EMPLOYMENT TRIBUNALS

Claimant: Mrs Dumigan

Respondent: The Mount School Limited

Heard at: **Leeds** **On:** **28 June 2022**

Before: **Employment Judge Jaleel**

Representation
Claimant: **Mrs Dumigan (Claimant)**
Respondent: **Christopher Sellers (Director)**

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal is well-founded and succeeds.

2. The respondent was in breach of contract by dismissing the claimant without the full period of notice to which she was entitled. The complaint of wrongful dismissal is well-founded and succeeds.

3. The chance that the claimant would have been fairly dismissed in any event if a fair procedure had been followed is zero.

4. The claimant's conduct did not contribute to her dismissal. There shall be no deduction to any basic or compensatory award for contributory fault.

5. The claimant's application to strike out the claim on the grounds of the respondent's failure to comply with case management orders and/or unreasonable conduct of the proceedings is refused.

6. The respondent failed to provide the claimant with written reasons for her dismissal within 14 days of being requested to do so.

7. The Tribunal will decide the remedy for unfair dismissal at a further hearing to be scheduled. This will include the question whether any adjustment should be made under section 207A(2) of the Trade Union and Labour

Relations (Consolidation) Act 1992 for failure to follow the requirements of the ACAS Code of Practice on Disciplinary and Grievance Procedures.

REASONS

Introduction

1. This was a complaint of unfair dismissal brought by the claimant.

2. I had before me a bundle of papers prepared by the claimant.

3. Prior to the Hearing the claimant had made an application for strike out of the response under rule 37 on the due to the respondent's continued failure to comply with the Tribunal's directions including exchanging his witness statement, providing disclosure and/or compiling a Hearing bundle.

4. The claimant pointed out that despite having received a Strike Out Warning from the Tribunal on 13 June, and a follow up email, the respondent has not complied with the Tribunal's order to prepare a file of documents from both sides by 18 June.

5. The claimant stated that she was keen for the hearing to be held as scheduled and thought it would be unfair on her to have it delayed due to the respondent's non-compliance.

6. As part of her application dated 27 June 2022 the claimant duly sent to the Tribunal a file consisting of her documentary evidence as sell as a copy her witness statement. The email was also copied to Mr Sellers.

7. Mr Sellers stated that he thought that that the respondent was required to send any relevant documents and witness statement to the Tribunal only. The Tribunal had received a short statement from Mr Sellers with a copy of a written statement of employment attached. Mr Sellers also stated that he was awaiting contact from the tribunal regarding mediation but this had not transpired. The claimant corrected Mr Sellers and stated that parties were in fact awaiting contact from acas regarding mediation. As no contact was forthcoming from any party the claimant had submitted her witness statement and bundle of documents directly to the Tribunal.

8. I concluded that a fair hearing could still take place and the failure to comply with the Tribunal’s orders could be dealt with in ways which were less draconian. The claimant would be allowed ample time to take account of the short witness statement as well as the additional document disclosed by the respondent. The bundle of papers had been prepared by the claimant and parties had sufficient time to familiarise themselves with this.

9. Having identified the issues, I took some time to privately read into the witness statements exchanged between the parties and relevant documentation.

10. I heard evidence from the respondent's witness, Mr Sellers.

11. I then heard evidence from the claimant.

Issues

12. The claimant's complaint is of unfair dismissal and wrongful dismissal. There is no dispute that her employment was terminated for a reason related to conduct. The claimant has also claimed breach of contract in respect of the failure of the Respondent to give her full notice pay of 12 weeks.

13. I found that the parties had not adequately prepared to deal with any remedy applicable so I determined that this would be dealt with, if required, at a separate hearing I confirmed that, on this basis and changed circumstances, I would consider any arguments either that compensation ought to be reduced to reflect the claimant's pre-dismissal conduct and/or on the basis that, if there had been a defect in procedure, it may not have made a difference to the outcome.

