THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

MEMBERS: **Ms S Campbell**
Mr G Henderson

BETWEEN:

Mr E Reid

Claimant

and

London Borough of Lewisham (1)
The Governing Body of Horniman School (2)

Respondents

ON: **27 -24 February 2017**
25-27 April 2017 (In Chambers)

Appearances:

For the Claimant: Ms S Sleeman, Counsel
For the Respondent: Mr D Panesar, Counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

1. The claim of disability discrimination fails.
2. The claim of unfair dismissal succeeds but a 50% *Polkey* deduction is applied to any compensatory award.
3. A hearing to consider remedy will be listed on a date to be advised.

REASONS

1. By a claim form presented on 23 May 2005, the claimant complains of unfair dismissal and disability discrimination. The respondent admits dismissal and that the claimant is disabled for the purposes of the Equality Act 2010 (EqA) but denies that the dismissal was unfair or that it discriminated against the claimant.

2. We heard evidence from the claimant on his own behalf. The respondents gave evidence through Julie Loffstadt, Head Teacher; Pat Walker, School Governor; Michael Roots, Parent Governor; Brian Collymore, Human Resources Adviser; and Rosemary McGrath, School Governor.

3. The parties presented a joint bundle comprising 4 lever arch folders comprising in excess of 1370 pages. References in the judgment in square brackets are to pages within the bundle.

Issues

4. The issues are agreed save for the PCPs (provision, criterion or practice) in respect of the section 20 EqA claim. We deal with the issues more specifically in our conclusions.

The Law

5. Section 20 EqA provides that where a person (A) applies a provision, criterion or practice (PCP) which puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled it is the duty of (A) to take such steps as it is reasonable to have to take to avoid the disadvantage.

6. Section 21 EqA provides that a failure to comply with a section 20 duty constitutes discrimination against a disabled person.

7. Section 15 EqA provides that a person (A) discriminates against a disabled person (B) if –
   a) A treats B unfavourably because of something arising in consequence of B's disability, and
   b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

8. Under the Code of Practice on Employment, the definition of something arising in consequence of disability includes anything which is the result, effect or outcome of a disabled person's disability.

9. In considering the issue of proportionality, we must ask ourselves whether the treatment of the claimant was reasonably necessary to achieve the stated aims. Allonby v Accrington & Rossendale College and others [2001] EWCA 529. Put another way, could the aims reasonably have been achieved by a less discriminatory route and do the respondent's aims outweigh the discriminatory impact of the treatment/measures.

10. We remind ourselves that unlike unfair dismissal, the test of proportionality is not "band of reasonable responses". Rather, we must reach our own view on whether the action of the respondent was an appropriate and necessary means of achieving the legitimate

aim. That involves a balancing of the reasonable needs of the business against the effects of the respondent's actions on the claimant.

Findings of Fact

1. The second respondent (R2) is a community school controlled by the London Borough of Lewisham, the first respondent (R1). It is a small school with a capacity of 240 pupils. At the relevant time it had 1 class per year group, of between 11-12 pupils per class; 1 teacher per class, plus a float and a specialist in Music and Foreign languages. There were 44 staff on its books and 14 governors, a large percentage of whom were parent governors.

2. The claimant was employed by R1 from 20.4.98 until his dismissal on 31.12.15 as a permanent unqualified teacher of music at the school, working 3 days a week. Music was an essential part of what the school provided and the claimant was the only permanent music teacher.

3. Since the early 1980s the claimant has suffered from an anxiety disorder and he relies on this as his qualifying disability.

4. On 1 January 2014, Julie Loffstadt (The Head) became the Headteacher at the school. It was her first job in the role.

5. On 9 September 2014, the start of the new academic year, the claimant was signed off work by his doctor with work related stress and remained off continuously until his dismissal 14 months later.

6. The claimant says that the trigger for his absence was receiving the 2014/15 academic timetable for his music lessons. In June 2014, he had met with the Head to discuss his timetable for the next academic year and had told her of his preferred pattern of teaching. The claimant says that the timetable presented to him on 3 September had not accommodated any of his preferences. The effect that this had on him is described at paragraph 8 of his witness statement. He says that he broke down and suffered a range of symptoms together; including dizziness, stomach cramps, diarrhoea, headaches, loss of appetite, insomnia.

7. On 3 October 2014, the claimant lodged a grievance against the Head alleging a bullying management style. [111-120]. In brief, he claimed that he had been bullied, ignored and undervalued by the Head and that this had caused him untold stress.

