



EMPLOYMENT TRIBUNALS

Claimant: Mr G Coleman

Respondent: Doncaster Culture & Leisure Trust

Heard at: Leeds Employment Tribunal

On: 27 June 2023

Before: Judge Sills

Representation

Claimant: Mr Rixon

Respondent: Ms Rush

JUDGMENT

The Claimant's claim for unfair dismissal is dismissed.
The Claimant's claim for wrongful dismissal is dismissed.

REASONS

INTRODUCTION

1. The Claimant brings claims for unfair dismissal and wrongful dismissal. The Claimant worked for the Respondent as a swimming teacher from 20 May 2015 until his dismissal on 11 October 2015.

PROCEDURE, DOCUMENTS, AND EVIDENCE HEARD

2. The parties agreed a 126-page bundle. I heard evidence from the Claimant and Ms Rush for the Respondent. After hearing the evidence, Ms Rush applied to rely on additional evidence. I refused that application on the basis that I had already heard the evidence. I then heard submissions from the representatives. Mr Rixon provided written submissions which I have considered. I then gave oral judgment and reasons in relation to the unfair dismissal claim, dismissing the claim. Mr Rixon requested written reasons. I did not give judgement or reasons in relation to the wrongful dismissal claim at the hearing.

FINDINGS OF FACT

3. The facts are largely not in dispute. On 30 September 2022, the Claimant was giving a swimming lesson to a group of year 5 or 6 children from a local primary school. In the course of that lesson, the Claimant stated to one of the female pupils that 'it looks like you work out'. The Claimant accepts that he made this remark. On the same day, the school contacted the Respondent to complain about this comment being made to one of the pupils, describing it as inappropriate, and one that made the student and the schoolteacher feel uncomfortable. Prior to the next lesson, the school contacted Respondent on behalf of the girl's parents to find out if the same teacher would be giving the swimming lesson.
4. The Claimant was suspended on full pay on 1 October 2022. He was interviewed along with a colleague who was there at the time. The Claimant accepted making the comments. The colleague, Ms McGarry made some additional remarks which Claimant accepts were not taken into account in the course of the investigation or the decision to dismiss.
5. The disciplinary hearing took place on 11 October 2022. At the end of the hearing, the Respondent informed the Claimant that his actions were a clear safeguarding concern, that the comment was inappropriate and had caused upset and potential damage to the child, and to the Respondent reputationally. The Respondent decided this was a gross misconduct issue. The Claimant was dismissed with immediate effect. The Claimant appealed and the decision was upheld on appeal on 21 October 2022.
6. There were limited factual issues in dispute. These related to whether the Respondent had referred the incident to Local Authority Designated Officer (LADO) and Disclosure and Barring Service. In relation to LADO, while there was email correspondence indicating that a referral had been made, it did not show the attachment. In relation to DBS, while the Respondent had disclosed the form, the Claimant had contacted DBS who stated that no referral had been made in his name.
7. I am satisfied that both referrals were made. I see no reason why Respondent would seek to falsify paperwork or make false claims in relation to this issue. Having dismissed Claimant due to safeguarding concerns, again I see no reason why the referrals to LADO and DBS would not be made. The fact that LADO and DBS have not taken any action does not show that no referrals were made. So, I find that the issue was referred to LADO and DBS as claimed by Respondent.

UNFAIR DISMISSAL

THE LAW

8. It is not in dispute that the reason for dismissal was conduct. The question of whether the dismissal was fair is determined by s98(4) of the Employment Rights Act 1996 which states as follows:

“(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case.

9. In considering whether the employer acted reasonably in treating it as a sufficient reason to dismiss the employee, I must consider whether dismissal was within the range of reasonable responses.
10. The approach to misconduct dismissals is based on the decision in British Home Stores v Burchell [1980] ICR 303 and the following questions must be addressed:
 - a. Did the Respondent genuinely believe that the claimant was guilty of misconduct?
 - b. If so, was that belief based on reasonable grounds?
 - c. Had the employer carried out such investigation into the matter as was reasonable?
 - d. Did the employer follow a reasonably fair procedure?
 - e. If all those requirements are met, was it within the band of reasonable responses to dismiss the Claimant rather than impose some other disciplinary sanction such as a warning?

CONCLUSIONS

11. I am satisfied that the Respondent genuinely believed that the Claimant was guilty of misconduct and that the belief was based on reasonable grounds. That is because the Claimant accepts he made the comment and accepts that the comment was inappropriate. I am satisfied that the Respondent carried out a reasonable investigation, given that there is no dispute over the facts. I am satisfied that the procedure followed by the Respondent was reasonably fair. There was an initial investigation. A disciplinary hearing followed at the end of which the Claimant was dismissed. The Claimant was given and exercised his right of appeal.
12. The issue is whether the decision to dismiss the Claimant falls within the range of reasonable responses. The Respondent's case is that the Claimant's conduct did raise safeguarding issues and did amount to gross misconduct. The Claimant argues that the Respondent was not entitled to find that the Claimant's conduct was a safeguarding issue and was not entitled to dismiss the Claimant.
13. In some respects, the decision to dismiss the Claimant can be seen to be somewhat harsh. This was dismissal for a first offence. It was a single remark made. The Claimant acknowledged he made the remark and now acknowledges to his credit that the remark was inappropriate.
14. However, it is necessary to consider the Respondent's position, as an organisation providing swimming lessons to primary school children. The teachers who give those lessons are in a position of trust. I do accept that

inappropriate behaviour by swimming teachers employed by the Respondent can lead to reputational damage. This can be seen in the present case when the school first raised the issue of the Claimant's conduct with the Respondent on the day of the incident, and the parents of the child subsequently sought clarification through the school as to whether Claimant would be teaching the class before deciding whether the daughter would attend the next lesson.