14. The claimant accepted that the reason for her dismissal was the potentially fair reason of conduct. I identified the issues to be determined and both parties confirmed their agreement as follows:

    14.1 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant, having regard in particular, whether;
        14.1.1 there were reasonable grounds for that belief;
        14.1.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
        14.1.3 the respondent otherwise acted in a procedurally fair manner;
        14.1.4 dismissal was within the range of reasonable responses .
    14.2 If the claimant's dismissal was unfair, what is the chance, if any, that she would have been fairly dismissed in any event?
    14.3 If the claimant was unfairly dismissed, did she cause or contribute to her dismissal by her own culpable and blameworthy conduct?
    14.4 Did the claimant fundamentally breach her contract of employment by committing an act of gross misconduct? This requires the respondent to prove that the claimant committed an act of gross misconduct.

Facts

15. The respondent is a private school for children aged 3 -11.

16. The claimant was employed as a piano and singing teacher by the respondent from October 1997 to 12 December 2021. Her role involved piano and singing lessons for pupils before, during and after the school days on Tuesdays and Wednesdays during term time.

17. The respondent took over the running of the school in 2017.

18. On Saturday 11 December 2021 Mr Sellers sent an email advising all members of staff to attend a meeting on Monday 13 December 2021 at 13:40 at the school:

    FULL STAFF MEETING 1:40pm ICT ROOM

    Every employed member of staff is to attend a full staff meeting on Monday at 1:40pm in the ICT room.

    All children are to be registered for the afternoon and the taken to the hall where they will watch a film, supervised by supply staff.

    This is not an optional meeting. If you are not contracted to be on site at this time, you are still required at this meeting. No exceptions.

    The meeting will last on hour maximum.

    Chris

19. The email was followed up with a whatsapp message informing staff members of the meeting and asking them to check their emails.

20. Having read the email, the claimant told Mr Sellers that she was unable to attend the meeting as she was seeing her sister (who was travelling from a distance) and other family members on the day.

21. The family gathering was to discuss treatment and care for the claimant's 90-year-old mother who had been diagnosed with cancer recently. The gathering itself had been planned some time ago and the claimant was unable to rearrange this.

22. The claimant did not advise Mr Sellers of the importance of her family gathering.

23. Mr Sellers responded to this email and advised the claimant that the meeting was not optional and she was required to attend for one hour. The claimant reiterated that she was unable to attend.

24. Mr Sellers again stated by email that the meeting was not optional.

25. On the following day 12 December 2021, the claimant again responded to Mr Sellers by email and told him that she was not free and was therefore unable to attend the meeting.

26. Mr Sellers then sent an email stating 'resignation accepted'. The claimant responded to this and clarified that she had not resigned.

27. However, she then received an email from Mr Sellers thanking her for 'clearing up any avoidance of doubt' He went on to inform her that the email was formal notice that her employment was to cease. The claimant was told that she would be paid until the February half-term and was not required to attend school any further.

28. On 13 December the claimant asked Mr Sellers as well as her line-manager and Headteacher Mr Euan Burton-Smith for a statement of reasons for her dismissal. She did not receive a response to her email.

29. On 16 December 2021 the claimant again asked Mr Sellers and her line manager for a statement of reasons for her dismissal. She also stated that she wished to appeal the decision and asked for confirmation that she would be paid her full statutory notice of 12 weeks, ending 4 March 2022.

30. Mr Sellers responded by email on the same day and stated that the claimant would be paid as set out in her contract of employment (which he attached for reference).

31. I found that there exists a background to the events that transpired in December 2021; the Respondent has been keen for the claimant to take up her employment on a self-employed basis given the time she has off and to allow her to manage her outside interests which includes a gin making business. Mr Sellers described a 'failing on his behalf' and if he 'had followed the book' the claimant would have been subject to verbal and written warnings previously. Mr Sellers described the claimant as 'one of the most difficult members of staff to have worked with over 4 years'. He also alluded to the apparent refusal of the claimant to go on the afternoon rota. I found that there was no evidence to substantiate Mr Sellers comments.

