



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100314/2017

Hearing Held at Dundee on 28, 29 and 30 August 2017

Employment Judge: I McFtridge (sitting alone)

Ms J Gibson

**Claimant
Represented by:
Ms L Campbell
Solicitor**

Dundee City Council

**Respondents
Represented by:
Ms M Geddes
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was not unfairly dismissed by the respondents. The claim is dismissed.

REASONS

1. The claimant submitted a claim to the Tribunal in which she claimed that she had been unfairly dismissed by the respondents. The respondents submitted a response in which they admitted that the claimant had been dismissed but stated that the claimant had been summarily dismissed for gross misconduct and that the dismissal was procedurally and substantively fair. At the hearing evidence was led

on behalf of the respondents from Mrs Vivienne Louise Snee a Head Teacher with the respondents who had carried out an initial investigation into the matter which led to the claimant's dismissal and Michael Wood the retired former Executive Director of Children and Families with the respondents who chaired the disciplinary hearing following which the claimant was dismissed. The claimant gave evidence on her own behalf and evidence was led on her behalf from her father Peter Michael Gibson and her sister Nicola Jane Munro. A joint bundle of productions was lodged which was added to with consent during the hearing. During the course of the hearing I also permitted the respondents to adduce additional evidence relating to the claimant's credibility. I also allowed the claimant to lodge an additional document despite opposition from the respondents. Documents will be referred to below by their page number. The additional documents which I allowed the respondents to add are to be found at pages 251-255. The additional document lodged by the Claimant is at p250-250/1. On the basis of the evidence and the productions I found the following essential matters to be proved or agreed.

Findings In Fact

2. The claimant is a qualified Teacher. She commenced employment with the respondents as a Class Teacher. The latest statement of employment particulars which she received was dated 30 June 2011 and was lodged (pages 26-30). It was signed by the claimant on 31 July 2011. It confirms her continuous service as starting from 19 February 1996. It is possible that the claimant worked on an ad hoc or supply basis for the respondents prior to this date however my finding was that her continuous service commenced as at 19 February 1996.
3. Initially the claimant worked as a Class Teacher however in or about 2011 she became a Learning Support Teacher. She worked at Mill of Mains Primary School, Barns of Claverhouse Road, Dundee as a Support for Learning Teacher. She was one of two Support for Learning Teachers at the school. Her role involved taking individual children and small groups. The respondents have various policies which are available on their intranet which applied to the claimant. The disciplinary procedures for teachers (DNCT/2) was lodged (pages 183-193). The grievance

procedure (DNCT/3) was lodged (pages 194-201) and DNCT/16 Leave of Absence and Leave Provisions was lodged (pages 202-205).

4. As a qualified teacher the claimant requires to be registered with GTCS. GTCS have produced guidance on the use of electronic communication and social media. This was lodged (pages 206-210). They have also produced a Code of Professionalism and Conduct which was lodged (pages 211-225).
5. In or about May 2015 the claimant was involved in an incident along with another member of staff Beverley Brown. The claimant's position was that there had been friction between her and Beverley Brown for some considerable time leading up to this incident however no formal or informal grievance had been raised. Following the incident both the claimant and Beverley Brown lodged complaints with Ms Snee the Head Teacher of the school. The claimant's complaint took the form of a complaint under the respondents' bullying and harassment procedure whilst Ms Brown's complaint was made under the formal grievance procedure.
6. The respondents have a process whereby, provided the parties agree, complaints under the grievance procedure and the bullying and harassment procedure can be referred to an external mediator. The external mediator will carry out a mediation on the usual basis with a view to resolving the issue between the parties. Ms Snee approached both parties and the claimant and Ms Brown agreed that the matter could be referred to mediation. For various reasons the mediation could not be arranged to take place prior to the end of the school term in June and it was fixed to take place at the start of the new school term in August.
7. Up until June 2016 the claimant had lived with her parents however she had made arrangements to move into a home of her own along with her daughter on 8 June 2015. The respondents' leave policy provides for discretionary leave of up to one day's paid leave for a house removal. In advance of her move the claimant asked for discretionary leave for 8 June and this was granted.
8. The claimant's mother also works for the respondents as an Additional Support Needs Assistant. She worked on a supply basis and had, for a considerable

period, been working at Craigowl School. The claimant's mother had been diagnosed as suffering from a malignant brain tumour from February 2009 onwards. By June 2016 she had had two operations and additional treatments which had reduced the size of the tumour for a time however on each occasion the tumour had recurred. Despite this the claimant's mother had continued to work at Craigowl School on a supply basis.

9. The claimant's mother required to attend regular medical appointments and wished to have the claimant accompany her to these appointments. On numerous occasions the claimant had requested discretionary leave from Ms Snee for this purpose and this had been granted so that the claimant could accompany her mother to an appointment. In addition, the claimant like all teachers was entitled to two and a half hours per week reduced class contact time. This is time when a teacher is not expected to be in contact with children and although there is an expectation that teachers will use this time for preparation the teacher is free to leave the school during this time. On occasions Ms Snee had indicated to the claimant that she should use her reduced class contact time to attend an appointment with her mother.

10. In addition to the provisions regarding discretionary leave the respondents' policy DNCT/16 includes a further section headed "Entitlement: Serious family illness and family bereavements" (page 202). This goes on to state

"1.1 Serious family illness –

- up to 3 days paid; additional days – refer to Head of Service

1.2 Family bereavement

- up to 5 days paid; additional days – refer to Head of Service

Note: for both provisions above, family includes spouse, civil partner, co-habitee, son, daughter, parent, foster parent, guardian, mother/father-in-law, brother, sister, and brother/sister-in-law. It may include others, for instance where the employee is the closest relative and is responsible for managing the person's affairs."