8. We don't need to go into the detail of the grievance but there are 2 allegations in particular that are worth mentioning. The first is that, for some unknown reason, he was treated less favourably and negatively in comparison to his colleagues by the Head ignoring him when he greeted her in the morning. [112] The second and more serious allegation relates to an incident on 6 February 2014. The claimant claimed that he was carrying a school iMAC computer from one room to another for his afternoon music session and was confronted by the Head who aggressively asked where he was going with it. The claimant says about this in his grievance that: "*I felt I had been stereotyped as a thieving black male who shouldn't have been walking around with such a valuable item. There was a clear inference that I must be up to no good…………This incident has made me extremely uneasy and destroyed my confidence and faith in Ms Loffstadt as a Head Teacher. After all if she can treat me in this challenging and inappropriate*

manner, how can I be confident of her treatment towards the students I mentor, mainly black boys?" [113]

9. On 17 October 2014, the Head was sent formal notification of the grievance, and a copy, by Brian Collymore (BC) part of R1's HR Team. [238-239] BC provides HR advice to the school under a service level agreement between R1 and R2. In his letter BC advised the Head of the option of resolving the matter informally through Mediation, which is provided for under the school's grievance procedure. The conditions for Mediation are set out at clause 5.4 of the procedure and make clear that it is voluntary and will only take place with the agreement of both parties. [320].

10. The Head sought advice from BC as to whether she should proceed down the Mediation route and it is fair to say that he was lukewarm and decidedly discouraging about that prospect, to put it mildly. In one exchange of emails BC tells the Head that mediation is a waste of time and that he thinks it is best for her to say no to it so that the matter can go straight to a hearing. [256] The Head did say no to Mediation though she contends that she came to that decision herself. She told us that when she read the grievance, she was shocked by its contents and hurt that she could have been so misinterpreted. She said that she was concerned that if she entered into Mediation, there was a risk that she would find herself in another grievance and therefore wanted the comfort of a formal structure behind her to give some support.

11. The Head provided her response to the grievance and on 18 December 2014, the grievance was heard by a panel of 3 governors [439-463]. The outcome of the grievance was that none of the complaints were upheld. [465-471] The claimant lodged an appeal and one of the things he sought was the school's proposals for repairing the breakdown in his relationship with the Head. [1211-1212] Although the appeal was subsequently withdrawn, this remained a constant request throughout the claimant's absence.

12. In the meantime the claimant remained off sick and his absence needed to be managed. Normally this would be the Head's responsibility but in order to diffuse the situation, it was decided that Sofie Hashmi, (SH) Assistant Head, would manage the absence instead.

13. On 18 March 2015, SH held an absence review meeting, which was attended by the claimant and his union representative, Jo Laverty (JL). The claimant stated that he was not fit enough to return to work at that point but when he was, he would require lots of support. JL asked whether there would be a reconciliation meeting with the Head and if so, whether she would be willing to meet with the claimant. SH said that there would have to be such a meeting and that she was sure that the Head would be willing to participate in such a meeting. [618-622] This was an assumption on the part of SH as she had no specific instructions from the Head to that effect. Although details of the discussion were relayed to the Head afterwards, no arrangements were made by her or anybody else within management to schedule such a meeting.

14. There were 5 OH reports over the period of the claimant's absence and they all attribute his continued absence to the unresolved workplace issues. In the report dated 29 April 2015 (received by R1 on 19 May), R1 was advised to organise a meeting with the

claimant before his return to work to discuss his concerns, identify the stressors and minimise them where possible. [661-662]

15. JL had repeatedly asked R1 for its proposals on meeting with the claimant to address his concerns and according to her email to BC of 29 June 2015, she was repeatedly told that it was up to the claimant to come up with a solution. In the email, JL complains about the lack of suggestions from management as to how bridges could be built to facilitate the claimant's return to work. She goes on to say that if the school could not think of a positive way for him to return, it may be best if he left. She then raised the prospect of redeployment. [707]

16. In his reply, although BC acknowledged that the claimant would have to meet with the Head at some point if he wanted to return to work, he did nothing to facilitate this. On the issue of redeployment, BC said it was unlikely but that he could facilitate this by designating the claimant a medical redeployee. He explained that to do so, the claimant would have to be served with notice of termination of his contract. [735-736]. BC told us that this requirement was not contained in any written policy but was the normal practice within Lewisham.

