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EMPLOYMENT TRIBUNALS

Claimant: Mr D Kwai

Respondents: 1. The Governing Body of Morpeth School
2. London Borough of Tower Hamlets

Heard at: East London Hearing Centre **On:** 22-23 February 2017

Before: Employment Judge Goodrich (sitting alone)

Representation

Claimant: Mr P Tsamados (Solicitor)

Respondents: Ms K Newton (Counsel)

JUDGMENT

The judgment of the Employment Tribunal is that:-

- 1 The Claimant was fairly dismissed. The claim is dismissed**
- 2 The Claimant's wrongful dismissal claim fails and is dismissed.**

REASONS (RESERVED JUDGMENT)

The claim and the issues

- 1 The background to this hearing is as follows.**
- 2 The Claimant obtained an ACAS Conciliation Certificate, as is now required before issuing Employment Tribunal proceedings, covering the period from 25-26 May 2016. His presented his claim on 13 July 2016.**
- 3 The Claimant brought a complaint of unfair dismissal; and a wrongful dismissal claim for notice pay.**

4 The Claimant provided grounds of claim setting out the details of his claim against the Respondents. In summary, his case was that he was dismissed for an incident in which he was the victim of an assault against him by a teacher, called Mr Islam, at the school at which he worked as Facilities Manager for the school.

5 The Respondents entered a response denying the Claimant's claims. Their case, in summary, was that both the Claimant and Mr Islam were dismissed because of an incident involving a serious altercation between the two of them, the exchange of provocative and abusive language which escalated into a fight, at a time where staff and children were present on the school premises.

6 The case was listed for this two day hearing.

7 At the outset of the hearing I discussed with the parties what were the issues I would be required to decide. The agreed issues are as follows:-

Unfair dismissal case

- 7.1 The Respondents accept that there are no jurisdictional issues in this case; and that the Claimant is entitled to bring an unfair dismissal and wrongful dismissal claim.
- 7.2 The Claimant accepts that conduct was the reason or principal reason for the Claimant's dismissal.
- 7.3 The parties dispute whether the dismissal was fair within the meaning of section 98(4) Employment Rights Act 1996. In particular the Claimant's case, which the Respondents dispute, is that the Respondents did not have reasonable grounds for believing that the Claimant had committed an act of gross misconduct; and did not conduct as much investigation as was reasonable.
- 7.4 If, which the Respondents dispute, the Tribunal were to find the dismissal to be unfair, the Respondents' case, which the Claimant would dispute, is as follows. Insofar as any procedural defects might be found the Respondents would contend that the Claimant would or might have been dismissed if fair procedures had been followed. Additionally, they would contest that the Claimant caused or contributed to his dismissal by his conduct.
- 7.5 If successful in his unfair dismissal claim the Claimant seeks compensation not reinstatement or re-engagement with the Respondents.

Wrongful dismissal

- 7.6 The Respondents contend and the Claimant disputes that the Claimant committed a repudiatory breach of contract so as to entitle them to dismiss the Claimant without notice pay.

Other matters arising during hearing

7.7 I read in advance of the witnesses giving evidence their witness statements, as is now the Tribunal's usual practice. I was also provided with a reading list from both representatives.

7.8 On the Respondents' application I watched CCTV footage of the incident that gave rise to the Claimant's dismissal (although not all of the incident was covered by the CCTV footage). Mr Tsamados, on the Claimant's behalf, was not happy about not having been given more notice by the Respondents of their intention to ask me to view the CCTV footage, although he did not object to the application.

The relevant law

8 Section 98(4) Employment Rights Act 1996 provides that:

"... 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 the case of *British Homes Stores v Burchell* [1978] IRLR 379 guidance was given that in a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair, an Employment Tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, there must be established by the employer the fact of that belief; that the employer did believe it. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

10 In considering the fairness or unfairness of a dismissal an Employment Tribunal will usually consider both the procedures adopted by the employer and the sanction, or punishment, of dismissal. In both these respects the function of the Tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

11 The starting point of interpreting section 98(4) are the words themselves. The

band of reasonable responses is not to be regarded as some kind of tick box exercise. A tribunal should also take into account the gravity of the charges and their potential effects upon the employee concerned.

12 The Tribunal will also consider, when it considers it relevant, the ACAS Code of Practice on disciplinary and grievance procedures.

Wrongful dismissal

13 When considering whether or not conduct amounted to gross misconduct so as to justify summary dismissal guidance was given in the case of *Neary v Dean of Westminster* [1999] IRLR 288 (Special Commissioner). Guidance was given that whether particular misconduct justifies summary dismissal is a question of fact. The character of the institutional employer, the role played by the employee in that institution and the degree of trust required the employee vis-à-vis the employer must all be considered in determining the extent of the duty of trust and the seriousness of any breach thereof.

The evidence

14 On behalf of the Respondent I heard evidence from:-

14.1 Mr James Elliott, who conducted the disciplinary investigation on the Respondents' behalf.

14.2 Mr Robert Crothers, who was chair of the disciplinary panel that dismissed the Claimant.

14.3 Mr Daniel Bader, Chairman of the Governing Body of Morpeth School.

15 On behalf of the Claimant I heard evidence from the Claimant himself.

16 In addition I considered the documents to which I was referred in an agreed bundle of documents.

17 In addition, as referred to above, I viewed CCTV footage concerning the incident that gave rise to the Claimant's dismissal.

Findings of fact

18 I set out below the findings of fact I consider relevant and necessary to determine the issues I am required to decide. I do not seek to set out each detail provided to me, nor make findings on every matter in dispute between the parties. I have, however, considered all the evidence provided to me and I have borne it all in mind.