32. Despite having worked at The Mount School since 1997 the claimant's received her first contract of employment in January 2020. On receipt of this she emailed Mr Burton-Smith to inform him that she had never seen this "contract" before and made it clear that she did not accept the terms as described in this statement since they differed in several substantive ways from the way she had been accustomed to working.

33. A meeting was arranged between the claimant, headteacher Mr Burton-Smith and Mr Sellers. The claimant, by way of email confirmed her agreement to be part of the late Club cover rota on a Tuesday until the end of the year as a gesture of goodwill (even though she maintained that this additional duty did not fall within her terms and conditions).

34. In her email she also reiterated that it was her intention to carefully consider any proposed changes to her working terms and conditions when the paperwork was available. However, due to the covid pandemic no further discussions took place regarding the Claimant's working arrangements.

35. The respondent has its own Disciplinary and Conduct Policy. I found this to be a comprehensive policy. It makes reference to investigation, hearings, appropriate action as well as an appeals process. Furthermore, the policy document also contains a section setting out examples of instances of misconduct and gross misconduct (albeit that the lists are not exhaustive).

36. The failure to comply with reasonable instructions from senior staff is considered to constitute misconduct.

37. The claimant was the only member of staff who did not attend the meeting.

38. I found that Mr Sellers did not explain to the claimant what the meeting was about. He maintains that the subject matter was confidential as it related to safeguarding concerns. I found that the claimant would have been unaware of the importance of the meeting and the fact that it related to a serious safeguarding concern.

39. The respondent did not carry out an investigation prior to dismissing the claimant nor did he discuss the situation with any other member of staff. In his own evidence Mr Sellers did not think that an investigation or hearing was necessary. He also stated that he did not confer or discuss the matter with anyone else as 'I am the employer, the person that pays your wages, im top of the line manager' as well as stating 'I had enough of playing games'. I found that Mr Sellers had made his mind up about dismissing the claimant without ascertaining the facts regarding her refusal to attend the meeting by way of an investigation meeting. In fact, in his evidence stated precisely that the claimant would still have been dismissed if an investigation had been carried out.

40. When it was put to Mr Sellers if he had considered any alternative sanctions to dismissal he stated that it had gone 'past that point'. Again, I found that that he was intent on dismissing the claimant.

41. Mr Sellers states that disciplinary issues are generally directed to the Headteacher and Mr Sellers would then investigate matters in accordance with the policy. However, in this instance Mr Sellers did not see any reason for 'it to be stepped down to someone else'.

42. Mr Sellers did not address the claimant's request for a statement of reasons for her dismissal and/or her request to appeal the decision.

43. The respondent did not provide the claimant with a reason for her dismissal or the right of appeal.

44. The claimant had already finished for the term when she was dismissed. The claimant did not normally work on Monday in any event.

45. The respondent contends that notice pay was paid in accordance with the claimant's contract of employment

46. The claimant had an exemplary employment record and had not received any warnings and was not subject to other disciplinary action in the 24 years of her employment.

47. The respondent uses a secure platform to maintain contact with parents and contact from personal accounts is forbidden. Following her dismissal, the claimant contacted parents of students she taught from her personal email account to advise that she was no longer employed by the Respondent. I accepted that the claimant had contacted the parents of children (who had been entered into upcoming competitions, festivals and examinations) to provide them with necessary updates.

The Law

48. In a claim of unfair dismissal, it is for the employer to show the reason for dismissal and that it was a potentially fair reason. One such potentially fair reason for dismissal is a reason related to conduct under Section 98(2)(b) of the Employment Rights Act 1996 ("ERA"). This is the reason relied upon by the respondent.

