that happened.

24. To therefore say that Lisa Ashcroft-Day had it in for him because he was a TU rep because she had said about not letting him go on the training course had she known, flies in the face of the sequence of the evidence in Mr Haggis's own statement. It follows that we believe the evidence of Lisa Ashcroft-Day that she had no hostility to him being in the trade union and indeed went so far as to let him go on the training course, having previously raised this issue of the ballot but accepted it was really a matter for the Claimant and his trade union.

25. It follows that this chapter of events supports the credibility of Miss Ashcroft-Day but it has a rather serious undermining effect on the credibility of Mr Haggis.

26. There are two other issues viz credibility and Mr Haggis and we will refer to that in our mainstream findings of fact.

27. The next witness we heard from for the Respondent was David Whittaker. He is employed by the Trust as Director of Learning. He did not know the Claimant at all before he was asked to deal with the appeal. He had no knowledge of him being a trade unionist until he was informed of that when he was briefed to undertake the appeal. However, he knew nothing about whether there was an issue relating to trade union activities and the interface to the decision to dismiss the Claimant because there was nothing to that effect anywhere in the documentation he was supplied with or indeed in the Claimant's grounds of appeal, scant as it was.

28. What it means is that we are totally persuaded by Mr Whittaker that no part of his decision can be tainted by prejudice against Mr Haggis because he was a trade unionist. Indeed in that context as is to be expected in the public education sector, the Respondent recognises and indeed welcomes trade unions and most of its staff are members.

Findings of fact

29. The following is a summary of our findings of fact.

30. Events centre on 13 March 2020 and the incident with Student A in the central recreational area/ assembly hall in the school..

31. Student A is 14; a solid young man of six foot 3 inches or thereabouts in height. He has a history of exclusion from schools prior to being placed at this establishment and a propensity on occasion to violence. It may be that is because of his own educational limitations or other issues such as mental health

but, as to that, we know no more. But he was not unique, other pupils presented very challenging behavioural issues. By its very nature this was what the school catered for along with the responsibilities, training and the safeguarding issues in summary that this must entail.

32. On 13 March 2020, Tracey Lomas (TL), who is another teacher, was dealing with a group of key stage 3 students, including student A. They were playing up; to do with not putting hoops away. To cut a long story short, TL wanted student A in particular to pick up one of the hoops which had been truculently thrown on the floor and to provide it to the Claimant, Mr Haggis, referred to as "*Sir*". Student A remained belligerent. In terms of the statements from TL (Bp82 and Bp99) and Bp 99) obtained during the ensuing investigation completed by SL and the evidence which she gave at the disciplinary hearing (Bp 173), TL said that with her training she would have been able in that circumstance to however defuse it so that there would not be an escalation. As it is, the weight of the evidence is that the Claimant got himself involved. We know it is a difficult judgement call but this brings us to what then happened and the corroboration for the finding of the employer viz first of all Sarah Jorgensen then Miss Ashcroft-Day and Mr Willott in particular in terms of factual findings.

33. The Claimant inserted himself between TL and student A. The Claimant is a large well-built man who we have no doubt whatsoever is not backward in coming forward and can be strident in his manner. He is also of considerable physical presence.

34. What then happened is that the situation escalated instead of defusing and it would look like student A became even more heated and pushed the Claimant, who at that stage summoned help. That brings in Paul Jervis (PJ), who is an Assistant Manager in the team. He now became involved. As to his evidence see first the statements to the SJ investigation at Bp 81 and Bp 106 and thence his evidence at the disciplinary hearing at Bp 160.

35. The next bit is a mixed picture. On the evidence as we see it there is no doubt that the Claimant and PJ manhandled student A to restrain him, each of them holding an arm. Student A went to the floor. He landed up face down. TL at that stage, it seems to us on the evidence at the direction of PJ and possibly the Claimant, sat on his legs, presumably to stop him being able to wriggle about and so he would be calmed down. The issue then is did the Claimant carry on keeping student A face down longer than he should have and was this in despite of PJ and Miss Lomas (TL) urging him to let go.

36. What we then do know is that the Student A was turned up so that he was sitting with his back to the wall. The issue then becomes as to whether his dignity was unacceptably impinged by the Claimant not letting him pull his trousers up, which had presumably descended in said struggle.

37. At that time, the initial incident report (Bp 75) in some ways was sanitised by PJ and TL on the basis that they thought they should only record what they could say they had clearly seen and not venture opinions. However, both

complained to the relevant senior team leader in the school, who we guess must have been SC, as a result of which an investigation started because of the serious nature of what was being alleged, as to which we have touched upon.

