EMPLOYMENT TRIBUNALS

Claimant: Mrs J Miller

Respondent: Hugh Baird Further Education College

HELD AT: Liverpool **ON:** 17 February 2017
29 June 2017

BEFORE: Employment Judge Robinson
(sitting alone)

REPRESENTATION:

Claimant: Mr T Hughes, Non-practising Barrister
Respondent: Ms C Sullivan, HR Adviser

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for unfair dismissal succeeds.

2. The compensation both in relation to the basic and compensatory awards shall be reduced by 50% under the Polkey principles and by a further 75% for contributory fault.

3. The remedy hearing will take place at **Liverpool Employment Tribunal, 3rd Floor, Civil & Family Court Centre, 35 Vernon Street, Liverpool, L2 2BX** at **10.00am** on **22 September 2017**.

REASONS

The Issues

1. The only issue before the Tribunal is one of unfair dismissal. There were issues relating to unpaid wages but those were resolved prior to the hearing.

2. Mrs Miller is a teacher of mathematics and she worked for the respondent from January 2012 until she was dismissed for gross misconduct on 9 February

2016. Her personnel file was free of any conduct issues prior to the events that had her sacked.

3. There was no dispute that the claimant had made a comment to two students, CD and GR, on 9 December 2015 because the claimant was upset about a previous incident to which I will refer below:

4. The comment was made outside the school building, the claimant saying words to the effect that :-

"my partner and son wanted to come and sit at the back of the class and my son wanted to bring a gun."

5. It was the students who called the claimant over to them. GR was going to speak to the claimant in order to apologise over what had happened a couple of days before.

6. The claimant had been concerned about the behaviour of this particular class which GR and CD attended. On 7 December 2015 they had been unruly and the claimant had become upset about the poor behaviour of the students in particular these two young women.

7. The claimant did not work on Tuesday 8 December 2015 and then on 9 December 2015 the incident described above occurred.

8. The students did not make the complaint. The complaint was made by another member of staff, Sara Carter, who overheard the comment and reported it to Mick Howey who in turn reported it to Mrs Miller's line manager, Natalie Blackmore.

9. There was no parental complaint yet the investigating officer, Pauline Rowlands, suggested in her report that there was. The claimant did not know until the actual disciplinary hearing that it was not the students who had complained about her comment but the member of staff.

10. The claimant admitted that she had made a comment. It was said by the college that it brought the college into disrepute, especially with the level of gun crime in the area where the college is situated and that it was unprofessional behaviour. The claimant accepted that "it was totally out of order". The respondent's management believed the comment made was significantly below the professional standard required.

11. Although the claimant wanted the CCTV footage to be shown neither the investigating officer nor the dismissing officer obtained the CCTV footage. It would, in their view, have made no difference to the outcome. The investigating officer and therefore consequently the dismissing officer accepted that it was the students who had instigated the conversation. There was some doubt as to whether the claimant's son suggested that he "wanted to come into the class with a gun" or "would come into the glass with a gun".

12. The respondent made much of the fact that the comment was not made in the heat of the moment and that the claimant had been absent on 8 December and therefore she should have settled down despite being upset the day before. It was

accepted also by the respondent that both Sara Carter and Natalie Blackmore were correct in raising the issue for a potential disciplinary hearing.

13. There was a young man in the vicinity when the comment was made. He was the brother of CD, but no statement was taken from him because the respondent felt that, as the claimant had admitted making the comment, there was no requirement to take a statement from him at the investigation.

14. The investigating officer accepted that the comment was not made maliciously by the claimant but it was “ill judged”.

15. In terms of the procedure, the claimant did receive all the documents seven days before the hearing so that she could prepare her defence.

16. The appeal officer felt that he could not consider any alternatives to dismissal. In effect the investigating officer, the dismissing officer and the appeal officer saw this issue in a stark light. Firstly that the comment was made and secondly it was not said in the heat of the moment.

17. The dismissing officer said at the dismissal hearing that there “never could be any mitigating circumstances” in this situation. The claimant complained that she was prohibited from contacting people (other members of staff) in order to support her. Management felt that hearing from others would not have made any difference to the sanction.

18. The statements of both CD and GR show that no threat was made. The claimant felt that she was under pressure from the class CD and GR attended because of lack of support from higher management, and she made much of the fact that there was a prior incident in the classroom on 7 December which was upsetting for her. There was also low morale in the department she worked in. The dismissing officer decided to dismiss after considering only the incident of 9 December 2015 and not the issues which led up to the incident with CD and GR.. She felt there was no excuse for the claimant’s poor behaviour towards those students.

19. There was no consideration of the claimant's honesty and remorse, and the claimant felt that the outcome of the disciplinary hearing was predetermined.

20. The claimant pleaded that she had no disciplinary record and she did not instigate the conversation with the students. She accepted that she should not have said what she said and Paula Rowlands, the investigating officer, accepted that the poor behaviour of the students on 7 December had resulted in the claimant being upset but the dismissing officer, as set out above, did not take that into account.

21. The dismissing officer suggested to me that the claimant showed no remorse. She did, The dismissing officer did not accept the claimant’s plea that she would never repeat that behaviour. There was no malice behind the statement, as accepted by the investigating officer, and the claimant’s reason for saying what she said was to “convey how upset I was at the behaviour of the girls”.

22. The dismissing officer, in short therefore, found there was no mitigation and that the claimant did not show remorse.

23. The disciplinary procedure sets out that even if gross misconduct is proven the advice to the dismissing officer is that they "may" dismiss not that they "shall" dismiss.

24. The dismissing officer accepted during cross examination that she did not take into account the health of the claimant or whether there were special circumstances which might mitigate her behaviour. She did not take into account the length of service of the claimant.

