

SCHOOLS North East Governance Conference

Graham Vials, Associate, Ward Hadaway



The future of our region is in school

- » The local authority (LA) employs the staff working at community and voluntary controlled schools.
- » The Governing Body is the employer of staff working at voluntary aided and foundation trust schools.
- » Staff working at Academies are employed by the Academy / MAT through a charitable company.
- » Governing bodies / Academies / MATs are responsible for all staffing matters including:
 - » The appointment and dismissal of all staff.
 - » Establishing procedures to regulate the conduct and discipline of staff and addressing grievances and capability issues.
- » Governors may delegate many of their employer functions to the Headteacher or one or more governors, or both.

- » Since 1 January 2010, the Governing Body of a school in England has been required to ensure that any person (or, if a panel is appointed, at least one person on that panel) who interviews an applicant for a teaching or support post in a school has completed the safer recruitment training.

- » Before teachers or support staff are appointed, the employer must carry out the following checks:
 - » Identity check.
 - » Qualifications check (note academy and non-qualified teachers)
 - » Right to work in the UK.
 - » Enhanced DBS check and children's barred list checks if required

- » Keeping Children Safe In Education – DfE Guidance – Governors to read

- » Discrimination risks?
 - » *Rainbow v Milton Keynes Council 1200104/2007*

- » Advertisement of the role (internally or externally)
- » Is there a job description? Who do we need for the role?
- » Fixed term or permanent?
- » How shall we shortlist?
- » What form shall the interview take? Ensure there is a paper trail.
- » Prepare the contract of employment and offer letters?
- » Are there any conditions on employment (subject to references etc)
- » Should there be a probationary period?
- » Do you have an established induction process?

- » Governors are often required to take part in formal hearings to manage staff.
- » There are 5 potential fair reasons for dismissal
 - » **Conduct**
 - » Acting dishonestly or inappropriately
 - » **Capability**
 - » Struggling with performance
 - » Unable to perform the role due to sick absence or an illness
 - » **Redundancy**
 - » A reduced requirement for work to be undertaken
 - » **Statutory restriction**
 - » Barred from teaching
 - » Loss of work permit
 - » Doesn't pass certain qualifications
 - » **SOSR** (some other substantial reason)
 - » Breakdown in trust and confidence / working relationship / third party pressure

- » Any dismissal needs to be both procedurally and substantively fair.
- » Ensure you comply with your policies and the ACAS code of conduct.
- » The Burchell Test (*BHS v Burchell [1978] IRLR 379*)
 - » *The employer believed the employee to be guilty of misconduct.*
 - » *The employer had reasonable grounds for believing that the employee was guilty of that misconduct.*
 - » *At the time it held that belief, it had carried out as much investigation as was reasonable.*
- » If so, does the dismissal fall within a band of reasonable responses? (*Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*)
- » The Tribunal should not substitute their own view of what they would have done.

- » For there to be a fair procedure in misconduct cases (and to avoid a claim of unfair dismissal):-
 - » The school must carry out a reasonable investigation (secure the evidence).
“An ounce of documents is worth a ton of recollection”
 - » The employee must be made aware of the allegations, the severity and the evidence against them. Ensure the disciplinary invite letter is well drafted.
 - » An employee must be given time to prepare for the hearing and given the opportunity to put forward their version of events.
 - » An employee must be afforded the right of appeal by someone independent (usually Chair of Governors / Trustees).

- » Factors to consider ...
 - » Length of service for an unfair dismissal claim? Less than 2 years?
 - » Have you followed your policies and procedures? Are these policies contractual – i.e. are they part of the employee's T&C's?
 - » Has there been consistency of treatment with other staff?
 - » Are there any prior warnings or previous disciplinary record?
 - » Has the employee shown any remorse?
 - » Was the employee provoked or under stress or has the misconduct arose because of the employee's disability?

- » If the dismissal is unfair?
 - » What is the potential compensation at Tribunal?
 - » Is there also a potential discrimination claim (uncapped damages)
 - » Will they find alternative employment? If so when?
 - » Will there be an ACAS uplift of 25%?
 - » Has there been any contributory conduct?
 - » Would dismissal have taken place in any event (Polkey)?

- » Potential problem areas:-
 - » The difficulty/non-availability of trade union representatives.
 - » What steps should be taken if the employee goes off sick?
 - » Too much delay?
 - » Memories fade?
 - » Summer holiday delay
 - » Is a fair "trial" still possible?
 - » Delay can render the dismissal unfair (*Royal Society for the Protection of Cruelty to Animals -v- Cruden 1986 ICR205*)
 - » Settlement agreements?

- » Performance management issues

- » Sickness absence issues
 - » Long term – permanent off work – will they come back?
 - » Short term intermittent

- » Performance issues
 - » Ensure the policies are followed to the letter.
 - » Set the required standard and set a timeframe for assessment
 - » Deal with problems early. Don't let them fester.
 - » Employer must establish the reason or principal reason for dismissal and a lack of clear evidence of poor performance is therefore likely to render the dismissal unfair.
 - » Must go through a formal warning process.
 - » Informal management
 - » Formal process leading to first written warning and targets set
 - » Final written warning and targets set
 - » Dismissal
 - » Performance issues lead to a dismissal on notice – so review the contract of employment / burgundy book