11. The Claimant was off on 8 June to deal with her house move. The claimant's mother did not attend her own work on Monday 8 June and advised that she was assisting the claimant with her move. Since the claimant's mother was a Supply Teacher she was entitled to work whatever hours she wished. It is, incidentally, accepted by the respondents that the claimant's mother did not actually physically assist the claimant on 8 June but did provide her with moral support. On 9 June the claimant was aware that her mother was due to attend a hospital appointment at Ninewells Hospital in the afternoon. On the morning of 9 June the claimant telephoned Mill of Mains Primary School before it opened. She left a message on the answering machine to the effect that she was taking two days' carer's leave. The claimant sounded upset on the recorded message. As it happens, Ms Snee was absent from school at this point since she had recently suffered a bereavement in her close family. The call was listened to by Ms Snee's deputy, Ms Wise. The claimant did not attend school on 9 and 10 June. On 11 June she telephoned the school to say that she was herself unwell and the claimant did not attend school on 11 or 12 June claiming these days as sick leave.
12. Ms Snee's deputy, Ms Wise felt that the claimant's action in simply leaving a message to say she was taking carer's leave was inappropriate. She was also aware that the claimant's mother usually worked at Craigowl School. She appears to have had a suspicion that the Claimant's mother had attended work at Craigowl on 9 and 10 June. She decided that she would speak to the Head Teacher of Craigowl School at a head teacher's meeting which she was due to attend later that week. In the event the Head Teacher of Craigowl School was not at that meeting and Ms Wise therefore decided to telephone Craigowl School and spoke to the Deputy Head Teacher of that school, Christine Howie. Ms Howie advised Ms Wise that she would have to check the position. She then checked with Ms James and reverted to Ms Wise to advise that the claimant's mother had in fact been working at Craigowl School on both 9 and 10 June.
13. In the meantime the claimant returned to work on or about 15 June. Ms Snee also returned to work at around this time. The claimant was asked to confirm the reasons for her absence the previous week and completed the appropriate paperwork. This confirmed that she was claiming carer's leave for 9 and 10 June

and sick leave for 11 and 12 June. This was in addition to the one day discretionary leave which she had been allocated for 8 June. Ms Wise advised Ms Snee of what she had done and Ms Snee took advice from the respondents' HR department. She was advised to hang fire until the claimant's time sheet had been submitted.

14. At around this time the claimant advised Ms Snee that her mother had not received good news regarding her condition and that she was to get another operation. The claimant asked Ms Snee for time off and during the last week of term (29 June to 3 July) asked if she could leave at 2.30 rather than 3.30 each day. This was so she could visit her mother in hospital for 3.00pm. Ms Snee advised the claimant that she could leave at 2.30 for each of these days. She was advised to use her reduced class contact time for this purpose. On one of the other days of this week the claimant asked if she could attend hospital in the early morning since she had not been able to speak to the doctor. Ms Snee said that she would allow this. The claimant did not return until late afternoon.

15. On the last day of term (3 July) the school was due to close at 12 noon. The claimant asked if she could be permitted to not come in on that date. She was aware that she had used up all of her reduced class contact time. She asked Ms Snee if she could be permitted to take the time off out of her allocation of reduced class contact time for the first week of the new term which was due to start at the end of August. Ms Snee indicated that there was another member of staff who had not received any reduced class contact time that week. If the claimant was allowed to go then that member of staff would not get her reduced class contact time at all and in the circumstances Ms Snee was not prepared to allow the claimant this time.

16. After school closed at 12 noon on the final day of term a number of members of staff went for lunch together to celebrate the end of term. The claimant was not part of this group. During the course of the lunch various members of staff noticed certain postings which the claimant made on Facebook. Telephones showing these postings were passed around the group. Ms Snee was unaware of this at the time.

17. The school was closed for the summer holidays until mid August. At some point in early August Ms Snee attended a funeral of the parent of a member of staff. She was approached by another member of staff, Carol Henderson, who said that she wanted to discuss something with her but it was not appropriate to do so at a funeral. Ms Snee indicated that she would be in school the next day. The following day, 11 August, Ms Snee was telephoned by Carol Henderson. Ms Henderson advised Ms Snee that on the last day of the previous term she had attended the staff lunch. At that lunch a number of staff had raised concerns about postings which the claimant had made on Facebook. A telephone showing the postings had been passed around those present. Ms Richardson said that she was really bothered by the comments because the claimant was making offensive comments about the school with others. Ms Richardson said that she knew the claimant had at least one parent as a friend. She said that a number of people had felt that the Head Teacher required to be informed but they had decided that this was something which should be held over until the beginning of the following term.
18. Ms Snee was aware that Jane Duncan, the Administrator at the school was on friendly terms with the claimant and was her friend on Facebook. Ms Snee asked Ms Duncan if she was aware of these posts and if she could be shown them. Ms Duncan showed her telephone to Ms Snee and Ms Snee arranged for the posts to be downloaded to a computer and printed out. The printed out posts were lodged (pages 84-86). The posts bear to be made by the claimant. Dates are given for the post but no timing. A number of posts were dated 3 July. It is probably as well to set these out:-

“Most people on this planet are cunts. Even when you think they’re not, they actually are. Fact.”

“Fucking hate this bastard place. Absolute utter fucktards. Nasty cunts and a whole new side to someone else.”