17. On 30 June 2015, R1 held a stage 1 capability meeting. This is the informal stage of attendance management under its Capability Procedure. The claimant did not attend the meeting but was represented by JL. Following the meeting, R2 wrote to the claimant informing him that it had decided to convene a stage 2 - formal action - meeting. [691]

18. In the meantime, JL informed BC that the claimant wished to pursue medical redeployment. As a result, the stage 2 meeting, which had been scheduled to take place on 16 July, was cancelled and the claimant was served with 12 weeks' notice of termination of employment, commencing on 9 October 2015 and expiring on 31 December 2015. The letter advised that if in the meantime he was declared fit for work by OH, his medical redeployment status would be revoked and the notice of termination would be rescinded. It also advised that if redeployment was not possible and he remained unfit for work, the matter would proceed to stage 3 of the capability procedure in order to consider whether to dismiss him (even though the decision to dismiss had already been taken). [745-747]

19. The claimant received one offer for a teaching post through the medical redeployment process, but he felt unable to accept it as it was not a music position.

20. On 20 October 2015, BC informed JL that a formal capability meeting was being arranged to consider whether the claimant should be dismissed because it had not been possible to medically redeploy him. [989]. On 22 October, BC sent a further email asking JL to inform the claimant that he would be referred to OH before the stage 3 hearing. [987]

21. On 2 November 2015, BC wrote to the claimant notifying him that a stage 3 capability had been arranged for the 16 November 2015 at 1pm. [1028-1029]

22. On 27 October 2015, BC was informed that an appointment had been made for the claimant with OH on 25/11/15. Although BC asked for the appointment to be brought forward to a date before the stage 3 hearing, this did not happen. The claimant was only

notified of the appointment by letter dated 17 November 2015, the day after dismissal, which he says he did not receive. [1093]

23. The hearing duly took place on 16 November before a panel of 3 governors, chaired by Mike Roots (MR). The claimant was accompanied by JL. The Head attended to present the management case. She recommended his dismissal. The claimant on the other hand claimed that he was fit to return to work. [1073-1087].

24. The claimant was notified of the decision to dismiss him by email on 17 November. [1093A] This was followed up by a formal letter of dismissal dated 23 November 2015. [1094-1099]

25. On 8 December, the claimant lodged an appeal against his dismissal. The main ground of appeal was that the panel did not obtain a more up to date medical report before making its decision. He also made the clear point, as he did at the stage 3 hearing and before us, that he was ready to deal with issues he had previously not been able to and that he was willing to do what was required to get back to full teaching at the school. The claimant makes clear in the appeal letter, as he did at the stage 3 hearing that he was willing to engage in mediation [1107-1114]

26. Notwithstanding that the claimant was still employed, he was not re-referred to OH.

27. Between the dismissal and the appeal, JL requested a medical report from the claimant's GP in support of his appeal against dismissal. The report contained the following passage:

   "*Throughout the time he was off sick I saw him on a regular basis and monitored him for depression. He had no symptoms severe enough to merit medication. On discussion with him he was quite clear that he did not want to take medication and would be able to work in a different environment. In August he reported that he had asked to be deployed to another school but I understand that no appropriate placement has been found.*

   The reason for the increasing length of time on the certificates was because it was obvious to me there was going to be no different situation unless he was able to be in a different school. We had an agreement that if a place was found, he would return to me and I would issue him a certificate of fitness for work. I have not been asked for a report on his health from the occupational health department. I would normally have expected this after somebody had been off sick for such a length of time". [1169-1170]

28. Accompanying the report was a fit note stating that the claimant may be fit for work if there were mediation as this may be helpful in resolving the issues at work. [1168]

29. Both the report and sick note were provided to the appeal panel.

30. The appeal hearing took place on 14 January 2016 before a panel of 3 Governors, chaired by Sarah Briche. [1201- 1210] The claimant reiterated that he was fit to return to work but in order to do so, needed to have a reconciliation meeting with the Head as he did not want to return to a hostile environment.

31. On 20 January 2016, the respondent wrote to the claimant rejecting his appeal. [1225-1229]

Submissions

32. Both parties presented written arguments supplemented by oral submissions. The submissions are summarised briefly below.

Claimant's Submissions

33. The PCP relied on for the section 20 claim is a minor re-wording of the PCP in the original pleadings and does not amount to a change in PCP. The respondent's attendance requirements placed the claimant at a substantial disadvantage compared to non disabled employees as his disability related sickness put his attendance well below the expected level as a result of which, he was subjected to the respondent's capability procedure. It would have been a reasonable adjustment to adjust the capability procedure. It would have been reasonable for the respondent to have engaged in mediation and/or promoted reconciliation between the claimant and the Head as this would have allowed him to recover to the point where he could return to work.