19 I have made below findings of fact for the Claimant's wrongful dismissal claim; and some additional findings of fact under the heading of wrongful dismissal, as tribunals were encouraged to do in the case of *London Ambulance Service NHS Trust v Small* [2009] IRLR 563 CA.

20 My findings of fact for the Claimant's wrongful dismissal claim concentrate on the issues identified in the guidance given in the *British Homes v Burchell* case; whereas my findings of fact for the wrongful dismissal claim concentrate on what I found actually happened as regards the incident that led to the Claimant's dismissal.

21 The Claimant, Mr Derek Kwai, was employed by the Respondents from 3 December 1990 until he was summarily dismissed after a disciplinary hearing had taken place. The effective date of termination of his contract was 1 March 2016. By that time he had worked for over 30 years in local government service.

22 The Claimant worked at Morpeth School. This is a large secondary school in East London, in Bethnal Green.

23 The Claimant's position was described as facilities manager for the school. As such he had tied accommodation, a house with four bedrooms, in the grounds of the school.

24 Prior to the incident the Claimant had not been in receipt of any disciplinary warnings. In answer to a question put to him in cross-examination Mr Bader (Chair of the Governing Body of Morpeth School and Chair of the appeal panel that considered the Claimant's appeal against dismissal) commented that he was aware of the Claimant's long service and the good work he had done in the school.

25 The first Respondent in these proceedings is the Governing Body of Morpeth School; and the second Respondent is the London Borough of Tower Hamlets. An explanation was given of their respective role in paragraph 4 of the Respondent's grounds of resistance. It was explained that the Education (Modification of Enactments Relating to Employment) (England) Order 2003 provides that when the governing body of a school has a delegated budget, the governing body has powers as to appointment, suspension, conduct and discipline, capability and dismissal of staff at the school. Article 6 of the order provides that the governing body is to be the Respondent to any application to an Employment Tribunal arising out of any of its actions taken in exercise of its employment powers. Morpeth School is a community school maintained by the London Borough of Tower Hamlets.

26 On Saturday 17 October 2015, an incident occurred which gave rise to the Claimant's dismissal.

27 Some of what took place on the day in question is agreed by the parties. Some is not. Where the parties are in dispute about important factual details I set these out under the wrongful dismissal claim element of my findings of fact separately, for the reasons given in paragraph 19 above.

28 Mr Islam was one of the teaching staff at the Morpeth School. He had developed a hovercraft project as part of his teaching programme. A small hovercraft was parked on the school premises for this purpose. The hovercraft needed to be repaired. Mr Islam engaged Mr Kip McCollum to repair the hovercraft. Mr McCollum took away the hovercraft and returned it on 17 October after it had been repaired.

29 Although it was a Saturday morning some pupils were at the school having revision classes with teachers.

30 The hovercraft engine was started and making a loud noise. Mr Kwai's house was close by to school football pitches where the hovercraft had been started up. It was approximately 10am.

31 The Claimant was disturbed by the noise. Neither he nor his wife had slept well the night before. He went out of his house to speak with Mr Islam and Mr McCollum about the noise. The contents of the exchange of words between him and Mr Islam is disputed between the parties.

32 The Claimant returned to his house. Shortly afterwards he came out of his house and back on to the playing area where the hovercraft was situated and Mr Islam and Mr McCollum were present.

33 There was an angry confrontation between the Claimant and Mr Islam which escalated in to a physical confrontation between the two of them, some of which was captured on CCTV. Much of what took place is disputed between the parties. The Claimant accepts, however, that he was the first to use physical force (albeit his case was that this was in self defence). A teacher and an assistant caretaker saw the two of them grappling with each other on the ground.

34 Part of the incident was captured on CCTV and there were various witnesses who saw at least some parts of what took place.

35 On 20 October 2015, the Claimant visited the police and gave a report of the incident to them.

36 No charges were brought by the police against either individual, neither individual seeking to bring charges and the police leaving the matter to the school to deal with. I was referred to a police record of the two allegations. The police report on the incident recorded that it was not possible to determine with any certainty which was the more credible allegation, although stating that it was perhaps noteworthy that the Claimant's account contained injuries that were perhaps more consistent with being assaulted; but also stated that the investigating officer would keep an open mind as to the actual culprit. No conclusive view was, therefore, expressed by the police, although some support for the Claimant's account was given. The police did not, so far as I was made aware, however, view any CCTV footage of the incident, or interview witnesses of it.

37 On 21 October the Claimant was suspended from work. He was notified of the allegations against him, namely of fighting or acts of violence at the workplace; and bringing the school into disrepute. The Claimant was notified that, if substantiated, the allegation would represent gross misconduct under the school's disciplinary code; and provided with a copy of the disciplinary code.

38 An external consultant, Mr James Elliott, was engaged to carry out a disciplinary investigation concerning the actions of the Claimant and Mr Islam.

39 Mr Elliott has impressive credentials for the carrying out of such a disciplinary investigation. He has previously been an Assistant Director of Housing for three local authorities, with experience in those roles of dealing with disciplinary related issues, one of which included joint work with the Metropolitan Police Fraud Squad investigating corruption and fraud in a local authority; he was a member of the Police Complaints Authority; and has been a senior investigations officer at the Standards Board for England responsible for investigating allegations of breaches of the code of conduct for members of local authorities, police and fire authorities. He has carried out a number of disciplinary investigations for the London Borough of Tower Hamlets.