“Raging at the fucktardness of absolute utter, devious bastards!! Shite faces!! X”

There is a response to this noted from someone called Wendy Fenn which states

"Half a day to go Jill"

The next response said to be from the claimant is

5

"Half an hour Wendy Fenn. Still have to return to these fucktards after 6 weeks though"

10 There is then a sign of a thumb pointing downwards. There are then two further comments, one from Wendy Fenn and one from a Steven Bell. Ms Snee also downloaded and printed out a post which appeared to have been made by the claimant the previous day (16 August). This was dated at 19:09 and stated

15 *"Ugh. Bollocks. Fuck. Shite. Bastards. Wankers. Arse biscuits. Back to bugging school tomorrow. Such bullshit. Even worse, it's with the adults".*

20 Once again there is then a pictogram showing a thumb pointing downwards. Neither Ms Duncan nor Ms Snee saw any other posts made by the claimant on either of these days.

19. Ms Snee decided to take advice from HR however all of the senior management team were out. She was unable to get them the following day and on Wednesday sent them an e-mail and spoke to a Sarah Simpson of HR. She e-mailed copies of
25 the posts to her. She also discussed the outstanding issue relating to the claimant's having apparently taken carer's leave on 9 and 10 June to care for her mother whilst, on the basis of the information Ms Snee had, the claimant's mother had herself been working on these two days.

30 20. In the meantime on or about 17 or 18 August the claimant had a mediation session with Beverley Brown in relation to the complaints each had made about the other the previous year. At the end of that mediation session it was anticipated that a further mediation session would take place.

21. The advice which Ms Snee received from the HR department was that there required to be an investigation under the respondents' disciplinary policy. Normally the policy would suggest that the investigation is carried out by the Deputy Head Teacher of a school. In this case Ms Snee and the respondents' HR department were concerned that Ms Wise had already been involved in the matter as being the person who had spoken to Craigowl School. Since she might be a key witness in any future disciplinary it was decided that it was inappropriate for her to conduct the investigation and that in the circumstances the investigation should be carried out by Ms Snee.

22. Initially Ms Snee was advised that the claimant could remain in post however on Friday 21 August Ms Snee was advised by HR that the claimant should be suspended.

23. As is the respondents' standard procedure the EIS who were known to represent the claimant were contacted so that one of their officers could be on hand for the suspension meeting. Mr David Baxter of the EIS attended at the school at around 1.15. The claimant had been teaching but was then approached by Ms Snee and Mr Baxter. Mr Baxter asked for and was granted the opportunity of a short meeting alone with the claimant at which he advised her that she was being suspended. He mentioned the Facebook posts to her and told her that she should immediately delete them. The claimant went on to her phone and deleted the posts. There was then a short meeting attended by the claimant, Mr Baxter, Ms Snee and Jane Ling of the respondents' HR department. During this meeting Ms Snee read out a pre-prepared statement. A copy of this was lodged (page 36). The claimant was advised that two serious matters had been brought to Ms Snee's attention. She was told *"The first concerns inappropriate comments you have posted on Facebook regarding your workplace and the second concerns you claiming paid time off on June 9 and 10 2015 to look after your mother, when your mother was working."* The claimant was suspended on full pay with immediate effect. She was advised that she could not attend her place of work. She was advised that she might maintain contact with her colleagues but must not impede nor seek to prejudice the outcome of the investigation. She was advised that she would be expected to make herself available for any meetings which might be arranged.

24. On the same day Ms Snee wrote to the claimant confirming the terms of her suspension. This letter was lodged (page 37).

5 25. Ms Snee then arranged to interview all of the staff who had been out for lunch on the last day of term who might have seen or heard the Facebook posts. She also interviewed all of the members of staff who were Facebook friends with the claimant. She also interviewed three staff at Craigowl School where the claimant's mother worked on supply. Ms Snee took statements. Her general approach was to interview the witness and then type up a statement which would then be sent out for signature. As a result the statements are generally dated some time after they were first taken. A number of the statements were lodged. Aine Wise's statement is at pages 45-46, Caroline Fenwick at page 47, Carolyn White at page 48, Carol Henderson at page 49, Beverley Brown at page 50, Pauline Fleming at page 51, 10 Lynne Harris at page 52, Vikki Clark at page 53, Winnie Kitt at page 54, Lynne McDonagh at page 55, Jane Duncan the Admin Assistant at the school also gave a statement which is at page 56-57. She was a Facebook friend of the claimant. Euan Smith the Head Teacher of Craigowl Primary gave a statement (pages 70-70/1). Christine Howie the Deputy Head Teacher at Craigowl Primary gave a statement (pages 71-72) and Allyson James a PT Supporting Learner at Craigowl Primary gave a statement (pages 73-74). Ms Snee also obtained copies of the timesheet lodged for the claimant's mother (page 75). The claimant was called in for interview on 9 September. Prior to the meeting Ms Snee had compiled a list of questions. Following the meeting Ms Snee sent a copy of the claimant's statement including the list of questions to the claimant for checking. On 23 October the claimant sent the statement back with a number of handwritten comments on it. The original statement sent to the claimant was lodged at pages 58-63. The version with the claimant's annotations was also lodged at pages 64-69.

30 26. The claimant accepted that she had made the Facebook posts. She also accepted that she had taken her mother to work on Tuesday 9 June. Her position was that she was entitled to take carer's leave for this purpose. Her position was that she had taken her mother to work at Craigowl Primary School and then went to get her mother's shopping and her prescription before collecting her mother at around

1.15pm to take her to a hospital appointment at Ninewells Hospital. The claimant produced a letter from her mother's GP confirming her mother's medical position. This letter was lodged (page 79). It confirmed that the claimant's mother was gravely ill and that it was necessary for the claimant to take time off work to care for her. The claimant also produced a copy of the appointment (page 80). The claimant's position was that her mother had not been at work on Wednesday 10 June.