25. The dismissing officer did not go back to the two girls and ask them what the context of the conversation was. Indeed she did not interview the two pupils at all.

26. Although the allegation that the claimant threatened the students was never put to the claimant in the lead up to the disciplinary hearing, the dismissing officer suggested that it was the claimant who first introduced the issue of "threat". The notes of the disciplinary hearing show that it was the dismissing officer who introduced the subject of "threat" by saying it was "an inappropriate comment which encapsulated a threat".

27. The dismissing officer accepted that if the issue of whether there was a threat or not was not part of the allegation it was unfair if it became a new allegation put to the claimant at the hearing. I find that it was the dismissing officer who introduced the element of "threat" in the discussion at the disciplinary hearing for the first time.

28. The dismissing officer also accepted that the claimant should have been told before the disciplinary hearing that the girls had not complained and that it was a member of staff who had done so.

29. When the claimant was suspended her suspension letter suggests that there was parental complaint but that was not true.

30. When the appeal officer was cross examined he could not recall reading the claimant's appeal documents, and indeed he said these words that to read them would have "taken an immense amount of time". He also went on to say that once it was established that the claimant was guilty of gross misconduct it was right to dismiss. He did not take into account, and accepted he did not take into account, the procedural requirement which suggests that a dismissal may only follow after gross misconduct.

The Law

31. The dismissing officer must have a reasonable belief on reasonable grounds after a reasonable investigation that the misdemeanour of which the claimant is accused occurred. The burden is upon the respondent initially to prove that they have dismissed for a potentially fair reason as set out in Section 98 (1) and (2) of the Employment Rights Act 1996. If that burden is satisfied then the burden as to whether the dismissal is fair is a neutral one as between the parties. The determination as to whether the dismissal is fair or unfair depends upon whether in the circumstances (including the size and administrative resources of the employer) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and the substantial merits of the case.

32. The Tribunal must not substitute its views for the views of the dismissing officer.

33. The sanction must be one within the band of reasonable responses recognising that that band is a wide band.

Conclusion

34. Applying that law to the facts of this case I came to the following conclusion.

35. The claimant admitted her offence. Therefore whether other people were interviewed or CCTV footage was looked at was irrelevant.

36. However, there are a number of features which would cause concern to any Tribunal with regard to the fairness of the decision to dismiss. In particular, neither the dismissing officer nor the appeal officer considered any mitigating circumstances. Even if they thought that what the claimant had done was gross misconduct they did not consider whether they should dismiss or not.

37. The principles in the case of **Brito-Babapulle v Ealing Hospital NHS Trust 2013 UKEAT 0358/12/BA** were not taken into account in that even if gross misconduct was found it is not inevitable that a dismissal is automatically then fair without further consideration of all the circumstances of the case. The dismissing officer should consider whether it would be fair in all the circumstances to dismiss for gross misconduct. That principle is even more pertinent when such a dismissal has the potential to end a teaching career. The decision to dismiss is therefore unfair for the following reasons.

38. Clearly the respondent here did not consider all options and, after hearing the dismissing officer giving evidence there was an element of prejudgment in the way she went about the process. It can be characterised in this way. The claimant said what she said, it was unprofessional, consequently there is no other option but to dismiss.

39. For the appeal officer to say that he did not read the appeal documents is also unfair. The claimant had the right to have those documents, that she prepared in her defence, read and considered at the appeal and they were not.

40. The allegation was ratcheted up in seriousness by the respondent management. From being considered by the investigating officer as a comment made off the cuff by the claimant and one which the claimant clearly should not have made it came to be interpreted in the context of the local gun crime issue by the dismissing officer. Furthermore the comment was considered to be made as a threat to the students when the students did not see it as that. Indeed it was the students who were trying to clear the air with their teacher and approached her. The claimant then made an unguarded comment repeating what had been said at home by her husband and her son. She has always regretted making the remark.

41. The claimant's good conduct in the past and the fact of her upset in relation to the way in which this particular class were behaving towards her were not taken into account sufficiently. The management accepted that they did not take the lead up to the incident into account.

42. This dismissal could have brought about the end of the claimant's teaching career. It was incumbent upon the respondent to make sure the process was gone through fairly and rigorously in relation both to the procedure and the substance of the allegation.

43. I cannot ignore those procedural wrongs. Equally I cannot ignore that the dismissing officer found that claimant's behaviour was poor and unprofessional and that she found it to be gross misconduct. The respondent has satisfied the burden upon them. They dismissed for conduct. I cannot substitute my view for that of the dismissing officer but I also cannot ignore that if the process had been gone through fairly and mitigation taken into account it was not inevitable the claimant had to be dismissed. That is especially so when one considers the respondent's own procedures which suggests that, even where the conduct is deemed to be gross misconduct, the sanction "may " be dismissal not "will" be dismissal. The substantial merits of this claim, when looking at all the circumstances, demand a finding of unfair dismissal. But in coming to my judgment I have taken into account the behaviour of the claimant and I have consequently considered what percentage chance the claimant had of being dismissed.

44. In those circumstances I make a reduction under the principles of **Polkey v A E Dayton Services** that if the procedure had been followed appropriately there was a 50% chance that the claimant would have been, in any event, fairly dismissed . Her basic and compensatory award will be reduced by that percentage.

45. I also have to consider thereafter the percentage reduction for the employee's contributory fault in accordance with section 123(6) of the Employment Rights Act 1996. By her own admission she was guilty of conduct which fell below the professional standards expected of her.

46. I believe that a further reduction of 75% to the claimant's basic and compensatory awards is just and equitable in all the circumstances of this case.

47. The claimant therefore has her declaration of unfair dismissal but any compensation will be reduced as set out above.

Employment Judge Robinson
03-08-17

Date 25 August 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE