West Midlands Councils
Employer Services

WEST MIDLANDS COUNCILS

# HR Bulletin *E-Update 12 - March 2011*

**No error of law or perverse decision- ET decision reinstated**

***In the case of Fuller v London Borough of Brent, the Court of Appeal has overturned the EAT decision that the Tribunal had substituted its own view, rather than providing a more objective test. The CA felt that the EAT had been overly critical in its findings and needed to read the judgment more in the round as opposed to focusing on the language which lead to subsequent over-analysis.***

**Background**

Fuller was an administrator in a maintained school specialising in teaching children with emotional and social problems. There were approximately 30 children not in mainstream school. Many of the 20 staff were trained in restraint techniques. Fuller's job meant she did not have contact with children, however in May 2007 an incident occurred where teaching staff were trying to control a child and Fuller intervened. The Headteacher spoke to Fuller and told her she was not to get involved with either the discipline or behavioural restraint of children in the school as it was not her job to do so. For reference, during the incident Fuller complained about the treatment of the child but there was no further discussion or disciplinary action taken about the incident. The Headteacher issued a revised 'restraint of behaviour policy' and provided training to staff, but Fuller did not attend this training as she had no contact with children.

In October 2007, another incident that required behavioural restraint occurred in which a child was kicking and screaming whilst being vigorously restrained. Fuller again intervened by telling the staff that that they needed to stop as they were hurting the child and stating that the staff did not care. The Headteacher was present and told Fuller to go back to the office which Fuller refused to do. Fuller commented that one of the staff was restraining the child in an inappropriately sexual way.

The Headteacher threatened to suspend Fuller and asked her to leave. It was observed that the child became more troublesome and reacted more violently to staff following Fuller's intervention.

The Headteacher investigated the October incident, interviewing 6 staff. Fuller was asked to provide a statement but did not do so. She also did not respond to attending a meeting. On 31 October, the Headteacher wrote to Fuller describing the matter as being of a 'serious child protection nature' and Fuller was suspended.

Fuller's solicitor wrote asking for details of the allegations. The Headteacher responded referring to the allegations as 'totally inappropriate intervention into a behaviour management issue regarding a pupil'. Statements were also made about the inappropriate comments made to staff and that this second incident occurred after a verbal warning had been given (in May).

Fuller was invited to a disciplinary hearing to answer to the allegations of unacceptable and inappropriate language in front of a pupil; repeated and inappropriate intervention into behaviour management issues; failure to follow a reasonable management instruction and finally questioning her professional competence which they felt was of a serious and persistent nature.

Fuller chose not to attend the hearing held in February and, in her absence, she was dismissed for gross misconduct; the grounds being that she had been found guilty of all of the matters brought before the Chair of Governors.

Fuller appealed against the dismissal, but did not attend the appeal hearing because her representative was unavailable. Her request for an adjournment was refused as the panel felt that there was no good reason why Fuller could not attend herself. The school did not uphold her appeal so she proceeded to take her case to the employment tribunal.

**The Tribunal**

The tribunal had concerns about the way that the investigation was carried out and in particular the lack of impartiality the Headteacher would have in conducting the investigation, but it could not fault the investigation itself. The tribunal felt that the May incident, described by the school as being a verbal warning, had been 'built up to more than it was'. It felt that whilst the school had the right to be concerned, the behaviour that followed did not warrant dismissal. The tribunal felt it was a one off incident and no reasonable employer would have reached the same conclusion. It therefore decided the dismissal was unfair. The school appealed to the EAT arguing the tribunal wrongly substituted its own view.

**The EAT**

At the EAT, the school argued that the tribunal wrongly regarded the May incident as not being a warning due to it not being conducted through the appropriate procedure. It felt the tribunal were also wrong in its belief that the respondent had rolled up the two incidents. The EAT agreed with the school regarding the tribunal substituting its own view about the sanction. It felt that the tribunal has failed to take into consideration the unique nature of the school and the problems it dealt with and therefore it had a right to determine what it felt was inappropriate. The EAT said about the Tribunal's judgment:

***'It is in order for a tribunal to decide what a reasonable employer would have done. The criticism in this case is of what the employer did without measuring it against that standard. Just because there are criticisms of what the employer did does not mean that the action fell below the standard, or outside the range of responses of a reasonable employer in dealing with the three stages of British Home Stores'***

As a reminder of the *Burchell* principle in *Burchell* v *British Home Stores*, EAT, the test is as follows:

- Is there a genuine belief on behalf of the employer that the employee was guilty of the alleged misconduct?
- Was that belief reasonably founded (through a reasonable investigation as the basis for its conclusions)?
- Could a reasonable employer dismiss for the misconduct?

The EAT felt that throughout the Tribunal's summation there was a reference to 'we felt' resulting in the EAT supporting the view that the Tribunal had substituted its own judgement which was not its place to do. Furthermore, whilst Fuller had not received a formal warning for the May incident, it felt that the incident was relevant as the employee would have known her behaviour on the second incident was unacceptable. It concluded that Fuller was solely dismissed for the October incident, referring to Airbus v Webb CA, (previously covered in our Bulletin) which confirmed that all incidents relating to the background of a dismissal, including an expired warning are relevant when considering whether or not to dismiss. Therefore, the tribunal should not have described the incident as a 'one off' as there were acts preceding it.

Accordingly, EAT allowed the appeal, concluding the Tribunal's decision that the dismissal was unfair should be overturned.

**Court of Appeal.**

The Court of Appeal agreed with the EAT that some passages in the Tribunal judgment invited criticism but the key question for them was whether the EAT was justified in setting aside the finding of unfair dismissal and dismissing Fuller's claim.