27. The claimant was aware that the timesheet submitted on her mother's behalf showed that her mother had been at work on 9 June from 8:45 to 12:15 and 12:45 to 13:30 (for which 6.5 hours was claimed) and that she had been at work on 10 June from 08:45 to 12:15 and then from 12:45 to 15:45. The claimant's position was that because of her mother's deteriorating health her mother had simply been unable to complete her own timesheets. Her father had therefore completed the timesheet on her mother's behalf and had filled it in incorrectly. The claimant provided a copy of a timesheet which she said her mother had started to fill in but had been able to complete (page 77). She also provided a timesheet dating from 2014 which had been completed by her mother and in view of the claimant showed that the handwriting was completely different from the handwriting on the form which had been submitted for June 2015.

28. With regard to the Facebook posts the claimant's position was that she had not made any of the posts on 3 July in working time and they did not relate to work. She said that the posts were because of how the hospital was treating her mother with appointments and the lack of treatment. In response to the question whether or not she thought this was appropriate she responded that it was her own page. When she submitted the handwritten comments she later indicated that it was her own page about her life and what was happening in her personal life/family life. She was asked what her intention was and she said it was to get something off her chest she wanted to voice and she later added that she was extremely upset. She indicated that she had made the posting "*Fucking hate this bastard place. Absolute utter fucktards. Nasty cunts and a whole new side to someone else*" when she was at the hospital and her position was that it was not about work.

When asked if it was reasonable that staff thought it was about the school she indicated that they didn't speak to her anyway and then at a later date stated

5 *"They don't engage with me at all so would have no idea what it pertained to regarding my personal family life."*

29. She indicated that she was referring to a medic at the hospital who she said was showing a different side. With regard to the question from Wendy Fenn about *"Half a day to go Jill"* she had responded *"Half an hour"*. She said she didn't know when she had posted this and didn't know the time. She said it must have been at work and that she had been under stress at work for a long time. She indicated that she did have friends on Facebook who were parents but said they were on restricted view and would only see posts that she wished to make public. She said she never actually set anything to public. She accepted she had four staff from school as Facebook friends. She thought she probably had 30-35 friends on Facebook. She said the majority of her friends didn't know what she did for a living. She said she had not read the GTCS guidance on social media. She accepted that the post made on 16 August was clearly about returning to school. When asked her intention she said she was missing when the children weren't in and preferred a normal school day when the children were in. She made the point that there was no mention of the school, the authority, the location or any individuals. She denied that the posts reflected poorly on her and she said that it was because that was how she was feeling. She said that on reflection she accepted people had been bothered by them but people didn't know her or what she had been going through and everyone's perceptions were different. She accepted that in 2013 Caroline Fenwick a previous Head Teacher had spoken to the claimant in relation to posts she had put on Facebook. She said that she had taken the comment off and that it had been dealt with in school. She confirmed that she was angry, upset, fearful, traumatised, not coping and felt alone.

30. Shortly after the meeting with the Claimant Ms Snee was contacted by the claimant's Union representative who indicated he had serious concerns about the claimant's wellbeing. The claimant had also sent a text message to a colleague expressing suicidal thoughts. Ms Snee decided it would be appropriate to make a

reference to Occupational Health before proceeding further. She arranged a referral. This was lodged (pages 87-88).

5 31. The claimant attended an Occupational Health appointment on 21 September and a report was issued following this. This was lodged (pages 89-90). It suggested a further Occupational Health review prior to any return to work. It was confirmed that there was no clear medical barrier to the claimant participating in the outstanding management processes but it was suggested that any discussions regarding this were conducted in a flexible and sensitive manner.

10 32. The respondents wrote to the claimant around 23 November inviting her to a disciplinary hearing which was due to take place on 17 December. This letter was not lodged. It transpired that Mr Wood who was to be chairing the hearing was unavailable on that date. On 26 November 2015 the respondents wrote again to
15 the claimant inviting her to a hearing to take place on 18 December 2015 at 9:30. This letter was lodged (page 91). There was attached to this all of the statements which the respondents intended to rely upon. These are listed on the second page. In addition, the copies of the three timesheets, the letter from the claimant's GP, a letter from the claimant's mother's Consultant, the NHS appointment letter
20 and the Facebook pages together with an investigation report were also lodged. The investigation report was lodged for the Tribunal at pages 41-44. This was completed by Ms Snee after she had carried out all her interviews.

25 33. The allegations which the claimant required to meet were said to be

- 30 (1) You claimed two days' paid (carer's leave) on 9 June 2015 and 10 June 2015 to look after your mother Elizabeth Gibson, when your mother was working at Craigowl School on those dates, and
(2) on various dates including 3 July 2015 and 16 August 2015 you posted inappropriate and offensive comments on Facebook regarding your workplace.

34. The hearing fixed for 18 December did not take place. The health of the claimant's mother had continued to deteriorate and her union representative contacted the school to indicate that the claimant was not emotionally in a place where she could

proceed with the hearing. Sadly the claimant's mother passed away shortly thereafter.

- 5 35. The claimant continued to maintain that she was unfit to attend work from 18 December and that she was not fit for interview at meetings. On 8 March the respondents completed a further Occupational Health referral which was lodged (pages 97-98). The respondents wished to establish when the claimant would be fit to proceed with a disciplinary hearing. The claimant met with Occupational Health on 31 March and a report was subsequently provided. This report dated 10 12 April 2016 was lodged (pages 99-100). The Occupational Health position confirmed that the claimant should be regarded as medically unfit to participate in any formal management meetings.
- 15 36. At around this time an issue arose regarding the claimant's provision of fit notes. A fit note was provided by the Claimant dated 1 February which confirmed that the claimant should be regarded as medically unfit from 18 December onwards.
- 20 37. A further Occupational Health appointment was arranged for 24 June. A report was issued following this which was lodged (pages 109-110). The Occupational Health physician advised that the claimant would be in a position to commence return to work duties although it was noted that the earliest opportunity would be after the commencement of the new academic year in August 2016.
- 25 38. By letter dated 22 July 2016 the claimant was invited to a disciplinary hearing to take place on 17 and 18 August 2016. The claimant was advised of the witnesses to be attending. She was also given further copies of the management evidence. This was as per her previous invitation. The disciplinary hearing was to be conducted by Michael Wood, Executive Director of the Children and Families Service.
- 30 39. In advance of the hearing the respondents' representative Drew Morrice, Assistant Secretary of the EIS, forwarded additional papers in a letter dated 1 August 2016. These included a submission from Nikki Munro, further Facebook postings, screenshots relating to a telephone discussion with a specialist at Ninewells on