40 In the course of his disciplinary investigation Mr Elliott interviewed the following witnesses:-

- 40.1 Mr Kip McCollum, who had been engaged by Mr Islam to repair the hovercraft.
- 40.2 Ms Joanne Currie, a senior lunchtime supervisor and teaching assistant who was on duty on 17 October 2015.
- 40.3 Mr Tony Peake, assistant to the Claimant and also on duty that day.
- 40.4 A local resident who lived in a property overlooking the school pitch and witnessed the incident.
- 40.5 Ms Reilly, the Head Teacher for the school who had taken a note of her conversation with Mr Reilly after the incident.

41 Additionally, Mr Elliott studied CCTV footage of the incident both on a small screen and a larger 32 inch screen which gave a better picture of the footage. He was able to pause, or "freeze frame" the footage and watched it on many occasions. He watched the footage with the Claimant and his trade union representative.

42 Mr Elliott took photographs of the sports pitch and took measurements at the location of the incident to establish the amount of movement of the parties involved from having watched the camera footage.

43 Mr Elliott interviewed the Claimant and Mr Islam separately on more than one occasion and gave the Claimant an opportunity to read and make amendments to his interview with him before the Claimant signed a copy of the final version of his interview.

44 Amongst the contents of Mr Elliott's interview with Mr McCollum were the following points:-

- 44.1 In answer to a question from Mr Elliott as to whether he had known Mr Islam for any length of time he stated that he had not known him at all before.
- 44.2 Around the 26 or 28 September he had come to collect the hovercraft to repair it when a man he believed to be the school caretaker had shouted

at Mr Islam over the fence and that angry words were exchanged.

- 44.3 On 17 October the caretaker (Claimant) had come out of his gate in an agitated state complaining that he had children sleeping as they had been to a party the previous night, to which Mr Islam pointed out that it was 10.30 on a Saturday morning. Mr McCollum stated that the Claimant's manner was aggressive and that they were shouting at each other.
- 44.4 He stated that the Claimant's manner was abusive and threatening and that he threatened to come and sort out Mr Islam once and for all saying: "I will sort you out once and for all". In response Mr Islam said something along the lines of: "If you think you are up to it bring it on".
- 44.5 The Claimant then went back into his house before coming back out towards them in an obviously threatening manner, so that Mr McCollum's fear was that the Claimant would assault Mr Islam.
- 44.6 Mr McCollum said that he then approached the Claimant, put his hands on his shoulders and warned him repeatedly that he would get into trouble, whilst the Claimant pushed him mildly and continued to shout abuse and threaten Mr Islam.
- 44.7 Both men were hurling abuse and accusations at each other. Mr McCollum stated: "All I was concerned to do was to stop these two idiots fighting".
- 44.8 The Claimant was wanting to get past him and the situation escalated to a point where he felt that it was futile to attempt to prevent them fighting. He moved away.
- 44.9 He then saw the Claimant take off his shoes and go for Mr Islam, pushing him back about 10 yards. The next thing he saw was Mr Islam had got the Claimant on the ground. He said that he then moved the hovercraft and parked it in the storage area so he did not see the men tussle.
- 44.10 He then saw the teachers arrive and break up the fight, hauling them off each other. He went to help them and with difficulty they managed to separate the two and keep them apart; but this was not easy as they kept taunting each other and threatening violence and continued to swear abuse at each other.
- 45 Mr Peake's statement included the following points:-
- 45.1 He had seen Del (Kwai, the Claimant) and Shiraz (Mr Islam) facing each other and finger pointing and Kip (McCollum) ushering the Claimant away and that the Claimant's manner was aggressive.
- 45.2 He went into the school office to get Jo (Currie) to try to help stop the confrontation.

45.3 When they returned the men were punching each other. The Claimant had his right arm around Mr Islam's neck and threw a punch at Mr Islam.

45.4 He and Ms Currie pulled the two men apart. Both were angry and there was a lot of swearing, mainly from Mr Islam.

46 Ms Currie reported that when she and Mr Peake arrived at the football pitch both men had their fists clenched and both threw a punch at each other at the same time although they did not connect as they had pulled the men apart. She also reported that the two were shouting abuse at each other.

47 The local resident's account was of the Claimant being the main aggressor in the confrontation.

48 Mr Islam's account was of the Claimant being the main aggressor, although he admitted to using abusive language in response to the Claimant. He reported being punched on the side of his head by the Claimant.

49 Among the contents of the Claimant's interview was the following:-

49.1 He disputed that there were any angry words exchanged on Mr McCollum's first visit when he had removed the hovercraft.

49.2 He disputed raising his voice or using abusive language when he first came out of his property on 17 October.

49.3 He stated that Mr Islam had said: "You're a coward and if you were on this side of the fence I will sort you out", but that he did not take this seriously.

49.4 He stated that Mr Islam had lunged towards him, he thought that he was goading him into hitting him, he grabbed Mr Islam's jacket and walked him back, pushing him back about 10 steps.

49.5 He stated that Mr Islam then threw him on to his back and started to punch him.

49.6 When Mr Elliott put to the Claimant Jo (Currie) account that it took quite a lot of effort to keep the two of them apart and that there was several occasions when he and Mr Islam would try to come together again or move towards each other, he appeared to accept this, stating: "fair enough, I understand that totally"; and accepted that the two of them were shouting at each other.

49.7 He disputed that he took his shoes off in order to start a fight and said that he had slippers which would come off when he moved.

50 Mr Elliott prepared a detailed disciplinary investigation report. He analysed all the evidence he had obtained from the witnesses, together with his analysis of the

CCTV evidence.