38. SC interviewed seven students (commencing at Bp 83), including student A. The Claimant says that they should not have been interviewed. We do not agree. Those students were clearly relevant. They were present when the incident occurred and thus being present, and given they are not small children of tender years, we can see that it would be a good and fair thing to at least find out what they had to say, particularly student A who had by the way injured one of his eyes in the struggle. The Claimant says that they were improperly interviewed. We have not heard from DB in this hearing but, piecing it all together and because he was interviewed by SJ (Bp115) and gave evidence at the behest of the Claimant at the disciplinary hearing (Bp170); and cross-referencing to SC; what actually happened is that four of the students were in one room (including student A), three in another. They were each in turn taken to a room in which sat SC who took a statement starting with student A, which was then agreed to by the relevant student before they left the room. They were then escorted back to whence they came and the next student taken to be interviewed and so on and so forth.

39. Cross-referencing to those statements, we do not see such evidence of collusion as to be so out of kilter with the evidence of say TL and PJ so as to mean that their evidence should have no weight attached to it. The evidence that they give is consistent, but it is not word for word in terms of alleged collusion, as to the portrayal of events insofar as they saw it and as described by TL and PJ.

40. There is a point which then comes in. In the investigation undertaken by SJ, she inter alia interviewed the Claimant (Bp 120 -128). He clearly knew why he was being interviewed, after all he had already been suspended with pay on 17 March 2020 (Bp 90) and informed as to why; it was clearly about what had happened on the day. Also focussing in coming out of the evidence of the seven students, and indeed the evidence of inter alia DB, the questioning was as to whether Mr Haggis had taken an unacceptably macho approach[2] so to speak when dealing with the students in particular in this group including Student A, in terms of explaining to them how he had the power to put them in holds, including on the floor, and that he would do so if it became necessary. And of concern was that the weight of the evidence included that student A in particular had been talked to about this by him including that he would be put on the floor if necessary by the Claimant. On the evidence it goes further, as to which see for corroboration DB's evidence to the investigation, as to whether student A was actually itching to be put onto the floor if the chance arose. And the Claimant did not cut off that conversation but on the face of it encouraged student A. Was that an appropriate discussion for a person in authority, viz the Claimant. Does it then run into therefore providing some weight as to whether he over escalated matters on 13 March 2020 and then behaved unnecessarily in terms

[2] Our words.

of both putting student A to the floor or rather his role therein and certainly as to the prolonged hold on the floor. So, the Claimant knew all that was part of the investigation.

41. He had an extensive interview with Sarah Jorgensen. He had present with him a trade union official. He denied that he had escalated matters. He sought to blame PJ for incepting the hold that led to the going to the ground and to blame PJ for the prolonged holding on the floor. So, he was not adverse by that stage in terms of his defence to putting the blame on PJ. He had every opportunity to explain fully his position. It was not a case where on that occasion he was reluctant to say anything about PJ, ie because of closing ranks and support for a colleague. Why is it relevant? That investigation interview had taken place on 27 April 2020. The Claimant got the investigation report and the statements thereto circa 14 May 2020. He was informed there was going to be a disciplinary hearing. Only on 18 May 2020 did he raise the most damning and extremely critical accusation against PJ. Although we do not have the email, we know it was in that format because SJ informed the disciplinary hearing as to what the Claimant had alleged in it and in terms of what she thought about that; whether it required any further investigation and where it went in terms of culpability and in terms of her conclusions that the Claimant had been guilty of the misconduct and, more important, it then goes to the findings of Miss Ashcroft-Day and Mr Willott.

42. Thus:

"*Mark said he witnessed him* (PJ) *use his knee to hit out into student A's ribs a number of times during the hold. Each time student A screamed out in pain …*" (BP 166).

43. We found the Claimant's evidence on this topic wholly unsatisfactory. He was at a loss to explain to us why he would not raise such an absolutely serious matter at the first opportunity, particularly when he knew he was under investigation post suspension. He had every opportunity to raise it in his interview with SJ. He did not. .The disciplinary panel concluded in their decision (as to which see the dismissal outcome letter at Bp 180 – 182) that the Claimant had raised this matter vexatiously. That is very important in terms of where it takes us in terms of trust and confidence and is the second credibility point. We have already raised that we do not believe Mr Haggis on the alleged exchange with Lisa Ashcroft-Day over the ballot poll and her stating that had she known she would not have let him go on the training course. So, there is the second nail in Mr Haggis's credibility coffin.

44. There is a third nail. The Claimant says that he should have been allowed a grievance because he raised he says a grievance in the disciplinary hearing, bearing in mind the Claimant had throughout that hearing, as he had at every meeting prior thereto, a trade union representative. So, if we go to the disciplinary hearing, and it is well into it and is at Bp 178:

"*I would like to raise a grievance against the IO. The investigation has not been*

carried out to obtain facts but to obtain my guilt by trying to pinpoint the blame on myself. My suspension is supposed to be reviewed every 2 weeks and it hasn't been.