49. If the respondent shows a potentially fair reason for dismissal, the tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the ERA, which provides:-

> *" [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) –*
> *depends upon 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*
> *shall be determined in accordance with equity and the substantial merits of the case".*

50. In a case of misconduct, a tribunal must determine whether the employer genuinely believed in the employee's guilt of misconduct and whether it had reasonable grounds after reasonable investigation for such belief. The burden of proof is neutral in this regard see **British Home Stores Ltd v Burchell [1980] ICR 303** and **Boys and Girls Welfare Society v MacDonald 1997 ICR 693 EAT.**

51. The tribunal must not substitute its own view. The tribunal has to determine whether the employer's decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached.

52. A dismissal, however, may be unfair if there has been a breach of procedure which the tribunal considers as sufficient to render the decision to dismiss unreasonable. The tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015. In respect of the investigation where an employee admits an act of gross misconduct and the facts are not in dispute, it may not be necessary to carry out a full-blown investigation. In **Boys and Girls Welfare Society v MacDonald** the claimant admitted the misconduct and was dismissed. The EAT said that it was not always necessary to apply the test in **Burchell** where there was no real conflict on the facts.

53. If there is such a defect sufficient to render dismissal unfair, the tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142**, determine whether and, if so, to what degree of likelihood the employee would still have been fairly dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed, then such

reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects. Guidance on how to approach that issue is set out in the case of **Software 2000 Ltd v Andrews [2007] IRLR 568**.

54. Under Section 122(2) of the ERA any basic award may be reduced when it is just and equitable to do so on the ground of any kind conduct on the employee's part that occurred prior to the dismissal. In addition, the tribunal shall reduce any compensation to the extent it is just and equitable to do so with reference to any blameworthy conduct of the claimant and its contribution to his dismissal – ERA Section 123(6). There is no requirement for the conduct or action of the claimant in question to amount to gross misconduct for it to be relevant conduct or action for the purposes of s122 or s123 ERA 1996. All that is required is for the conduct to be culpable, blameworthy, foolish or similar and this includes conduct that falls short of gross misconduct, and need not necessarily amount to a breach of contract. In **Hollier v Plysu** [1983] IRLR 260 the EAT suggested broad categories of reductions: 100% where the employee is wholly to blame; 75% where the employee is mainly to blame; 50% where the employee is equally to blame and 25% where the employee is slightly to blame.

Employee's post-dismissal conduct

Compensation for Contributory fault under Section 123(6)

55. Section 123(6) ERA explicitly makes clear that the employee's conduct must be shown to have actually caused or contributed to the employer's decision to dismiss in order for a reduction of the compensatory award on the ground of contributory conduct to be valid. Thus, by definition, deductions can only be made in respect of actions by the employee that took place prior to the dismissal and of which the employer had knowledge when the decision to dismiss was taken **(Nawaz v John Haggas Ltd EAT 838/83)**

56. The proposition that post-dismissal conduct cannot constitute a basis for making a reduction on the ground of contributory fault was affirmed in **Mullinger v Department for Work and Pensions EAT 0515/05**. On appeal, the EAT ruled that the tribunal had erred in law by taking account of misconduct that the employee perpetrated after his dismissal. The Court of Appeal subsequently upheld the EAT's decision to remit on this basis — **(Mullinger v Department for Work and Pensions 2007 EWCA Civ 1334, CA)**

Compensatory award (section 123(1)

57. There are limits to the tribunal's power to reduce the compensatory award under S.123(1) because of misconduct not known to the employer at the time dismissal takes place. First and foremost, it is well established that S.123(1) applies only to *pre-termination* conduct that does not come to light until after the dismissal: post-termination conduct cannot be taken into account as a basis for a reduction **Soros and anor v Davison and anor 1994 ICR 590, EAT.**

58. This is in contrast to misconduct occurring before the date of dismissal, but which is only discovered by the employer after that date. The EAT made it clear that conduct of the latter kind can be taken into account in considering what is just and equitable to award by way of a compensatory award.