The CA found that the tribunal got off on the right footing by asking the correct question which was 'was this belief founded on reasonable circumstances?' The CA felt that the Tribunal had answered this correctly that whilst expressing some concerns about the investigation being carried out by the Headteacher, concluding that it was exemplary in relation to the investigating of the witnesses. At this point therefore the Tribunal had not substituted it's own view. It was therefore necessary to consider the range of reasonable responses.

**Range of reasonable responses (law, fact and argument)**

In reviewing the case the CA highlighted that;

- The tribunal acknowledged that it was not for them to substitute its own judgment for that of the employer (which is the ' law' consideration);
- and then asked, was it reasonable to dismiss for this misconduct? (the 'facts 'consideration)

However, the tribunal then "took a wrong turning" by stating what its members 'felt' and giving its justification for it by reference to its findings of fact, rather than making an objective assessment of the reaction of a hypothetical reasonable employer; the telling lines being "we felt the behaviour itself did not merit dismissal" and "looked at carefully we felt that no reasonable employer would have dismissed her for a one off incident".

**'Argument'**

If the tribunal's answer was based solely on this statement, the CA would have agreed with the EAT that there was an error in law. However the correct answer to the question is based on a required objective test and the tribunal judgement also stated that "we felt that any reasonable employer would have imposed a lesser penalty which might have involved an apology to the teacher accused of sexual assault and may have involved some form of warning".

The CA therefore felt that a reasonable tribunal could have concluded that the dismissal fell outside the range of reasonable responses and was unfair, and as the Tribunal applied the objective test, it did not err in law, so there was no ground to dismiss Fuller's claim. Even if there was an error in law because the wrong legal test was applied, the CA concluded that it did not find the Tribunal's decision to be perverse.

If those circumstances had occurred, the correct route would have been to refer the matter to a fresh tribunal to consider a rehearing at which the range of reasonable responses could be applied.

**CA's conclusion**

In reinstating the tribunal's decision, The CA then made three pertinent comments:

- When a tribunal asks a correct legal question e.g. is an investigation reasonable in all the circumstances, it should give a specific answer to it in addition to a discussion of the facts, law and argument. This is not for the EAT or the courts to work the answer out for themselves. Failing to answer the question only encourages an appeal which may be false optimism;
- An employee undergoing disciplinary action and facing possible dismissal should normally participate in the process by complying with an employer's reasonable request to provide statements, information and representations to attend the hearing. As the EAT acknowledges 'Fuller did not assist herself by not attending the meetings';
- Employees who have concern about the way in which fellow employees perform their duties (whistleblowers) should raise the matter in the right quarters rather than intervening directly with work situations which are outside their area of experience or responsibility.

**It is questionable if a different conclusion would have been reached if previous incidences had been taken through a formal disciplinary processes which strengthens the need for robustness in disciplinary processes, but it is perhaps refreshing that the Court of Appeal recognised that this is not always easy when staff refuse to cooperate. Formal warnings are better and ACAS recommends employees should be given at least one chance to improve before a final written warning issued and then dismissal (subject to the severity of the issue).**

# HR Bulletin *E-Update 12 - March 2011*

## Employer Services Team is here to help

***For advice and information on employment issues (including on any of the contents of this Bulletin) and consultancy support contact:***

***Colin Williams , Director of Employer Services on 07785 727306 (c.williams@wmcouncils.gov.uk)***

***Michelle Cartwright, Regional Adviser/Consultant-Employer Services on 0121 678 1019 or 07771 373202 (m.cartwright@wmcouncils.gov.uk)***

***Shane O'Callaghan, Regional Adviser/Consultant-Employer Services on 0121 678 1038 or 07771 373201 (s.ocallaghan@wmcouncils.gov.uk)***

***For general queries, please use our central inbox hr@wmcouncils.gov.uk***

***People and Leadership Team***

**Steps to Leadership: Accelerate**

- Do you have new or aspiring managers in your organisation?
- Do you want to offer them useful techniques and tools that can be used immediately?
- Do you want to develop their skills and competencies to become effective public sector managers and leaders in the future!

The Steps to Leadership Accelerate programme is an innovative, creative and exciting 'new and potential managers programme'. The delivery and content of the programme is unlike any other leadership programme currently offered and was developed by the public sector for the public sector.

**New cohort now available! Starts Wednesday 29th June 2011**

The overarching priority will be to enable delegates to develop skills and competencies to become effective managers and leaders in the public sector in the future. It will also provide support and development opportunities to those individuals with the ambition and potential to further their career.

**Who is Accelerate suitable for?**

This programme is aimed at new or aspiring managers who desire to progress their career within local government and the public sector. In addition to learning lots of useful techniques and tools that you can immediately use, it will also broaden your perspective and understanding of local government and the public sector and prepare you for future roles.

**What will you gain?**

- Lots of practical tools you can use to enhance your approach to leadership.
- An increased awareness of the issues facing leaders within the public sector
- An opportunity to network with and learn from other managers within the public sector.
- Enhanced future career prospects.

Accelerate is also an ILM recognised development programme. All delegates will receive ILM membership paid for 1 year.

**What will Accelerate involve?**

- Attending 6 full day workshops
- Participating in 3 half day Action Learning set meetings
- Completing 4 module projects (4 hours personal study per project).

**Modules:**

- Motivating and managing a team
- Partnership working
- Officer and elected member relations
- Self promotion

The Steps to Leadership Accelerate programme is now open for bookings for Cohort 11 starting in June 2011. Please see the Information for Applicants page for booking information - http://www.wmcouncils.gov.uk/stepstoleadershipaccelerate

Steps to Leadership Accelerate can be delivered in house at your organisation and can also be tailored to include topics or issues important to an organisation. Please email Samantha Darby, s.darby@wmcouncils.gov.uk to discuss these flexible options.