51 After analysing the evidence and making findings as to what he considered had happened Mr Elliott made some concluding remarks. Amongst his concluding remarks were that:-

- 51.1 The evidence supported that Derek Kwai (the Claimant) approached Shiraz Islam and Kim McCollum in a confrontational manner and Mr Islam responded in kind.
- 51.2 As the tension rose with provocative and abusive language being used by both parties, the evidence supported that physical contact was initiated by the Claimant.
- 51.3 After the physical contact and movement across the sports pitch the parties became separated by a reasonable distance, which gave an opportunity to reduce the likelihood of further physical contact.
- 51.4 Mr Islam then moved towards the Claimant who responded in similar manner so that further physical contact occurred followed by both of them falling to the ground and continuing physical contact.
- 51.5 They then moved out of the security camera's field of vision and evidence supported that further physical contact took place before they were separated by Morpeth staff followed by continued verbal exchanges and profanity.
- 51.6 Both engaged in an altercation lasting several minutes that began with abusive language and confrontational behaviour that became increasingly hostile, escalating to the point of physical confrontation.
- 51.7 This was contrary to the standards of conduct and disciplinary rules set out in the School's disciplinary code, which state as examples of gross misconduct: "fighting or acts of violence at the workplace, serious threatening or abusive behaviour towards members of the public, clients, fellow employees, elected council representatives".

52 Mr Elliott recommended that the evidence was sufficient for a panel to reach a finding of gross misconduct against both individuals.

53 When cross-examining Mr Elliott and in closing submissions two criticisms were made of Mr Elliott's investigation. One was that he should have investigated the previous history of the relationship between the Claimant and Mr Islam, even although Mr Kwai had not wanted to go back into the previous history. Additionally he should have given more weight to the fact that Mr McCollum had been engaged by Mr Islam to repair the hovercraft and was there at his behest. I do not agree with either criticism.

54 In part of the Claimant's comments on an earlier version of the Claimant's statement to Mr Elliott the Claimant stated that the history of his relationship with Mr Islam had no relevance to his actions on that day and that he had had no contact

with Mr Islam over the previous six years. Mr Islam also stated that their previous history had no bearing on their conduct on that day and also confirmed that he had not spoken with the Claimant for over six years. In fact, also, at paragraphs 303 and 304 of his report Mr Elliott made a brief reference to previous existing tensions between the two that dated back to 2009; and that it was possible that this had some bearing on the way in which the incident on 17 October 2015 evolved. He further explained (at paragraphs 305 and 306 of his report that Mr Kwai denied that there was any previous history between them; and that Mr Islam felt that their previous history was relevant but that it had “not necessarily” had any bearing on his actions on the day. He went on to state, in his report and when cross examined at this hearing that he had decided that investigating the previous history of relations between the two of them was unlikely to be a fruitful line of enquiry and the investigation concentrated on what happened on 17th October 2015 as its primary purpose. This, I find, was an entirely reasonable decision and reasoning on his part.

55 As regards Mr McCollum’s relationship with Mr Islam Mr Elliott was alert to the issue, as shown by his having questioned Mr McCollum how long he had known Mr Islam. Mr Elliott also had in mind that Mr McCollum was criticising both the Claimant and Mr Islam for their actions and, having interviewed him, felt that his evidence was reliable.

56 Both the Claimant and Mr Islam were required to attend disciplinary hearings.

57 A letter was written to the Claimant, dated 8 July 2016, notifying him that the disciplinary hearing would be to consider the allegation of gross misconduct that his conduct breached the standard set out in the school’s disciplinary code, which was enclosed with the letter. He was provided with a copy of the investigation report; records of all the investigatory interviews held; copies of the security camera recording; copy of the school’s disciplinary procedure and any relevant code of conduct or other policies; and his contract of employment.

58 The Claimant was notified that Mr McCollum, Ms Reilly, Mr Peake, Ms Currie and a local resident would be called as witnesses. He was asked to notify of any witnesses he wanted to call; and was warned that a possible outcome of the disciplinary hearing might be summary dismissal.

59 The Claimant provided additional documentation for the disciplinary hearing, including a witness statement from his wife. This concerned her account of events that had occurred in 2009 when their son was a pupil at the school of Mr Islam. She also referred to an incident where a department technician had a gun delivered to their address.

60 The disciplinary hearing took place on 29 January 2016. There was a panel conducting the disciplinary hearing, chaired by Mr Rob Crothers, a school governor. The Claimant had a trade union representative attend the hearing on his behalf.

61 Prior to the Claimant’s disciplinary hearing starting there was a meeting of the panel with the Claimant and his representative to seek to agree the procedure.

62 The agreed procedure was that Mr Islam’s disciplinary hearing would be

conducted first, followed by the Claimant's. If either party wanted to raise issues or questions that were pertinent to the other hearing there would be an opportunity to call the other party as a witness or reconvene either hearing or for any points to be put to the other side in writing. The panel and the investigating officer would also have this opportunity.

63 In fact, although the Claimant and his representative gave a long list of questions to Mr Islam to answer, on receipt of his responses (which were incomplete, as he refused to answer a number of the questions) neither the Claimant nor his representative wanted to call Mr Islam as a witness, or for the hearing to be reconvened.

64 Mr Islam's disciplinary hearing started in the morning and lasted into the afternoon.

65 The Claimant's disciplinary hearing started in the afternoon and lasted for about seven and a half hours, finishing around midnight.

66 The hearing took so long because the CCTV evidence was viewed at the hearing (on a 32 inch screen), all the witnesses attended the disciplinary hearing to give evidence and the Claimant, investigating officer and panel had an opportunity to question them; together with Mr Elliott presenting his report; and both he and the Claimant and his representative having the opportunity to give closing statements.

67 The witnesses were asked searching questions from the panel. For example, Mr McCollum was asked by Mr Crothers whether, if he and Mr Islam had discussed the Claimant after the first incident, that would have coloured his behaviour or view of events on the second incident. Mr McCollum responded that it would not and that he thought that "DK" (the Claimant) was rude and aggressive and he formed his opinion based on what he saw. Mr McCollum also criticised both individuals over the incident, describing them as being as bad as each other.

68 The Claimant stated that he was polite and courteous towards Mr Islam at the start of the exchange. He complained that it was Mr Islam who was being aggressive and goaded. Mr Crothers challenged the Claimant on his account. He asked him why, if he felt that Mr Islam was placing a physical threat, he did not turn and walk back into his house. The Claimant accepted that this was a mistake on his part. Mr Crothers asked him why he did not de-escalate the incident on 17 October, to which the Claimant replied that he fell into the trap and returned the argument. He was challenged on why he did not walk away.

69 Mr Crothers challenged the Claimant on having the choice and stepping forward to make the first move in the physical confrontation. The Claimant stated that he had seen the look on Mr Islam's face and made a judgment that he had to go for him, grabbing his jacket and pushing him away.

70 Mr Crothers challenged the Claimant as to why he was seen on the CCTV evidence walking towards Mr Islam, subsequently not backing away.

71 Mr Crothers challenged the Claimant on Mr Peake being clear that he had to

separate the two men; whereas he (the Claimant) said that he was not in physical contact with him anymore. He stated that he did not remember physical contact after going off screen but there being lots of shouting but no physical contact. Mr Crothers challenged him that Mr Peake was clear that he was in contact. The Claimant amended what he had said to say that there might have been contact.

72 Mr Crothers challenged the Claimant on whether he had taken his slippers off because he anticipated an altercation and challenged him that he was anticipating there was going to be a physical altercation and he did not want to be hindered by his slippers. Eventually the Claimant stated that his slippers were coming off so that he took them off.

73 Mr Crothers challenged the Claimant on the evidence being that both men were shouting abuse at each other; with the Claimant responding that Mr Islam's abuse was threatening and aggressive, and that his (the Claimant) was making a point.

74 Mr Crothers challenged the Claimant on why he did not walk away, to which the Claimant accepted that he should have.

75 I found Mr Crothers to be an exceptionally impressive witness. Both the written documentation, particularly of the evidence at the disciplinary hearing and his oral evidence showed an impressive level of analysis on his part; and his recollection at this hearing of the details of what had taken place was excellent.

76 Although the disciplinary hearing finished very late, neither the Claimant nor his representative asked for the hearing to be adjourned and wanted to finish the hearing.

77 The Claimant, as had been the procedure agreed between the panel and the Claimant's trade union representative, submitted questions for Mr Islam to answer. Mr Islam responded to the questions, although many of his responses were unhelpful, such as "inappropriate question".

78 Ms Reilly clarified with the Claimant whether he wanted the disciplinary hearing to be reconvened and the Claimant notified her that he did not want to do so, but that he would deliver further written representations.

79 The Claimant made further written representations in a letter to the panel, including criticisms of Mr Elliott's report.

80 The outcome of the disciplinary hearing was that the panel decided that they would recommend to the local authority that he should be dismissed for gross misconduct.

81 Mr Islam was also dismissed by the Respondent for gross misconduct.

82 In his letter dated 1 March 2016, Mr Crothers gave the panel's reasons for their decision; and notified him of his entitlement to appeal against the decision.

83 The panel made various findings including that:

- 83.1 It was clear from the CCTV recording that he and Mr Islam had a fight on school grounds, with each of the witnesses (other than Jemima Reilly) confirming that they observed some or all of the fight taking place.
- 83.2 The panel did not accept the Claimant's description that the incident was not a fight on the basis that he did not intend to do serious harm to Mr Islam.
- 83.3 The Claimant had accepted at the hearing that immediately after Mr McCollum stepped out from between him and Mr Islam, he (the Claimant) had initiated physical contact with Mr Islam. The Claimant had claimed to do so because he had concluded, based on Mr Islam's expression, that he was going to initiate physical contact with him. The panel found that whether that was right or not, the Claimant did not wait to find out despite the fact that he admitted at the hearing that he was not afraid of Mr Islam.
- 83.4 Although the Claimant had disputed that he was aggressive and threatening when first emerging from the school house to enter the sports pitch Mr Islam, Mr McCollum and the local resident all reported that his behaviour was seriously aggressive and threatening before the fight commenced. The panel found Mr McCollum to be an honest and credible witness and accepted his version of events.
- 83.5 The Claimant had accepted that there were a number of occasions on that morning in which he could have walked away from, or otherwise deescalated the situation. He had accepted that he could and should have left the sports pitch at any point during the two minutes forty seconds during which Mr McCollum was keeping him and Mr Islam apart before the fight itself commenced.
- 83.6 He could and should have backed away from Mr Islam after he started backing away from him; and walked away from Mr Islam as soon as Tony Peake and Joanne Currie arrived and placed themselves between him and Mr Islam.
- 83.7 He, instead of taking opportunities to avoid the incident occurring or continuing, had at least fuelled the confrontation.
- 83.8 The panel considered the evidence it had heard from him, his wife and Laura Worsley about a history of difficulty between him and members of his family on one hand and Mr Islam and other members of his team on the other hand; but did not feel the need to determine exactly what happened prior to the events on 17 October. He added that even if it was to accept his version of these historic events it did not accept that they amounted to a justification of the events in the morning.
- 83.9 Mr Crothers referred to there being pupils at the school that morning and that if none of them had witnessed the incident it was good fortune.

84 In conclusion Mr Crothers stated that the panel was satisfied that gross misconduct was proven. In particular:

- 84.1 He had a fight in circumstances in which he could have taken steps to avoid it.
- 84.2 Both before and after this incident his behaviour was seriously threatening and abusive towards Mr Islam.
- 84.3 Even if there had been no physical contact or acts of violence between him and Mr Islam, his threatening and abusive behaviour would have, in itself, have constituted a separate incident of gross misconduct.
- 84.4 He rejected the Claimant's allegations of bias on Mr Elliott's part.

85 The Claimant appealed against his dismissal. The grounds stated were:

- 85.1 The investigation and evidence presented to the panel was biased.
- 85.2 New evidence had come to his attention which would represent important mitigating circumstances.
- 85.3 The decision was disproportionate taking into account his 30 years exemplary service.
- 85.4 The devastating effects of his dismissal on himself and his family.

86 The Claimant provided further written submissions in support of his appeal. These included a letter from his GP, points raised by his trade union representatives, points made by himself and written representations on the evidence that had been given during the disciplinary processes.

87 The Claimant's appeal hearing took place on 25 May 2016. The appeal panel consisted of a panel of three governors of the school, the chair of the panel being the chair of the school governors.

88 The Claimant was present together with his trade union representative.

89 The procedures adopted by the panel were as follows:

- 89.1 Mr Bader gave the introductions and outlined what the process for the appeal would be. The following processes were as Mr Bader had described.
- 89.2 The Claimant and his trade union representative outlined the case for the appeal.
- 89.3 Mr Crothers, as chair of the disciplinary panel that had decided to dismiss the Claimant, asked the Claimant questions to which the Claimant responded.

- 89.4 The panel asked the Claimant questions.
- 89.5 Mr Crothers explained how the disciplinary panel had reached their decision.
- 89.6 The Claimant and his representative asked questions of Mr Crothers, to which he responded. The Claimant submitted some new evidence. This was an assertion on his part that Mr Islam had a past history and a teaching assistant had reported him about his behaviour in a pub.
- 89.7 Both the Claimant and his representative and Mr Crothers made concluding remarks.
- 89.8 The panel adjourned the appeal in order to consider their decision.
- 90 Amongst the points made at the appeal hearing were the following:
- 90.1 The Claimant's trade union representative laid stress on the Claimant's length of service and mitigation (concerning the noise of the hovercraft) and stated that the decision to dismiss was particularly harsh and disproportionate.
- 90.2 The Claimant gave his account of events, disputing that he had been involved in a fight.
- 90.3 Mr Crothers emphasised that the panel had scrutinised all the evidence and made its decision on the evidence they preferred.
- 90.4 In explaining the disciplinary panel's decision, Mr Crothers explained that the panel had sat for 7.5 hours of written evidence, witness and CCTV footage; had gone through everything diligently, taking into account differences heard and reached a conclusion; they had decided that "DK" (the Claimant) was aggressive from the start of the incident and that although he accepted that he had become aggressive at some point thereafter, they believed he had made the first contact. He explained that the Claimant had three clear opportunities to de-escalate, the incident had taken place on school premises with pupils on site and was sustained over many minutes; and that the panel had considered the mitigating circumstances but felt that they had no alternative but to impose the most severe penalty. He explained that the panel had heard about his positive impact on the school over many years, but the fact that there had been long and good service did not make the conclusion less severe, only sadder. He gave a more detailed explanation of their reasons.
- 91 It was disputed between the parties as to whether the appeal panel had read and considered written submissions provided by the Claimant to the panel. On the balance of probabilities I find that they did. Mr Bader, when giving evidence at this hearing, had a less clear recollection of the appeal than Mr Crothers had of the

disciplinary hearing and Mr Crothers evidence generally showed a better recall than did that of Mr Bader. Nonetheless, in the appeal panel's letter, written relatively contemporaneously to the appeal hearing, Mr Bader stated that the panel had considered evidence presented in writing by the Claimant. Although the minutes of the appeal panel do not make specific reference to the points made in the Claimant's written submissions, this does not surprise me as the minutes were a record of what was said at the meeting. If the Claimant and his representative did not refer explicitly to his written representations, I would not expect the minutes to contain references to his representations being discussed.

92 The outcome of the Claimant's appeal was to dismiss the appeal and uphold the disciplinary panel's decision. Included in their reasons were the following points:

- 92.1 They heard the Claimant's concerns regarding procedural irregularity and did not find any evidence of bias by the investigating officer.
- 92.2 They were satisfied that the disciplinary panel had taken all the facts into account and that Mr McCollum's statement was not biased.
- 92.3 That the panel had considered the case he and his representative had put to reduce the sanction from dismissal to a final written warning but decided that his actions clearly amounted to gross misconduct and they were very uncomfortable about setting an example to other members of staff and pupils.
- 92.4 They were satisfied that there was sufficient evidence to support the original decision and that the decision was correct.