I feel opinions have been collated not facts. SC did the interviews with the students. When a new IO was taken on, the interviews should have been discredited and new ones done by new IO".

45. So, that goes to the student point. We have dealt with that. There was no need for the Respondent via SJ to re-interview said students. We have already said that we conclude that there was nothing untoward about the process. What they had to say was corroborated by PJ and TL. Otherwise, it is not a grievance, it is actually raising an issue which is absolutely relevant to the disciplinary process. It is not about something else. If it was supposed to be a grievance, it was not raised at all in his appeal. We do not accept that this was down to the Claimant's "naivety". This is a man who has obviously got a considerable grasp of employment law. He told us how he is particularly knowledgeable on the working time regulations. He has been on a trade union course. He had trade union representation throughout the internal process. He has incidentally not called any trade union official for the purposes of this hearing. It follows that that is the third plank in the credibility issue. We just do not believe him on the point.

The trade union issue and its link to the dismissal

46. The Claimant was a member, we would think long-standing, of the NEU. He was not accredited by it until following him putting himself up to be the TU rep at school. Nobody else, he says, wanting the role, he was appointed without a ballot, which we know was circa at the end of January 2020. In February, he went on his TU training course. Post appointment to the role and 13 March, there is no evidence whatsoever that the Claimant engaged in any form of trade union activity.

47. Going back to the preceding year, he raises in terms of the Trade Union issue and thus as to SJ; Lisa Ashcroft-Day and Mr Willott being motivated to do him down and dismiss him via the disciplinary process, the following.

48. In September 2019, he was in the new gym at the school with two other persons, who were DB and PJ. In his statement for this hearing, the Claimant made no mention whatsoever of his witness Mr Jordan as being present. In came SJ because the three of them were using the gym equipment during working hours. She challenged why they should be there; surely, they had work to do given the school was being commissioned. Therefore she required them to stop using the gym and go off and undertake some work. PJ and DB promptly went. It seems to us that there is an issue as to whether the Claimant was prepared to accept what prima facie appears to have been a reasonable management request from SJ. Did it escalate as the Claimant says? Was there an argument about it? Was there then a further confrontation, if that is the right word, a week later as witnessed it seems by Mr Jordan to the effect that SJ told the Claimant that she

had never been spoken to in that manner by a colleague in her many years of teaching experience. SJ denies that second encounter. Does it matter? Do we need to form a view? What has it got to do with trade union activities? Absolutely nothing. On the face of it, SJ was making a reasonable management request. It is perhaps illustrative of the Claimant's attitude that he resisted it.

49. The next point is if even so if SJ was against the Claimant from then on, she was on a panel that appointed Mr Haggis into a promotive role as the Key Stage 3 Leader. He says: "*Oh well there wasn't anybody else going up for the job so she had no choice"*. Before us SJ countered : "*that is not correct. Had I considered he wasn't suitable, I wouldn't have appointed him*".

50. We agree with SJ. Based on our experience as an employment tribunal and which is collectively very extensive, if there is only one person who puts themselves forward at that first recruitment round, and who is internal so to speak, it does not follow that they get appointed. The important point is this however: he was. If SJ had been so against him from then on, it flies in the face of her agreeing to that appointment.

51. We then bring back in Lisa Ashcroft-Day). It seems, taking the Claimant's evidence at its highest, that he had used the new furniture in what was now going to be the library in the school (but could be used for other purposes) for a different session but he had not put it back where it should be for the use as a library. If Lisa Ashcroft-Day did ask him to put it back where it should have been, that would not have been an unreasonable request. It is the same theme. Although Ms Ashcroft-Day denies there was any difficulty between the two of them, we can simply say that again it has got nothing to do with trade union activities. And if Ms Ashcroft-Day had been against the Claimant from there on, we note how come she accommodated his desire to go on the trade union course and made sure that he could do so. It just does not connect.

52. Thus, what are the trade union activities we are left with that might be discernible as such in the period we are dealing with. The Claimant mentions as specific instances supporting colleagues; and Mr Jordan and DB referred to his supportive approach to his colleagues, for which he is to be commended. It may well be, although SJ and Lisa Ashcroft-Day have no clear recollection of the same perhaps because it does not stick in their minds, that he might have accompanied one or other employees to a meeting with the Senior Leadership Team over such as being transferred from one level in the school to another and perhaps some concern about that. But the point is that the Claimant at that stage had no trade union role. He had not been appointed a representative in the school for the NEU. If he chose to assist colleagues in a non-union way, and that is without any form of accreditation from his trade union, that is a wholly different thing from taking part for those people on the basis of it being part of his trade union activities for an independent trade union. That engages as an example of the jurisprudence Chant v Aquaboats Ltd (1978) ICR 643, in terms of the illustrative cases that Mr Shepherd put forward in his written submissions: doing something but not in a formal union role, ie organising a petition amongst colleagues as an example, does not provide the shield of protection that is