34. Regarding the section 15 claim, the unfavourable treatment set out in the list of issues was not a proportionate means of achieving the respondent's legitimate aim. The aims could have been achieved by promoting reconciliation and obtaining an updated OH report.

35. The dismissal was unfair procedurally and substantively. If the recommendations of OH had been followed, there was a strong chance – 80% - of the claimant returning to work.

Respondent's Submissions

36. It is accepted that the claimant's absence arose out of his disability. His dismissal by reason of ill health was unfavourable treatment but a proportionate means of achieving the respondent's aim of ensuring staff are available and present to teach.

37. The PCP relied on by the claimant in his further particulars of claim was the requirement to meet a 97% attendance rate. He cannot seek to rely on a new PCP at the hearing. The claimant was not required to meet a 97% attendance rate. He was dismissed after 14 months of absence during which he was paid 6 months' full pay and 6 months' half pay. All the sickness certificates throughout the absence declared the claimant unfit for work. Mediation/promoting reconciliation would not have ameliorated the claimant's vehement sense of grievance against the Head which persisted up to his dismissal and beyond.

38. Given the medical evidence, dismissal was within the band of reasonable responses to the claimant's absence. If the tribunal finds otherwise, given that the claimant remained unfit for work post dismissal, it was an inevitable consequence that he would have been dismissed in any event.

Conclusions

39. Having considered our findings of fact, the parties' submissions and the relevant law, we have reached the following conclusions on the issues:

Discrimination arising in consequence of disability

40. The Claimant relies on the following matters as unfavourable treatment: i) failing to promote reconciliation; ii) beginning capability proceedings without an updated OH report; and iii) dismissal. We are satisfied that all of these amount to less favourable treatment. The issue for us is whether they arise in consequence of disability.

41. In relation to (i) failure to promote reconciliation, this was not because of something arising in consequence of the disability. The issue of reconciliation arose because of the claimant's grievance which was based on alleged incidents occurring prior to the absence. There is no evidence before us of a link between any failure by the respondent to promote reconciliation and the claimant's disability. Similarly, in relation to (II) we cannot see how the respondent's failure to obtain an updated OH report was because of something arising in consequence of disability.

42. However, we accept that the dismissal arose because of something arising in consequence of disability, namely, the claimant's long term absence, caused by his anxiety and depression which the respondent concedes is a disability.

Proportionate means of achieving a legitimate aim

43. The respondent's stated legitimate aim was to ensure that staff were available and present to teach and that the School operated appropriately in relation to the same taking into account its financial obligations and obligations to other staff and pupils. We are satisfied, objectively, that this is a legitimate aim for the respondent to have.

44. In determining the question of proportionality, we have considered whether there was a less discriminatory way of achieving the stated aim. The claimant contends that promoting reconciliation and obtaining an updated OH report would have been proportionate. However, that would only achieve the legitimate aim if it resulted in the the claimant being fit to return to his role as a music teacher. In considering proportionality, the tribunal is entitled to take into account matters that occurred after the dismissal. Cadman v Health and Safety Executive 2004 EWCA Civ 1317, Although that case was looking at justification in the context of indirect sex discrimination, the principle is of equal application to a section 15 claim.

45. For the reasons set out under the Polkey heading below, we are not satisfied, on balance of probability, that the promoting reconciliation and obtaining an updated OH report would have led to the claimant's return to work in the foreseeable future. In the 14 months of the claimant's absence, the school had to rely on supply music teachers. This did not allow for continuity of teaching or curriculum development at a time when the school was required to develop a new curriculum in line with new national guidelines. The Head told us that with no-one leading music, the school was unable to move forward. That no doubt had a detrimental effect on the pupils. In those circumstances, we find that the respondent's need for a permanent music teacher who was present and available to teach outweighed the claimant's need to remain in employment and that dismissing him (thereby allowing the school to hire a permanent replacement) was a proportionate means of achieving its aim. In those circumstances, the section 15 claim fails.

Reasonable Adjustments

46. In his further and better particulars, the the claimant defined the PCP as an expected attendance rate of 97%. [62]. In the list of issues, the PCP had been slightly varied to the requirement to maintain a certain level of attendance at work in order to avoid risk of sanction. In our view this is a distinction without a difference as the evidence of BC was that it was the normal practice in Lewisham to apply an expected attendance rate of 97% and that was not disputed.