3 July, a screenshot of a text which the claimant had sent to her union representative David Baxter on 3 July, a further communication from the claimant's Consultant Neurosurgeon and correspondence from Dr Michael Gray. These were all lodged (pages 119-124).

5

40. The statement from Nikki Munro who is the claimant's sister took the form of an e-mail. She confirmed that in fact she had picked up her mother's timesheet which had been completed by her father and handed this in to the Head Teacher at Craigowl Primary School. She said that whilst she was doing this she noticed that there was an error in it since it stated that Mrs Gibson had attended Craigowl Primary School on Monday 8 June whilst Mrs Munro was aware that her mother had not been at school that day but had been supporting the claimant with her move. She had scored out that line on the timesheet. She had not noticed any other errors. It was her position that the time claimed on Tuesday 9th and the entry for Wednesday 10th June were inaccurate. She stated that on Tuesday 9 June her mother had been at an appointment at Ninewells Hospital in the afternoon and then went on to state *"as a result of the news she received at this appointment, was not in on Wednesday 10th June. She was present for work on Thursday 11th and Friday 12th June."* The Facebook posts from Jacqui Gardyne were generally supportive posts in relation to the claimant's mother's illness. The claimant also posted a further Facebook post she claimed she had made at 10:44 am on 3 July. This was accompanied by a note from the claimant indicating that she had picked up a voicemail from the claimant's radiotherapy and medication consultant during her break and had written the post during her break. The post stated

25

"Fucking hate this place. Full of total bitches. Nice. Mum's chemo/radio medication doctor on the phone saying we can't get an earlier appointment than August/September. Not having it!! Mum needs something, anything at least try. I'll fight for her!!"

30

41. There was another post dated 8:24am on 3 July stating

"Can't wait several hours to see mum So worried. She was bad and immobile before being emergency admitted last month. Just hoping"

5 *function, even some of it, will be restored. Can't bear having watched my mum severely deteriorate over the last few months. The fact it's now travelled into the actual brain matter, I'm so worried I need her so much. Forever I'm cracking up . . . Need to be strong for mum though, she needs me, as always. Now more than ever This is just HORRIBLE."*

42. The text message to Mr Baxter was lodged (page 124). After a discussion about her timesheets it says

10 *"Feel sick. Just found out from mum that my DAD completed her timesheet, as mum's right arm had gone by that point".*

43. The letter from Mr Mowle the claimant's mother's Consultant was lodged (pages 125-126). Mr Mowle confirmed that he had treated the claimant's mother. He had
15 been authorised by the claimant's mother to provide whatever medical evidence the claimant wished. He confirmed the progress of the claimant's mother's illness. He confirmed that the claimant had attended the Neurosurgical Outpatient Clinic at Ninewells Hospital with her mother on the afternoon on Tuesday 9 June. He said that this had been of great importance to her mother and to the decision making for
20 her ongoing clinical care.

44. He went on to say

25 *"I understand that Miss Gibson also attended the Accident and Emergency Department with her mother the following day. Unfortunately, Accident and Emergency records are not placed in the electronic patient record so I do not have access to this, but have no reason not to believe Miss Gibson's account."*

30 45. The letter from the claimant's own GP stated

"This is to state that Jillian Gibson is a patient of this practice. She has had a difficult time with her health for some years but was exceedingly stressed in the latter half of 2015 due to her mother's terminal illness.

Her mum sadly passed away just before Christmas 2015 and she was clearly under considerable stress in the weeks and months before this occurred.” (page 127)

- 5 46. On 10 August the claimant’s union representative also lodged a further e-mail from the claimant’s father. He stated

10 *“At the start of June I received call at house from a teacher who took Liz up to the Ninewells hospital saying she was experiencing numbness in her arm and leg when at school. Liz had tried to get hold of me but was unable to contact me. I immediately went up to A&E where I met the teacher who was alongside Liz. After telling me what I have just explained I gave her the money for the parking I thanked her and she left.*

15 *This was not the first time Liz had experienced this numbness at the school over the last 5mth or so. It normally lasted about 15mins or so but always went away. This was the first time it had lasted a while.”*

- 20 47. The claimant duly attended the disciplinary hearing. She was accompanied by Drew Morrice as her union representative. Mr Wood conducted the hearing and was accompanied by Christine Fender of the respondents’ HR department. A note taker was also present. The notes taken by the note taker were lodged (pages 135-158). Mr Wood’s own notes were also lodged (pages 159-161).

- 25 48. At the beginning of the meeting the claimant indicated that she would prefer not to be in the room whilst the witnesses were giving evidence but was happy to wait in a side room so long as her representative Drew Morrice was present. The claimant was quite clear this was what she wanted to do and Mr Wood agreed with this. The Claimant therefore remained in a waiting room with her father during the
30 times in the hearing when Ms Snee presented her case.