Closing submissions

93 On behalf of the Claimant Mr Tsamados gave oral submissions. These included the following points:

- 93.1 He accepted Ms Newton's submissions as being an accurate summary of the relevant law.
- 93.2 The dismissal was unfair.
- 93.3 The investigation by Mr Elliott was substantial but it was not as much as was reasonable, given the Claimant's length of service. Both Mr Elliott and Mr Crothers should have investigated the previous history between the Claimant and Mr Islam in their own right, even although neither of them asked him to.
- 93.4 Greater weight should have been placed by the panel on Mr McCollum having been engaged by Mr Islam.
- 93.5 He was not satisfied that the appeal panel had considered the additional written submissions presented by the Claimant for his appeal, giving his reasons for this.

- 93.6 The CCTV evidence was inconclusive on key moments and supported what the Claimant was saying.
- 93.7 The Claimant was not an aggressor but responded in kind with reasonable force. He was a homeowner and facilities manager whose intention was to turn off the machine making an extremely loud noise. He felt under attack and any abusive comments were in response to those of Mr Islam.
- 93.8 The dismissal was wrongful as the Claimant may have committed misconduct, rather than gross misconduct.

94 On behalf of the Respondent Ms Newton had presented a skeleton argument at the outset of this hearing and gave additional closing submissions. Her skeleton argument gave submissions as to the relevant law and the Respondent's case in response to the relevant legal principles. Her submissions included the following points:

- 94.1 The investigation by Mr Elliott was comprehensive and thorough. He interviewed all the witnesses, analysed the CCTV footage carefully on a small and large screen and a frame by frame analysis, carried out relevant site visits and the Claimant had clarified during the investigation that any history between him and Mr Islam was irrelevant to the events on 17 October 2015.
- 94.2 The decision to dismiss was based on a reasonable investigation, referring to the panel's decision letter, together with Mr Crothers' witness statement and oral evidence. They had disregarded scathing evidence from the local resident and Mr Islam against the Claimant; had the CCTV evidence and considered Mr McCollum's evidence credible and accepted it. The witnesses were cross examined by the Claimant's representative and the panel.
- 94.3 The process was fair and one that had been agreed by the Claimant and his representative. The Claimant's length of service was taken into account.
- 94.4 The appeal was conducted in accordance with policy and the Claimant permitted to give new evidence.
- 94.5 The Claimant was fairly dismissed. As regards the Claimant's wrongful dismissal claim none of the witnesses supported the Claimant's account of events. Every account showed him to be the aggressor.
- 94.6 She made criticisms as to the quality of the Claimant's evidence. Where notes against him were damning the Claimant said that they were not accurate, where the Claimant and Mr Islam were away from the CCTV camera he took advantage of this by saying that nothing had happened.

- 94.7 She set out her submissions as to what had taken place.
- 94.8 If, contrary to her submissions, the dismissal was held to be unfair there should be 100% reduction to award both on “Polkey” grounds and for contributory fault.

Conclusions

Unfair dismissal claim

95 As the Claimant accepted the conduct was the reason or principal reason for his dismissal, the Respondent has satisfied the burden of proof required of employers under Sections 98(1) and (2) Employment Rights Act 1996. In view of this concession the Respondent also has satisfied the first part of the guidance given in the *British Home Stores V Burchell* case, namely that the employer believed that the employee had committed the misconduct alleged against him.

96 I have, next, considered whether the procedures adopted by the Respondent fell within the band of reasonable responses a reasonable employer might have adopted. I have concluded that they did including for the following reasons:

- 96.1 As referred to in my findings of fact I consider Mr Elliott’s disciplinary investigation to have been comprehensive and impressive. In my experience many employers do not manage to interview witnesses that are not employees of theirs. In this case Mr Elliott not only interviewed all the witnesses of the events thoroughly but also secured their attendance at the disciplinary hearing. He visited the site where the incident occurred and considered the CCTV footage of the incident and analysed it carefully. His report was thorough and well reasoned. As referred to in my findings of fact I reject the Claimant’s criticisms that it was biased, or failed to give sufficient investigation of the previous history between the Claimant and Mr Islam. In fact he did refer to it, even although both individuals informed him that it had no bearing on the events on the day in question.
- 96.2 As regards the disciplinary panel that made the decision to dismiss the Claimant, it is difficult to criticise the hearing as being incomplete when it lasted about seven and a half hours. There was a discussion and agreement reached with the Claimant and his representative about how the panel proposed to conduct the disciplinary hearing. Every witness gave their account of events to the panel and was questioned. The Claimant and his representative were able to question the witnesses and Mr Elliott and to set out their case. I do not agree with the submission that greater weight should have been placed on Mr McCollum having been engaged by Mr Islam to carry out repairs on the hovercraft and thus perhaps biased in Mr Islam’s favour. He was highly critical of Mr Islam’s behaviour as well as the Claimant’s. The disciplinary hearing was as thorough a disciplinary hearing as I can remember being recounted to me.

- 96.3 The Claimant's appeal was a review rather than a re-hearing of witness evidence. Nonetheless, it was lengthy and as described in my findings of fact had a procedure that was outlined and agreed at the outset; and provided the Claimant and his representative to present their cases fully.
- 96.4 The questions of whether the employer had reasonable grounds upon which to sustain belief in the guilt of the employee and had carried out as much investigation as was reasonable in all the circumstances are linked. If an employer has failed to carry out as much investigation as was necessary, they may well not have reasonable grounds for their belief in the employee's guilt.
- 96.5 In this case the disciplinary panel listened to all the witnesses, each of them were questioned and were the panel was able to reach its own assessment of each individual's credibility. The evidence against the Claimant was overwhelming. They not only had the advantage of CCTV evidence that showed much of what had taken place but also heard from a number of witnesses all of whom gave evidence that did not support the Claimant's account of events. In view of Mr McCollum being heavily critical both of the Claimant and Mr Islam, the Claimant's arguments that he was biased in Mr Islam's favour were weak. They also had the benefit of listening to him.
- 96.6 Nor should it be forgotten that Mr Islam was summarily dismissed for gross misconduct for his behaviour towards the Claimant.
- 96.7 The appeal panel also had ample grounds for upholding the disciplinary panel's decision. They heard both the grounds for appeal submitted by the Claimant and his trade union representative; and Mr Crothers' explanation for the disciplinary panel's decision.
- 96.8 In summary, if these disciplinary processes failed to meet the guidance given in the *British Home Stores v Burchell* case, I find it difficult to think of disciplinary processes that would comply.

