



THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

F

AND

(1) G
(2) H

PUBLIC PRELIMINARY HEARING

Held at: North Shields

On: 20 April 2017

Before: Employment Judge A M Buchanan

Appearances

For the Claimant: In person
For the Respondents: Ms C Millns

JUDGEMENT ON PUBLIC PRELIMINARY HEARING

It is the Judgment of the Tribunal that:

1. It is not appropriate to strike out the claim of unfair dismissal pursuant to Rule 37(1)(a) of Schedule I to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Rules").
2. It is appropriate to make a Deposit Order pursuant to Rule 39 of the 2013 Rules and the Deposit order is issued under separate cover.
3. There will be a Telephone Private Preliminary Hearing at 9.30am before Employment Judge Buchanan on Friday 12 May 2017 in order to identify the issues in the claim advanced by the claimant and to make appropriate case management orders.

REASONS

1. This matter came before me this afternoon to determine two questions. The first question is whether I should strike out the claim which the claimant brings to this Tribunal of ordinary unfair dismissal on the basis that it has no reasonable prospect of success applying the provisions of Rule 37(1)(a) of the 2013 Rules and secondly, if I do not strike out the claim, to consider whether I should make an order that the claimant pay a deposit in a sum not exceeding £1,000 as a condition of continuing to advance any specific allegation or argument in his claim on the basis that it has little prospect of success.

2. At the outset of the hearing this morning I agreed with the parties that I would particularly concentrate on the reason that the respondent dismissed the claimant as it accepted it did on 3 May 2016. I heard from two witnesses for the respondent in the course of the hearing namely the dismissing officer and secondly from the officer who dealt with the claimant's appeal against dismissal. I heard also from the claimant. I have taken account of the witness statements from those three witnesses and the cross-examination of them. In addition I received helpful submissions from the claimant himself and from Ms Millns on the part of the respondent and those submissions supplemented written submissions which Ms Millns handed to me at the outset of the hearing this morning running to some 13 paragraphs. I had an agreed bundle of documents before me this morning extending to some 325 pages. Any reference in this Judgment to a page number is a reference to the relevant page within that agreed bundle.

3. I have considered the legal test which I must apply in relation to the strike out application. The test for a strike out of a claim is a high test. I remind myself of the words of Lady Smith in the case of **Balls v Downham Market High School & College [2011]** when she said this:-

"The tribunal must first consider whether on a careful consideration of all available material it can properly conclude that the claim has no reasonable prospect of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible the claim will fail, nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is in short a high test. There must be no reasonable prospects".

4. In the course of the hearing this morning the claimant effectively challenged the decision of the respondent to dismiss in several ways. First he raised issues in respect of the procedure which was followed. He made criticisms of the investigation and, to his credit, the dismissing officer accepted both prior to today and also before me that the investigation with which he was confronted as chair of the disciplinary panel was not as thorough as he would have expected it to be. The claimant raised other procedural issues in respect of the decision making process.

5. Secondly, the claimant raised issues in respect of the categorisation by the respondent of what he admitted to having done as gross misconduct. The claimant referred to the second respondent's disciplinary policy (page 48) and the distinction

there made between serious misconduct and gross misconduct and particularly pointed to the fact that action which compromises the professionalism of the school and/or local authority and will bring the school and/or local authority into disrepute is categorised as serious misconduct, whereas gross misconduct is defined, amongst other ways, as any situation which gives rise to a fundamental breach of trust and confidence by the employee making continuation of their employment unacceptable. The claimant seeks to make a distinction and to say that the categorisation by the respondent of his admitted misconduct as gross misconduct was outwith the band of reasonableness.

6. Thirdly the claimant referred to the Teachers' Standards (page 55). It was this document which formed the basis of the decision to dismiss the claimant and I take that from the letter of dismissal dated 3 May 2016 (pages 229-231). That letter set out the allegations faced by the claimant which I will not rehearse but which are all framed by reference to the Teachers' Standards (page 55) Part 2 and effectively the first two bullet points which read:-

"A teacher is expected to demonstrate consistently high standards of personal and professional conduct. The following statements define the behaviour and attitudes which set the required standard for conduct throughout a teacher's career:-

Teachers uphold public trust in the profession and maintain high standards of ethic and behaviour within and outside school by –

(a) treating pupils with dignity, building relationships rooted in mutual respect and at all times observing proper boundaries appropriate to a teacher's professional position;

(b) having regard for the need to safeguard pupils' well-being in accordance with statutory provisions.....".

7. The letter of 3 May 2016 (page 231) dismisses the claimant in the following terms:-

"Whilst there was no evidence of you failing to treat the pupil with dignity and respect by your own admission you had taken actions which the panel believed breached the teachers' standards with regard to trust, observing proper boundaries and safeguarding. The panel therefore believe the allegations against you were substantiated and that your continued employment would represent an unacceptable safeguarding risk to the school".

8. The claimant points out that in reaching that decision neither the disciplinary panel nor the subsequent appeal panel appears to have taken any cognisance of a document (pages 56-71) now produced which gives advice on *"factors relating to decisions relating to the prohibition of teachers from the teaching profession"*. That document is not specifically directed at misconduct panels such as dismissed the claimant but it could be said to be advisory to them and there is a distinction made in that guidance (page 62) as to what amounts to *"unacceptable professional conduct"* and particularly what amounts to such conduct outside an education setting which it says will only amount to unacceptable professional conduct if it *"affects the way the person fulfils their teaching role or if it may lead to pupils being exposed to or influenced by the behaviour in a harmful way"*. The claimant will seek to rely upon that document at any final hearing

of this matter. That effectively is the way the claimant seeks to advance his case of unfair dismissal.

9. Set against all that I weigh the following matters. The claimant had worked for the second respondent for 8 years and had apparently a clean disciplinary record. A matter arose in September 2015 by reason of the second respondent receiving anonymous correspondence. At no time did the second respondent receive a complaint from the pupil at the centre of the allegations against the claimant or from her parent or indeed anyone else on her behalf. On investigation the police decided to take no action against the claimant and there was no question of any sexual impropriety or any sexual relationship having occurred between the claimant and the pupil who is at the centre of the allegations against him. That said, the claimant, in acting as he admits he did, placed himself in a position of great vulnerability as a teacher.

10. The claimant accepts three matters occurred in respect of his conduct and his involvement with Student A. First the claimant and Student A travelled to London and back together and had an overnight stay on 28 July 2015 during which time the claimant accepts he was "*in loco parentis*" for Student A. They stayed overnight in a hotel in separate rooms and the reason for the visit to London was to familiarise the student with a city where she might subsequently study and also for music tuition reasons. Secondly, the claimant and Student A had a meal together alone in a restaurant at the Windmill Hotel in Hartlepool on 6 August 2015, again after a music session involving other people all of whom were appropriately DBS checked. Thirdly, and probably most seriously, the claimant and Student A had a meal together and then stayed overnight in the same hotel in Whitley Bay on 27 August 2015. Apparently they occupied the same room for some 20 minutes and then the claimant removed himself either to the bar or to the reception area of the hotel and spent the night there. I take account of the reasons which the claimant explained to the disciplinary panel of the necessity for the claimant and Student A to stay together on that night. It is clear that by any standards those actions placed the claimant in a very vulnerable position indeed and that was compounded by the fact that no report either in advance or retrospectively was made by the claimant to the second respondent about any of those matters until such time as the anonymous report was received. I take account also of the fact that the claimant states, and it appears to be accepted, that he was at the time involved in a very close personal relationship with the mother of Student A and effectively came into closer contact with Student A as a result of that relationship than otherwise might have been the case.

11. Thus I have had to consider whether I can say that the claimant's challenge to the decision to dismiss him has no reasonable prospect of success and I conclude that I cannot reach that conclusion. It seems to me that it is open to the claimant to assert procedural irregularities in the way this matter was investigated. It is open to the claimant to assert that the characterisation of what he did by the respondent as gross misconduct was either wrong in law or outwith the band of a reasonable response and I particularly bear in mind the decision of His Honour Judge Hand QC in **Sandwell & West Birmingham Hospitals NHS Trust v Westwood [2009] 0032 EAT** which engaged with the question of the characterisation of gross misconduct. Thirdly it seems to me that it is possible for the claimant to assert that a decision to dismiss him given his service and clean disciplinary record and the circumstances of the case was outwith the band of a reasonable response. I cannot say that those arguments have no reasonable prospect of success and therefore I decline to strike out this claim.

12. In light of that decision, it is necessary to identify closely the issues arising in the claim of unfair dismissal and to make case management orders. I have decided to conduct that hearing by telephone and will do so on Friday 12 May 2017 at 9.30am. The matter should be listed before me with an estimated length of hearing of 45 minutes.

EMPLOYMENT JUDGE A M BUCHANAN

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 3 May 2017.**

**JUDGMENT SENT TO THE PARTIES ON
5 May 2017**

AND ENTERED IN THE REGISTER

Julie Davies

FOR THE TRIBUNAL