15. I turn to the comment itself. The Claimant accepts it was inappropriate. It is a comment made by an adult male in a position of trust to a female child aged 10 or 11 about that child's body and physical appearance when the child was in swimwear and in front of other people. The comment demonstrates he had been observing her physical appearance. In that context, however intended, the comment is highly inappropriate.
16. I must consider whether it was open to the Respondent to decide this was a safeguarding concern and whether doing so was in the range of reasonable responses. I do not accept that the Respondent should have left this to LADO or DBS to decide. It was for the Respondent to decide how to deal with the conduct. I do accept that this issue was perhaps not clear cut, as explained by the Respondent on the form when giving reasons for the delay in raising a safeguarding issue with the LADO.
17. I have considered the Respondent's policy on safeguarding. I note that safeguarding relates to children's health and safety and well-being (Claimant's bundle at P91), including their mental well-being. Having regard to the nature of the comment, and the fact that it was raised by the school the same day recording that the child was made to feel uncomfortable, I find that it was in the range of reasonable responses to treat this as a safeguarding concern, in that it was conduct capable of adversely affecting a child's health and safety and well-being, including their mental well-being.
18. The delay in referring to LADO and indeed DBS is not in my view significant. This was not a clear case, and the question of whether there were safeguarding issues was decided as part of the disciplinary process. Having made that decision, the referrals were then made.
19. I now consider whether the decision to treat this conduct as gross misconduct and to dismiss the Claimant was in the range of reasonable responses. I find that it was for the following reasons. The Respondent's disciplinary policy does state concerning summary dismissal that if 'there is a major breach of duty or conduct that brings or might bring the organisation's name into disrepute, dismissal will normally result'. Noting the complaint from the school, the Respondent was entitled to find that this was conduct that might bring the organisation's name into dispute. The Respondent's business included providing swimming lessons to school children, and swimming teachers are in a position of trust. This was inappropriate behaviour by a male swimming teacher towards a female child. The behaviour was an inappropriate comment about the child's physical appearance in a swimming class. It was in the range of reasonable responses for the Respondent to find that the conduct gave rise to safeguarding concerns. It was in the range of reasonable responses to find that the conduct did amount to gross misconduct, whether as a serious

violation of health and safety practices, or simply as a matter of comparable seriousness to the examples given. It was in the range of reasonable responses to find that this was conduct that might bring the organisation's name into disrepute.

20. I accept that dismissal may not have been the only reasonable outcome. However, I also find that the Respondent did consider alternatives to dismissal. The letter of dismissal dated 11 October 2022 makes explicit reference to the Respondent considering alternatives to dismissal. I am satisfied that dismissal was within the range of reasonable responses not withstanding the points made by the Claimant at the disciplinary hearing and as part of his appeal. So, the Respondent did act reasonably in dismissing the Claimant.

21. I therefore dismiss the claim for unfair dismissal.

WRONGFUL DISMISSAL

22. The parties did not refer to the claim for wrongful dismissal at the hearing. I gave judgement on the unfair dismissal claim alone. The Claimant's case in relation to this claim is that his summary dismissal amounted to a breach of contract and wrongful dismissal and that he was entitled to his notice pay.

THE LAW

23. An employee will not be entitled to notice of termination if they have fundamentally breached the contract e.g., the contract is terminated because the employee is guilty of gross misconduct.

CONCLUSIONS

24. I must decide for myself whether the Claimant's conduct amounted to a fundamental breach of contract such that he was not entitled to notice of termination. I find that the Claimant's conduct did amount to a fundamental breach of contract for the following reasons. I note that the Claimant acknowledges that the comment was inappropriate, and that it was a single remark. However, the Respondent is an organisation providing swimming lessons to primary school children. The teachers who give those lessons are in a position of trust. Inappropriate behaviour by swimming teachers employed by the Respondent towards the children they are teaching can lead to reputational damage. In this case the child's school raised the issue of the Claimant's conduct with the Respondent on the day of the incident, and the parents of the child sought clarification as to whether Claimant would be teaching the next class before deciding whether the child would attend. As referred to above, in the context in which it was made, the comment was highly inappropriate.

25. Given that the Respondent's policy states that safeguarding relates to children's health and safety and well-being, and the concern raised by the child's school, I find that the Claimant's conduct did give rise to a safeguarding concern. I find that the Claimant's conduct was conduct that brought or might bring the Respondent's name into disrepute and so on this basis the Respondent was entitled to summarily dismiss the Claimant. I am

Case No: 1800994/2023

satisfied that the conduct, inappropriate conduct towards a child, was of a similar level of seriousness to the matters listed as amounting to gross misconduct and so I am satisfied that the Claimant's conduct did amount to gross misconduct. The Claimant's conduct amounted to a fundamental breach of the contract of employment and so the Claimant was not entitled to notice of the termination of his employment. The Claimant's claim for wrongful dismissal and notice pay is dismissed.

Tribunal Judge Sills
Sitting as an Employment Judge

Date 21 July 2023

WRITTEN JUDGMENT AND REASONS
SENT TO THE PARTIES ON

25 July 2023

CM Haines

FOR THE TRIBUNAL OFFICE