49. Ms Snee began by presenting her report.

50. There was an issue regarding whether or not the claimant's mother had been at work on the second day (10 June). Initially Ms Wise had telephoned Christine Howie the Deputy Head Teacher of Craigowl Primary. She had reported back to the effect that she had spoken to Allyson James who was the person best placed to say whether or not the claimant's mother had been in or not. Ms Howie had reported to Ms Wise that the Claimant's mother was not in on 10 June. Allyson James' statement however indicated that she had understood the question was whether the claimant's mother was in on the day of the call rather than on 10 June. It was clear from Mr Smith's statement that he was also not in a position to independently verify whether the claimant's mother was at work on 10 June or not. Ms Snee's final position was that as a result of this no-one could say for certain that the claimant's mother was at work or not at work on 10 June. With regard to the timesheet Mr Smith's evidence was to the effect that the claimant's mother had come to the school around the beginning of term and had brought cakes. She had not mentioned any issue with her timesheet. The first she had mentioned that the timesheet was in error was after the claimant had been suspended.
51. Ms Wise gave evidence about receiving the telephone message from the claimant and thereafter contacting Craigowl School. She said she had seen the Facebook comments and was shocked and that she found them distasteful and unprofessional. Carol Henderson one of the teachers who had seen the Facebook posts also gave evidence to the effect that she had been shocked. She said she thought that the posts were about her. Beverley Brown another teacher also gave evidence. She confirmed that she and the claimant had previously attended mediation. She accepted that she had a difficult working relationship with the claimant but not all the time. Jane Duncan also gave evidence about the answering machine message. She said the claimant was crying and upset when she called saying that her mother was very ill. She confirmed that she had heard people talking about the Facebook posts and that she had taken screenshots and e-mailed them to Ms Snee. Ms McDonagh also gave evidence. She was a friend of the claimant on Facebook although she said the claimant had blocked her the same day she was suspended. She found the comments violent and nasty. She indicated she had left the lunch earlier than planned.

52. The second day the claimant gave evidence. She indicated that when she made the posts she had been raging against the world. She gave her story regarding the events of 9 and 10 June. She said that she had been at the A&E department of Ninewells on Wednesday 10 June. The claimant had not previously mentioned this at her previous investigation or indeed at any point prior to the letter coming in from the claimant's mother's Neurosurgeon.

53. Mr Wood indicated at the end of the meeting that he would require time to consider his decision.

54. Mr Wood's position was that the whole issue regarding the 10 June appeared to be somewhat confused and complicated. He did not feel that he had any specific evidence that he could rely upon one way or the other. In order to try and obtain some clarity as to the claimant's position he decided that he would give the claimant the opportunity to produce some documentary evidence from the hospital confirming that she had attended A&E with her mother on 10 June. He wrote to the claimant's union representative asking him to produce this. The claimant did not produce anything and on 9 September Mr Wood wrote direct to the claimant confirming

"Prior to making a decision as to the outcome of the disciplinary hearing, I agreed to you submitting further information from the Accident and Emergency department of Ninewells Hospital. I understand you have requested this but have not received any response and therefore been unable to submit the information for my consideration. I am keen to ensure that the time frame for making a decision in this matter is not prolonged and therefore would ask you to submit the information to me by no later than Monday 26th September 2016."

55. Following the claimant's failure to respond by 26 September Mr Wood wrote to the claimant on 7 October indicating that he would wait until 31 October before making a final decision. The Claimant contacted Ninewells Hospital. An e-mail from them dated 17 October 2016 was lodged for the Tribunal (page 169). This confirmed that given that the claimant's mother was now deceased her medical records

(which included reference to the attendance at A&E) could only be released in two circumstances. The first was where there was a medico-legal claim and the second was where the request was made by the patient's representative. It was confirmed that the patient's representative would be an executor. The claimant's father was the executor of the claimant's mother. No request was made by him to Ninewells for the medical records and the medical records were not produced at any stage.

56. The claimant provided Mr Wood with the email from Ninewells and indicated that nothing further would be provided. On 1 November 2016 Mr Wood wrote to the claimant setting out his decision.

57. With regard to the first allegation he considered that he was unable to make a finding that the claimant's mother had attended work on 10 June and therefore proceeded on the basis that she had been absent. He considered however on the basis of the evidence before him including the claimant's own statement the claimant had decided on the morning of 9 June that she would take the day off as carer's leave and the very first action she had taken was to drive her mother to work. Mr Wood considered that it was unacceptable for an employee to claim to take carer's leave for someone who was at the same time working for him in another school. He accepted that the claimant had gone to a medical appointment with her mother in the afternoon of 9 June but was aware from Ms Snee that Ms Snee was in the habit of allowing the claimant to attend such medical appointments with her mother on a discretionary basis. It was also noted that on the basis of the evidence from Ms Munro the claimant's mother had gone absent on 10 June because of what she had been told on 9 June. It would therefore appear that the claimant would not have known this on the morning of 9 June.

58. With regard to the Facebook posts he accepted that the claimant had been under stress. His view however was that the claimant had not shown any remorse or any belief that she accepted what she was doing was totally inappropriate. He was also aware that the claimant had previously been spoken to about a Facebook post. He noted that members of staff had been upset. He considered that the

posts were completely inappropriate and that they were in breach of the GTCS standards.