required for the purposes of s.152 of TULCRA. There has to be trade union activities and they do not and cannot start until his accreditation in January. In any event, there is no evidence, as we have now made plain, of any hostility to the Claimant in terms of assisting his work colleagues from SJ or Lisa Ashcroft-Day. Indeed, both of their statements as confirmed in their sworn evidence make absolutely plain in particular that they did not object at all to him being an accredited TU rep because there was not one in the school, although there were at other parts of the Trust and, given that they were in a state of change and there would be issues to be raised, such as working conditions and hours, it would be highly valuable to have a union point of contact in the school.

53. Finally there is no evidence advanced at all by the Claimant to support his accusation that Mr Willott had an ulterior motive to dismiss the Claimant in particular linked to the Claimant's trade union activities.

54. Finally, where is the evidence that the Claimant ever raised the trade union link during the internal process? We summarise as follows.

54.1 In his interview with SJ, he made absolutely no reference at all to that he was being victimised in terms of this process because he is a trade unionist.

54.2 A slight reference in objecting to Lisa Ashcroft-Day's or SJ's involvement in the run up to the disciplinary hearing because of "*difficulties with the SLT*". No mention, however that that is "because I am a trade unionist playing a legitimate role in this school in that respect".

54.3 In the disciplinary hearing[3] where the Claimant did a lot of the presenting in his own cause but also had a trade union official who also made representations, no representation whatsoever that victimisation by reason of trade union activities was behind the disciplinary process or that he was obviously going to be dismissed because of that. Nothing in the closing submissions of the Claimant at that hearing to that effect. In terms of the evidence as given at that hearing, no questioning of SJ on the basis of that was the ulterior motive behind her investigation conclusions. No renewed objection to the presence of Lisa Ashcroft-Day on the panel for that reason. No cross-examination of TL or PJ by way of example in terms of the crucial issue about whether or not PJ had gratuitously put the boot into the ribs of student A.

54.4 Finally, in the ground of appeal, to which we have referred, no reference whatsoever to trade union activities. We do not buy the Claimant's escape clause before us to the effect that this was down to a misunderstanding or naivety. It just does not fit with the person who is before us. We do not believe him.

[3] See minutes at Bp 160-179.

55. It follows that we are driven to conclude that he has sought to hang his claim on an allegation of dismissal by reason of trade union activities because otherwise he cannot bring his claim before this tribunal. It does follow, as is now obvious, that the tribunal concludes that this Claimant does not establish on the evidence and our findings of fact that the reason or principal reason for his dismissal was because he had taken part in trade union activities. There is no such inference to be drawn. Thus, that claim fails.

Breach of contract claim

56. We have already referred to the fact that it is a different test. One thing in particular that flags up to us, and it is something that Mr Willott put in his decision for the dismissal, is that apart from anything else the Claimant made a false and vexatious extremely serious accusation against PJ in circumstances where it is wholly incredible that he would not have raised such an issue given safeguarding being crucial in this school at the earliest possible opportunity if it was true. That it was false cannot but fundamentally undermine trust and confidence. So, put together with the other findings that we have made, we have concluded that the Claimant's behaviour fundamentally undermined trust and confidence thus meaning that the Respondent was entitled to treat this contract of employment as repudiated and therefore was not obliged to pay any notice pay. That claim is dismissed.

S98 ERA

57. Finally, for the avoidance of doubt, a claim based upon "ordinary" unfair dismissal pursuant to section 98 of the ERA is dismissed for lack of qualifying service.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The Respondent having indicated it wishes to make a formal application for costs and therefore applies for the reasons in this case, it is hereby ordered that the reasons will be issued to the parties and thus of course will need to be published.

2. As to the application for costs, the following applies:

    2.1 Within 21 days of the receipt of our published judgment and reasons, the Respondent will make formal application for costs if it wishes to proceed, setting out fully the grounds for its application and with it sending in a schedule of costs sought.

    2.2 The Claimant will then have 21 days from then to reply to the same.

    2.3 The tribunal will then consider the application and if it considers it appropriate will list the same for hearing.

3. For the avoidance of doubt, it follows that the application and the reply thereto must be sent in to the tribunal when they are sent to the other party.

NOTES

(i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.

(ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

(iii) The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management':
https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20170406-3.2.pdf

(iv) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so.*" If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

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Employment Judge P Britton

Date: 2 February 2021

JUDGMENT SENT TO THE PARTIES ON

5 February 2021
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FOR THE TRIBUNAL OFFICE

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