59. That is not to say, however, that a tribunal is altogether precluded from considering a reduction of the employee's compensatory award by reason of his or her post-dismissal conduct. In **Cumbria County Council and anor v Bates EAT 0398/11** the EAT held that the employee's post-dismissal conduct can impact upon the assessment of how long he or she would have remained employed but for the dismissal. In other words, conduct that occurs after dismissal — even if not related at all to the employment from which the claimant has been dismissed may be used as a cut-off date for the period of ongoing loss, meaning that no compensation should be awarded for any period after that date. On this basis, post-dismissal conduct that is relevant to the question of what loss is attributable to the dismissal may be taken into account

Breach of contract

60. An employer will be in breach of contract if they terminate an employee's contract without the contractual notice to which the employee is entitled, unless the employee has committed a fundamental breach of contract which would entitle the employer to dismiss without notice.

61. The aim of damages for breach of contract is to put the claimant in the position they would have been in had the contract been performed in accordance with its terms. Damages for breach of contract are, therefore, calculated on a net basis, but may need to be grossed up to take account of any tax that may be payable on the damages. Damages relating to notice pay are subject to tax.

62. Severance payments are deductible from the losses in respect of which damages for wrongful dismissal are awarded in so far as they are intended to discharge the employer's liability for wrongful dismissal.

Conclusions

Application of the law to the facts

63. Applying these principles to the facts as found, I reach the following conclusions.

64. The respondent alleges conduct as its primary reason. It is for the respondent to establish the reason for dismissal. The claimant accepted that the reason for her dismissal was the potentially fair reason of conduct.

65. I found that the respondent genuinely believed that the claimant had committed an act of gross misconduct and that her employment was terminated for that reason. Mr Sellers decided to dismiss the claimant following her refusal to attend a staff meeting.

66. I then turn to the question of whether the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. I find that it did not and the dismissal was outside the range of reasonable responses.

67. The reasonableness of the investigation, the reasonableness of the grounds for believing in misconduct and the fairness of the procedure all overlap and I consider them together. I find that the respondent's approach was unreasonable in particular for the following reasons, based on the above findings of fact:

    62.1 I found that a reasonable investigation did not take place. Mr Sellers did not carry out an investigation and accepts that he did not hold a formal disciplinary process before dismissing the claimant. In his own evidence Mr Sellers did not think that an investigation or hearing was necessary. The claimant was unable to give her version of events. I have borne in mind that the claimant refused to attend the staff meeting. However, it remains that a reasonable investigation was paramount prior to reaching an outcome. I found that Mr Sellers did not explain to the claimant what the meeting was about. He maintains that the subject matter was confidential as it related to safeguarding concerns. I found that the claimant would have been unaware of the importance of the meeting and the fact that it related to a serious safeguarding concern. The claimant was deprived of the opportunity to present her version of events and any mitigating factors for the respondent to consider prior to making a decision.

    62.2 Mr Seller stated that he did not confer or discuss the matter with anyone else as 'I am the employer, the person that pays your wages, im top of the line manager' as well as stating 'I had enough of playing games'. This was against normal protocol as it was the Headteacher who would normally investigate any concerns. I found that Mr Sellers had made his mind up about dismissing the claimant without ascertaining the facts regarding her refusal to attend the meeting by way of an investigation meeting. In fact, in his evidence stated precisely that the claimant would still have been dismissed if an investigation had been carried out. When it was put to Mr Sellers if he had considered alternative sanction to dismissal he stated that it had gone 'past that point'. Again, I found that this emphasised that he was intent on dismissing the claimant.

    62.3 Mr Sellers failed to consider whether his own instructions were reasonable taking into account the fact that the claimant was asked to attend a meeting at short notice, she was not made aware of the content, she had finished for the term and in any event did not work on Mondays. She was essentially being asked to attend a meeting on her day off.

    62.4 I was not told of any alternative to dismissal that were considered by the respondent. There were other sanctions which a reasonable employer would consider such as giving a final written warning. It was unreasonable not to consider alternatives to dismissal.