- 5 59. His view was that either of the two allegations on their own would have been sufficient to justify the dismissal of the claimant. In the circumstances he decided that the appropriate sanction was to summarily dismiss the claimant for gross misconduct. He wrote to the claimant setting out his reasons in a letter dated 1 November. The claimant's last day at work was 31 October 2016.
- 10 60. Mr Wood indicated that he would be reporting the matter to the GTCS in accordance with the respondents' policy.
- 15 61. Following the dismissal Mr Wood did indeed report the matter to the GTCS. An investigating panel considered the matter on 26 April 2017. A copy of the minute was lodged (pages 250-251). The panel considered that there was not sufficient evidence to support the claimant having falsely claimed special leave for 9 or 10 June. In respect of the allegation regarding the Facebook posts they noted the claimant accepted that she had posted these. He stated that they *"took into account the (Claimant)'s admissions, insight and remorse for the distress that it had caused her colleagues."* They took into account the difficult circumstances that the claimant was experiencing and considered on that basis there was not a realistic prospect of a finding of impairment. They did however go on to state that they *"wish it to be noted that such conduct is not that expected of registered teachers and strongly recommend that the (Claimant) reflect further on her conduct and the terms of the Social Media policy issued by GTCS."* The matter accordingly did not proceed further within the GTCS.
- 20 25
- 30 62. In his letter of dismissal Mr Wood had advised the claimant and her union representative of the respondents' usual policy regarding the right of appeal. The claimant was told that if she wished to exercise her right she required to do so in writing within 14 days of receipt of the letter.
63. Following receipt of the letter the claimant decided that she wished to appeal. There was, however, some form of breakdown in communication between her and

her union representative. As a result of this it was not until 30 November that her union representative sent a letter of appeal to Mr Martin the respondents' Chief Executive. On 8 December 2016 Mr Martin wrote to the claimant's representative stating that it would not be appropriate to accept the appeal. He pointed out that the letter the claimant received was clear as to the procedure to be followed if she wished to appeal and he believed that it was her personal responsibility to do so within the timescale given.

64. Following the termination of her employment the claimant felt unable to apply for jobs for a period. From January 2017 onwards she started applying for jobs in Support for Learning or Additional Support Needs. She has applied to various neighbouring local authorities. She has had various interviews and had a job offer made to her which was withdrawn shortly afterwards as the local authority indicated that the job should not have been advertised. The claimant was on Employment Support Allowance until February 2017. She was then advised that she should have been receiving a severe disability element. From mid-February 2017 she has been in receipt of Employment Support Allowance plus a severe disability element as well. She receives £271 per fortnight benefits.

Matters Arising from the Evidence

65. I considered that both of the respondents' witnesses were attempting to assist the Tribunal by giving truthful evidence. I found their evidence to be credible and reliable. I noted that at the Tribunal hearing Mr Wood indicated that he was not at all sure about what had happened on 10 June and gave the claimant the benefit of the doubt whilst in his decision letter he was quite clear that he felt that the claimant's mother was probably at work on 10 June. That having been said I considered that his evidence at the Tribunal was truthful. It was clear to me that his principal concern was the decision the claimant had made on the morning of 9 June which was to the effect that she would be claiming two days' carer's leave and then the first thing she does is take her mother to work. His view was that it was a completely inappropriate use of carer's leave.

66. I found that the evidence of Ms Munro and the claimant's father to be similarly credible and reliable. Generally speaking I found the claimant to be a less impressive witness. She was inclined to make general sweeping statements without seeming to appreciate that in giving evidence to a Tribunal one must
5 confine oneself to the absolute truth. This was particularly evident when she said several times that she had never before been involved in a disciplinary process. The respondents' representative sought consent to lodge various documents in contradiction of this which was granted. This showed that the claimant had indeed been involved in disciplinary processes previously. I would also agree with the
10 respondents' representative to the effect that on occasions the claimant was evasive and refused to answer questions properly put to her in cross examination. That having been said there was no real dispute between the parties as to the way the investigation was carried out.

15 **Issues**

67. The sole issue to be determined by the Tribunal was whether or not the claimant had been unfairly dismissed. If I had found in favour of the claimant then the claimant was seeking compensation. Albeit she had originally indicated she was
20 seeking reinstatement.

Discussion and Decision

68. Section 98 of the Employment Rights Act 1996 states
25

“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.”

30

69. In this case it was the respondents' position that the reason for dismissal related to the conduct of the employee which is a potentially fair reason falling within section 98(2)(b) of the said Act. I did not understand the claimant to seriously dispute this and it was clear from the evidence that the reason in the mind of the decision maker in this case was indeed the claimant's conduct. I therefore considered that the claimant was dismissed for a potentially fair reason. I then required to go on to consider the terms of Section 98(4). This states

“(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.”

70. Both parties were agreed that I should approach the matter in the way set out in the well known case of **British Home Stores Ltd v Burchell [1978] IRLR 379**. In this case I was satisfied that the respondents in the person of Mr Wood had a genuine belief in the claimant's guilt as at the date of her dismissal. I was also of the view that the investigation which had been carried out was adequate. The case of **Sainsbury's v Hitt** makes it clear that the range of reasonable responses test applies to the adequacy or otherwise of an employer's investigation as well as to other aspects of the employer's actions. In this case I was satisfied that the investigation carried out by Ms Snee fell well within the band of reasonable responses. Ms Snee interviewed the witnesses which she considered to be appropriate. There was some criticism at the hearing that she had not used all of the witness statements in the final pack although they were produced for the hearing. The ones which were not used did not add in any way to the case one way or the other and the decision to leave them out was perfectly understandable. There was a suggestion that Ms Snee was not the most appropriate person to carry out the investigation. Whilst the respondents' policy states that normally it

will be the Deputy Head Teacher who carries out this task I entirely accepted the respondents' reasons for deciding that in the circumstances of the present case it was appropriate for Ms Snee to carry out the investigation given that Ms Wise was a key witness. It was also clear to me that Ms Snee had carried out her role conscientiously and honestly. In evidence she quite accepted that, having originally understood from Ms Wise that there was clear evidence the claimant's mother had been at work on 10 June, once the statements came in from the teachers at Craigowl it was clear that this particular line of evidence could no longer be relied upon.