97 I have next considered whether the sanction of dismissal lay within the band of reasonable responses a reasonable employer might have adopted. I have concluded that they did.

98 The disciplinary and appeal panels took into account the Claimant's lengthy and unblemished service; and decided that they did not outweigh the seriousness of what had taken place. The behaviour the disciplinary panel decided the Claimant had committed, and appeal panel upheld, fell within the definition of gross misconduct. The dismissal letter set out clearly what the panel decided the Claimant had done and why what the Claimant had done amounted to gross misconduct. They were entitled to decide that the seriousness of what he had done outweighed mitigating circumstances such as his lengthy unblemished service, the disturbance caused by the loud noise of the hovercraft near to where he lived and the Claimant being stressed at that time. Their decision lay within the band of reasonable responses a reasonable employer might have adopted.

99 The Claimant's dismissal was, therefore, not unfair.

Wrongful dismissal – findings of fact and conclusions

100 I take into account the findings of fact I have made above. Additionally I make the following findings.

101 I find that the Claimant was the instigator and an active participant in a confrontation with Mr Islam which started in shouting and abusive language; and escalated into a violent physical confrontation.

102 My reasons for so finding included the following:

102.1 I found the Claimant's evidence unconvincing. I did not believe his account of events.

102.2 Although I did not have the advantage of being able to see the CCTV footage on a large screen, or freeze-frame images, and the footage had no sound attached to it, I was able to observe the Claimant attempting to make his way past Mr McCollum when he was standing between him and Mr Islam, appearing to move towards Mr Islam; and images of Mr Islam being pushed backwards by the Claimant. I did not find the Claimant's evidence convincing as to why so many individuals' accounts of the events in which they described the Claimant as being the principal aggressor were biased or incorrect. The accusations of Mr McCollum being biased, when he also severe criticisms of Mr Islam's behaviour, were unconvincing. Nor did the Claimant give any convincing explanation why individuals such as Mr Peake, or Ms Currie would have given a biased, or incorrect, account of events.

102.3 Both the disciplinary and appeal panels were provided with more evidence than I was and closer to the events in question. They had the advantage of watching the CCTV evidence on a large screen, as well as a small one; and Mr Elliott watching it on numerous occasions and freezing the frames. They heard the accounts of the witnesses and saw them and asked them questions. In those respects they are in a better position to determine what took place than I am.

102.4 I accept Ms Newton's submissions that the Claimant's denial of any physical confrontation whilst they were off CCTV was unconvincing in view of Mr Peake's and Ms Currie's evidence that they had broken up a fight between the two of them and seen both punching, or attempting to punch, each other.

102.5 I agree with the disciplinary panel that even if there had been no physical contact or acts of violence between the Claimant and Ms Islam his threatening and abusive behaviour would, in itself, have constituted a separate incident of gross misconduct, in view of the wording of the Respondent's disciplinary code.

103 I find that the Claimant did, when first coming out to the playing field where the hovercraft had been, noisily, started up, behave in an aggressive and confrontational manner and shout at Mr Islam. He did threaten to “sort him out”. I found Mr McCollum’s account of this aspect of what took place to be convincing; and is supported in that all the witnesses accounts referred to the Claimant’s behaviour being aggressive. I also find that the Claimant, when he came back out of his house to confront Mr Islam a second time did so in an aggressive manner, so as to cause Mr McCollum to stand in between the two individuals in an attempt to prevent the confrontation escalating. It was Mr McCollum’s explanation for doing so and was convincing.

104 I find that the Claimant was attempting to get past Mr McCollum to get at Mr Islam when Mr McCollum stood between them and that he initiated the physical confrontation. This is consistent with what I saw on the CCTV footage played to me; and with Mr Elliott’s analysis, having watched the footage in greater detail than me. It is consistent with Mr McCollum’s account of events.

105 I find that the Claimant did push Mr Islam, did fail to take various opportunities to de-escalate the situation by walking away from it; did punch Mr Islam (and was punched by him); that the two of them had to be separated when fighting each other by Ms Currie and Mr Peake; and he did swear at Mr Islam and play his part in the abusive exchange of words between them. This is consistent with the accounts given by Mr Peake, Ms Currie, Mr McCollum (although for part of the time he was driving the hovercraft and not watching events) and with the CCTV footage, although some of what took place was not in range of the CCTV cameras. The Claimant did also accept at the disciplinary hearing that he could, and should, have taken an opportunity to de-escalate the situation.

106 It is sad that the Claimant, who had worked for so many years at the school where he and his family also lived very close nearby, was dismissed for one incident.

107 The Claimant’s wrongful dismissal claim, however, fails, both because what he did came within the Respondent’s description of gross misconduct set out in its Standards of Conduct and Disciplinary Rules; and his behaviour I have described above, as the facilities manager in a school, undermined the confidence of his employer to an extent sufficient to justify summary dismissal.

Employment Judge Goodrich

5 April 2017