47. The claimant was not at a substantial disadvantage because of this PCP as it was not applied to him. By the time stage 1 of the capability procedure was triggered he had been off sick for 7 months [657] and by the time of his eventual dismissal, he had been absent for 14 months. The claimant's attendance rate was therefore significantly below 97% by the time the respondent's took formal action.

48. The second PCP relied upon is "*requiring the Claimant to return to work without encouraging and arranging mediation/informal discussions to facilitate the Claimant's return to work*". Firstly, this was a new PCP introduced at the hearing. It was not in the further and better particulars of claim. Secondly, the claimant appears to have conflated the concept of PCP with reasonable adjustments by treating the respondent's failure to make the suggested adjustments as the PCP. The two are separate and the duty to make adjustments is dependant upon the existence of a PCP. In most cases, a PCP will apply more widely than just to a claimant. In our case, there is no evidence before us that the respondent applied such a PCP. In the absence of a PCP, the duty to make adjustments does not arise. The section 20 claim is not made out.

Unfair Dismissal

Reason for dismissal

49. It is common ground that the claimant was dismissed for capability. The decision to dismiss with effect from 31 December 2015 was taken in July 2015 when he was put forward for medical redeployment. That is clear from the respondent's letter of 16 July 2015, which reads: "*This letter should be regarded as formal notice of termination*" and giving a termination date of 31 December 2015. [745-747] Although not expressly stated at the time, this was clearly because of his ill health [746]. If there was any doubt about the reason at that stage, the position was made clear in the stage 3 outcome letter dated 23 November 2015. [1094-1099]. We are therefore satisfied that the reason for dismissal was capability.

50. Having established the reason for dismissal, we went on to consider whether dismissal was in all the circumstances fair.

51. Two important aspects of a fair procedure in long term absence cases are i) consultation and ii) medical investigation. In reality the two are interrelated as the main purpose of consultation is to establish the true medical position and from that the likelihood of a return to work in the near future.

52. There was no discussion at that stage with the claimant about his medical position or about the decision to dismiss before the decision in July 2015. Indeed, the respondent's position at the time was that the claimant had to be dismissed in order to be considered

for medical redeployment. Whilst we were told that this was the respondent's practice, there was no legal reason why that should be so. Reserving the right to rescind the dismissal in the event that the claimant recovers sufficiently to return to work before the effective date of termination does not assist the respondent as a dismissal cannot be rescinded unilaterally; it requires the consent of the employee. Although the claimant agreed to medical redeployment, it is not the case (nor did the respondent seek to argue) that the he was, by so doing, consenting to his dismissal.

53. Although the decision to dismiss had already been taken, the respondent held a stage 3 hearing to consider whether that dismissal would in fact go ahead. The claimant was referred to OH for a further report for the purposes of this hearing, but the hearing took place before the appointment had taken place. Michael Roots, (MR),who chaired the hearing, was clearly alive to the issue as he had queried the need for an updated report with HR in early November. Despite being advised at the time by BC that a referral had been made and that if the question of the claimant's fitness was in doubt, they could defer their decision until an updated report had been received, the panel decided to proceed with the hearing. [1032]

54. At the capability hearing, the claimant had said that he was fit to return to work. All the hearing panel had by way of medical evidence at the time was the OH report of 4 June 2015 and a sick note dated 19.10.15. The OH report gave a prognosis of "…..*an adjustment disorder owing to a set of circumstances that need resolution*". The report said nothing about the likelihood of return. [687-688] The sick note signed the claimant off as unfit for work due to work related stress between 19.10.15 and 11.1.16 [971]

55. In relation to the claimant's contention that he was fit to return to work, MR says at paragraph 63 of his statement that the evidence had not suggested this and was ambiguous and inconsistent. If that was his view, then it is the more surprising that he did not adjourn the hearing to seek clarification by way of an updated OH report.

56. The appeal hearing was an opportunity to correct the situation. The lack of an up to date medical report and a willingness to engage in mediation were the key grounds of appeal. The claimant provided a further sick certificate and a GPs report for the appeal. The certificate dated 11 January 2016 signed him off until 15 February 2016 with stress at work but advised that he may be fit for work with workplace adaptations. Under "Comments" it states that mediation would be helpful in resolving the issues at work. [1168] The report from Dr Entwistle, who signed the certificate, is dated 12 January 2016 and the relevant passages are cited at paragraph 27 above. [1169-1170]. Both documents were provided to the appeal panel in advance. However, in its decision, the panel focused on the report alone, rather than looking at in context with the comments on the sick certificate. In our view, a reasonable employer faced with these documents and the claimant's contention that he was fit to return would have sought further clarification by way of an updated report from OH. The appeal panel did not do so.