10
71. There was a suggestion that Ms Snee could be criticised for not recording the time of posting of the various Facebook posts. It was the claimant's position that these had not been posted during working hours. It would appear however that although the time of the posts would appear on the claimant's own Facebook feed the timing did not appear on Jane Duncan's feed or on the screenshots which she provided. It would appear that this is simply a feature of Facebook and it is unfortunate that the claimant decided to delete these posts herself before keeping a note of the timings. It is clear that the claimant is the person responsible for the fact that these timings were not available to the investigation. There was also some suggestion that the other posts which were later lodged by the claimant and which would have tended to show her state of mind at the time were not copied at the same time. Ms Snee's evidence which I accepted was that these posts had not appeared on Jane Duncan's feed.

25
72. At the end of the day the only criticism which caused me any hesitation was the suggestion that this was one of these cases where the respondents ought to have further investigated the mitigation put forward by their employee. By the time of the disciplinary hearing it is clear that part of the claimant's position is that she was extremely upset and was behaving entirely out of character at this time. I accepted Ms Snee's evidence that whilst this may well have been the claimant's position at the Tribunal hearing this was not the way the claimant presented at the time of the investigation. This is also clear from the answers which the claimant gave to the various questions which were put to her by Ms Snee. It is clear even from the additional handwritten comments which the claimant made later that there was not

5 a great deal of evidence of remorse or indeed an indication that the claimant accepted that she was behaving inappropriately and that this was somehow out of character. I also accepted that the claimant at no time indicated that she had gone to Ninewells' A&E department with her mother on 10 June until the matter was raised by her mother's Neurosurgeon just before the disciplinary hearing. I considered that the investigation was properly carried out. Further investigation was of course carried out by Mr Wood who appeared to wish to give the claimant the greatest possible opportunity to produce evidence that her mother had been at A&E on the Wednesday. The claimant's evidence was that she had not contacted
10 Ninewells initially but then when she had contacted them had been advised that only the executor could obtain this information. The claimant's evidence was that she and her father had decided that this would not be appropriate. I have to say I do not understand why they would make this decision. That having been said it would appear that Mr Wood gave the claimant the benefit of the doubt in any
15 event.

73. I consider that Mr Wood had reasonable grounds for coming to the conclusion he did as to the claimant's guilt. The claimant did not dispute she had made the Facebook posts. He was also entitled to find that the claimant had indeed
20 telephoned the school and said she was on carer's leave and then gone out to take her mother to work.

74. I do not consider that the criticisms made of the respondents' procedure were justified. It was claimed to be inappropriate to lead evidence from Beverley Brown given that the Claimant had raised a grievance about her. I disagree. Beverley
25 Brown was a relevant witness. Her evidence agreed with that of everyone else. There was no reason to exclude her. I feel there was no issue with having Ms Snee carry out the investigation.

30 75. With regard to the penalty I would agree with the claimant's representative that this was an extremely harsh decision with serious personal consequences for the claimant. That having been said the legal test is that of the range of reasonable responses set out in the well known case of ***Iceland Frozen Foods v Jones [1982] IRLR 439***. This notes that in many (though not all) cases there is a band of

reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another. It notes that the function of the Tribunal, as an industrial jury, 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.

76. In this case it is difficult not to have a degree of sympathy for the claimant. It is clear that her mother had become seriously ill and that a poor prognosis was becoming evident in June and July 2015. Even given that situation, the Claimant's action in simply leaving a message saying she was taking carer's leave was high handed. I accept Mr Wood's position that it was inappropriate for any employee to claim carer's leave on the basis of a sick relative and then take that relative to work. I entirely accept that the respondents' policy says that carer's leave is an entitlement and not discretionary but this does not mean that it can be taken unilaterally without notice or discussion. Holidays are an entitlement and an employee who called in to leave a message saying that they are taking the day off as holiday without further discussion would not be behaving properly. The only circumstance when the Claimant's action in unilaterally declaring she was on carer's leave might have been appropriate would have been in response to some unexpected catastrophe and this was not the case here. It is entirely to be expected that an employee who says they are on carer's leave and then takes their sick relative to work is going to be in breach of the terms of the scheme.

77. On 3 July the claimant was waiting to see her mother after her mother's operation. She was concerned that her mother may not fully come round after the operation. That having been said it was clear from Mr Wood's evidence that what he took into account was that the claimant's behaviour in making these posts was totally unacceptable for any professional. At various times all employees are going to find themselves in stressful situations. The claimant ought to have known that no matter what, it was unacceptable for her to make these grossly offensive posts. I consider that Mr Wood was justified in his decision that the claimant's suggestions that they were not made at work or didn't refer to the school or that her profile did

not say where she worked were not at all relevant. The posts should never have been made. It was inevitable that her colleagues and others would be offended by them. It was also clear from his evidence that whereas the GTCS had referred to the claimant's "*admissions, insight and remorse for the distress that it had caused her colleagues*" this was not something which had been at all evident to Mr Wood.

78. Mr Wood's position was that he had considered the alternatives open to him and decided that dismissal was the appropriate sanction. His view was that either one of the allegations by itself would have justified dismissal. My own view was that if the sole allegation had related to the absence on 9/10 June then this would not have justified dismissal but that is not the only allegation here. The Facebook posts were admitted by the claimant. On any view, as discussed above, they are highly inappropriate posts to be made by a professional teacher. It would be very difficult for me to make a finding that it would be outwith the range of reasonable responses for an employer to dismiss in response to the Facebook posts which the claimant had made. Given that Mr Wood was justified in finding both that the claimant had made an inappropriate claim for carer's leave and had made these inappropriate postings it is my view that the decision to dismiss was within the range of reasonable responses. The claim is therefore dismissed.

Employment Judge: Ian McFatridge
Date of Judgment: 25 September 2017
Entered in register: 25 September 2017
and copied to parties