    62.5 None of these matters were corrected on appeal, because no appeal took place. The respondent failed to provide the claimant letter of termination or a right of appeal despite repeated requests. The ACAS Code of Practice

calls for an appeal without unreasonable delay. I was not given any adequate explanation as to why the respondent failed to inform the claimant of his right to appeal the decision. Its approach in this regard was wholly unreasonable and meant that none of the previous shortcomings were rectified.

68. I have reminded myself that it is not for me to substitute my view, either as to procedure or as to substance. On balance, given the findings of fact above, I find that in the circumstances dismissal was not in the range of reasonable responses for the employer to take. There was no consideration on behalf of the respondent that the claimant was unaware of the subject matter of the meeting, her own circumstances and the fact that she had finished for the term and she did not work on Mondays in any event. No reasonable employer faced with these circumstances would dismiss the claimant for the reason given. Dismissal in the circumstances was wholly unreasonable. Dismissal was not within the range of reasonable responses of a reasonable employer.

69. I am satisfied that the matters set out above were outside the range of what was reasonable in terms of investigation, grounds for belief and procedure. In those circumstances no reasonable employer would have dismissed the claimant and her claim of unfair dismissal succeeds.

Further findings of fact: Polkey and contributory fault

70. It is therefore necessary, for the purposes of deciding whether there is a chance that the claimant would have been fairly dismissed in any event, and whether she contributed to her dismissal, to make findings about whether she actually committed misconduct.

71. I start by observing that I found the claimant's evidence to be credible. She made concessions in cross-examination where appropriate and presented as a witness doing her best to give an honest and accurate account of events.

72. The claimant refused to follow the instructions of Mr Sellers; the claimant was asked to attend a meeting at short notice over the weekend, she accepted that she refused to attend the meeting but I found that she was unaware of the content of the meeting and was preoccupied with her personal family matters. The claimant had finished for the term and in any event did not work on Mondays. She was essentially being asked to attend a meeting on her day off.

73. The respondent's disciplinary rules state that instances of misconduct include the 'failure to comply with reasonable instructions from senior staff'. The claimant was aware of the disciplinary rules.

74. The respondent also contends that as the claimant had contacted parents of students post her dismissal she would have been dismissed in any event. The respondent uses a secure platform to maintain contact with parents and contact from personal accounts is forbidden. Following her dismissal, the claimant contacted parents of students she taught from her personal email account to advise that she was no longer employed by the Respondent. There is no allegation that the information provided was incorrect. The respondent's complaint relates to the use of her own personal email to make contact with

parents. I accepted that the claimant had contacted the parents of children (who had been entered into upcoming competitions, festivals and examinations) to provide them with key information.

Chances of a fair dismissal in any event: Polkey

75. I turn to the question whether there is a chance that the claimant would have been fairly dismissed in any event if a fair procedure had been followed. As set out above, I find that there was fundamental unfairness in this process at a number of levels and that the sanction of summary dismissal was outside the range of reasonable responses in the circumstances. I have to consider whether, on the balance of probabilities, there is a chance that the claimant would have fairly been dismissed if a fair procedure had been followed. If so, how big is that chance?

76. The shortcomings in the respondent's approach were wide ranging as set out above, there were failures to gather evidence, to allow the claimant to represent herself and to properly consider and make findings about the situation that arose. The respondent would have to consider mitigating factors and any alternatives to summary dismissal. Any reasonable and fair procedure would, necessarily, have entailed proper consideration of whether the claimant had failed comply with reasonable instructions taking into account all relevant factors. This would also involve consideration of the fact that she remained unaware of the content of the meeting as well her own personal reasons as to why she could not attend. The claimant was asked to attend a meeting at short notice over the weekend, she had finished for the term and in any event did not work on Mondays. She was essentially being asked to attend a meeting on her day off. Given the findings I have made, I do not consider the respondent's request for the claimant to attend the staff meeting to constitute a reasonable instruction.

77. There is also no evidence of any disciplinary sanction for the failure of a colleague who had missed a staff meeting previously.

78. Had there been such a consideration, it seems to me inevitable that a different approach would have been taken. There are a number of cumulative steps, each of which if corrected, might have led the respondent to come to a different view from the one it had.

79. I find, applying the legal principles referred to above, that on the balance of probabilities there is no chance that the claimant would have been fairly dismissed.

If the dismissal was unfair, did the claimant contribute by culpable conduct?

80. I turn then to consideration of the claimant's conduct and how it ought to affect any award of compensation.

81. Whilst the claimant refused to attend the meeting I do not find her conduct to be culpable or blameworthy taking into consideration the points I have already set out above. I do not consider the respondent's request for the claimant to attend a staff meeting to constitute a reasonable instruction. No deduction is to be made from any basic award and/or compensation awarded to the claimant.

Post dismissal conduct and compensation

82. In respect of the claimant's post dismissal conduct I found that she contacted the parents as a result of her dismissal i.e. her actions only arose due to the circumstances of her dismissal. She wanted to provide key information to parents so not to disrupt the child's performance. There is no allegation that the information provided was incorrect. The respondent's complaint solely relates to the use of her own personal email to make contact with parents.

83. No deduction is made to the compensatory award in respect of the claimant's post dismissal conduct under S.123(1) and S.123(6):

85.1 S123(6) ERA explicitly makes clear that the employee's conduct must be shown to have actually caused or contributed to the employer's decision to dismiss in order for a reduction of the compensatory award on the ground of contributory conduct to be valid. Deductions can only be made in respect of actions by the employee that took place prior to the dismissal and of which the employer had knowledge when the decision to dismiss was taken. This wasn't the case.

85.2 It is well established that S.123(1) applies only to *pre-termination* conduct that does not come to light until after the dismissal: post-termination conduct cannot be taken into account as a basis for a reduction. I do accept that post-dismissal conduct that is relevant to the question of what loss is attributable to the dismissal may be taken into account in certain instances. However, I find this is not applicable in this case and I find that it would not be just and equitable to take account of such misconduct as a basis for reducing the compensatory award**.**

Breach of contract

84. The claimant brings a claim for wrongful dismissal. She contends that she was entitled to notice pay of 12 weeks unless she was guilty of gross misconduct. The respondent asserted that the claimant had been dismissed because of her refusal to attend a staff meeting. The respondent did however make a payment to the claimant in the sum of 11 weeks pay.

85. The respondent's disciplinary rules state that instances of misconduct include the 'failure to comply with reasonable instructions from senior staff'. The claimant was aware of the disciplinary rules.

86. I must decide if the claimant committed an act of gross misconduct entitling the respondent to dismiss without notice. In distinction to the claimant's claim of unfair dismissal, where the focus was on the reasonableness of management's decisions, and it is immaterial what decision I would myself have made about the claimant's conduct, I must decide for myself whether the claimant was guilty of conduct serious enough to entitle the respondent to terminate the employment without notice.

87. Whilst it is accepted that the claimant refused to attend the meeting, I do not consider the respondent's request for the claimant to attend a staff meeting to constitute a reasonable instruction on part of the Respondent (for reasons stated above). I therefore do not find that the claimant's actions to constitute gross misconduct.

88. I conclude that the claimant was dismissed on 12 December 2021 by the respondent confirming this by email.

89. The contract of employment states that the notice period to be given by the respondent to terminate employment will be before the last teaching day of any half term and employment will terminate at the end of the following half term. The claimant is entitled to reasonable notice, which must not be less than the statutory minimum notice. I conclude that she was entitled to 12 week's notice and the respondent was in breach of contract by not giving her this notice of termination.

90. The matter will be listed for a remedy hearing which will take place in due course. Separate case management orders will also be sent to the parties in connection with the same.

Employment Judge Jaleel

Date 14 September 2022