- » Sickness absence issues...
- » Short term versus long term.
- » Is there any disciplinary issue (genuine or not genuine absences)
- » Obtain medical advice
 - » An employer is entitled to take a medical opinion at face value
 - » However, in CFS Management Services Ltd v Thomas [2012] UKEAT/0511/11 it was held to be unreasonable of an employer to rely on a medical report which was obviously flawed.
 - » Where the employer obtains more than one medical opinion and the two opinions conflict, a reasonable employer would usually take steps to resolve this conflict

- » When dealing with sickness absence issues:-
- » Consider Reasonable adjustments to avoid a discrimination claim
- » Explore all alternatives to dismissal
 - » Alternative employment is the most common alternative to dismissal, although other examples include ill-health retirement or the employee claiming permanent health insurance.
 - » There is no obligation to create a role
- » Dismissal
 - » Reasonable if you can show the employee is not about to come back to work in the foreseeable future
 - » Ensure medical opinion is in place and up to date

- » Redundancy needs to be the real reason for the dismissal and the employer needs to follow a fair procedure (following your policies and including a 3 stage process)
- » The test of reasonableness - A tribunal must consider whether the decision to dismiss an employee was within the range of conduct that a reasonable employer could have adopted ("the band of reasonable responses test"). A Tribunal should not impose their own standards.
- » Reasonableness: Polkey guidelines
 - » Warns and consults employees, or their rep(s), about the proposed redundancy
 - » Adopts a fair basis on which to select for redundancy. An employer must identify an appropriate pool from which to select potentially redundant employees and must select against proper criteria.
 - » Considers suitable alternative employment. An employer must search for and, if it is available, offer suitable alternative employment within its organisation
- » Must give the right to appeal

Fair or unfair?

Heads or Tails.....



» ***Shrestha v Genesis Housing Association Ltd [2015] EWCA Civ 94***

- » Used his own car to travel - claimed expenses for the mileage travelled
- » An audit of the employees mileage claims - unusually high mileage (2x)
- » Disciplinary procedure against employee alleging that he had fraudulently over-claimed mileage expenses.
- » Employee gave several explanations for the mileage discrepancies: difficulty in parking, one-way road systems, and road works causing closures or diversions
- » Chair of Disciplinary questioned Employee regarding two of the journeys in question. He considered that it was not necessary to go through each and every journey because every journey was above the mileage suggested by both the AA and RAC.
- » Summarily dismissed for gross misconduct.
- » Argued not a "reasonable investigation".

» **Fair or unfair?**

» ***Shrestha v Genesis Housing Association Ltd [2015] EWCA Civ 94***

» **FAIR – HEADS WINS**

- » While an employer should consider any defences advanced by an employee, the extent to which it should investigate each line of defence will depend on the circumstances of the case. In a case such as this, it was misleading to talk in terms of distinct lines of defence.
- » What mattered was the reasonableness of the investigation as a whole.
- » You do not need a perfect investigation. You need a reasonable one.



- » ***Pendleton v Derbyshire County Council & Anor UKEAT/0238/15/LA***
- » Claimant was a teacher of many years with an exemplary record of service. Dismissed after failing to end her relationship with her husband (a Headmaster of another local school) after he had been convicted of making indecent images of children and voyeurism.
- » Brought a claim for religious discrimination - she was Christian and believed in the sanctity of marriage. She felt it was unfair to dismiss...
- » **Fair or unfair?**

» ***Pendleton v Derbyshire County Council & Anor UKEAT/0238/15/LA***

» **UNFAIR – TAILS WINS**

- » The EAT agreed with the Claimant as this practice by the school put those with the belief in the sanctity of marriage vows at a particular disadvantage.
- » The dismissal was held to be unfair.
- » The religious belief and discrimination outweighed the right to dismiss.



- » **City of York Council v Grosset UKEAT/0015/16**

- » The claimant was a teacher at a school operated by the City of York Council (the council). The claimant suffers from cystic fibrosis.
- » The claimant was dismissed after it was found that he had inappropriately shown the 18-rated film Halloween to a class of vulnerable 15 and 16 year-olds.
- » The ET after reviewing medical evidence that wasn't available to the council at the time of dismissal was satisfied that that misconduct had arisen as a consequence of the claimant's disability.
- » The council appealed to the EAT on the grounds that its decision to dismiss the claimant didn't amount to discrimination arising from disability. The appeal focused on causation and what the council knew at the time of dismissal.

- » **Fair or unfair?**

» **City of York Council v Grosset UKEAT/0015/16**

» **UNFAIR – TAILS WINS**

- » An employer could be guilty of discrimination arising from disability even in cases where the employer has reasonably concluded (on the basis of the available evidence) that the "something" for which it is proposing to dismiss a disabled employee is not caused by their disability.
- » The Council is seeking permission to appeal to the Court of Appeal.



» **Quick question**

- » Mrs X is alleged to have been drunk at school.
- » This is a disciplinary allegation – which may amount to gross misconduct
- » There is no hard evidence to prove
- » Several staff have come forward to provide witness evidence
- » Do we need to prove misconduct?

» **Yes or no?**

- » **Heads – Yes**
- » **Tails - No**

» **Quick question – Mrs X**

» **No – TAILS WIN**

- » An employer must carry out a "reasonable" disciplinary investigation and form a "reasonable" belief based on the facts, on the balance of probabilities.
- » There is no requirement in law for that belief to be true.
- » The employer must hold a reasonable belief – that is all.



Questions?



Graham Vials

Associate | Employment

E: graham.vials@wardhadaway.com

T: 0191 204 4383