57. It is clear to us from the notes of the appeal hearing, the appeal outcome letter and the evidence we heard from Rosemary McGrath, one of the appeal panellists, that there was a fundamental misunderstanding by the panel of the distinction between mediation associated with the grievance and mediation/reconciliation to clear the air between the claimant and the Head in order to facilitate a return to work. It was the latter that the grounds of appeal were addressed at and which the sick certificate alluded to, as had

previous OH reports. A constant refrain of the respondent was that mediation was voluntary under the grievance procedure and that the Head could not be compelled to engage in it against her will.

58. Because of this misunderstanding, the respondent failed to properly address this aspect of the claimant's appeal. Indeed, it appears to us from the notes of the hearing that when it came to the issue of reconciliation, the panel had a closed mind. When JL and the claimant tried to raise this, the panel, and MR, were quite defensive in their responses, querying why the questions were being asked and seeking to close down further discussion on the matter. The exchanges recorded on pages 1208–1209 of the bundle between the parties illustrate the point.

59. Further, there appears to have been little challenge of the respondent's case on reconciliation by the appeal panel. They seemed to accept the respondent's case that reconciliation was being dealt with by SH as part of the absence management process. That was abundantly clear from the evidence we heard from Rosemary McGrath who, when asked what evidence the appeal panel had of reconciliation efforts by the school, she referred to the actions by SH. The reality is that apart from telling the Head about the discussion on the subject at the the absence review meeting (see para 13 above), nothing was done by SH to progress the matter.

60. The appeal panel also appears to have accepted without question, the Head's evidence at the stage 3 hearing that no reconciliation meeting took place because an OH report had said that she was the cause of the claimant's stress and she did not want to cause him further stress by meeting him. [1077] There was good reason, in our view, for that account to be challenged based on the evidence available to the panel at the time. The OH report referred to is the one dated 29 April 2015 and although there is a reference in it to work related stress, it does not expressly state that the Head is the cause of it. In any event, this OH report was not seen by the respondent (and therefore the Head) until 19 May 2015, more than 2 months after the feedback from the absence review meeting. Yet there was no query from the panel as to the lack of action by the Head in the intervening period.

61. It is clear from JL's email to BC of 29/6/15 that in response to her many enquiries for suggestions as to how the relationship between the claimant and the Head might be repaired, she was repeatedly told by BC that it was up to the claimant to come up with a solution and manage this. [707] In cross examination, the Head told us that she was prepared to meet with the claimant but there was no response. This suggests to us that, like BC, she saw it as the claimant's responsibility to instigate reconciliation and not hers.

62. It is apparent from a number of email exchanges between the Head and BC following receipt of the grievance that she had a degree of antipathy towards the claimant. [142, 168, 201]. Her seemingly lukewarm approach to the idea of reconciliation suggests to us that those feelings had not diminished with the passage of time, despite her vindication by the grievance outcome.

63. None of these matters appear to have featured in the appeal panel's deliberations. Indeed it is noteworthy that appeal outcome letter makes no reference at all to reconciliation even though this was a main ground of appeal.

64. In our view, the respondent failed to properly deal with the claimant's appeal. No consideration was given to reconciliation and no up to date OH advice was sought on how reconciliation might impact on the claimant's ability to return to work.

65. In all the circumstances, we find that the dismissal was unfair.

Polkey

66. Having found that the dismissal was unfair, we have gone on to consider what the chances would have been of the claimant returning to work and therefore remaining in employment had a fair procedure been followed.

67. The general medical consensus at the time was that some form of mediation or reconciliation may (our emphasis) have been of assistance and it is likely that had an updated OH report been obtained, it would have expressed the same view. OH would probably have been unable to provide an assessment of the claimant's likely return to work in the foreseeable future without first knowing how successful the reconciliation attempts would be. That, however, is the assessment that we are now required to make.

68. The claimant's unfitness for work was directly related to the situation at the school. It is therefore reasonable to assume that in the event of successfully reconciliation, there would be no medical reason preventing his return to work. Conversely, if reconciliation failed, then, based on the GPs report of 12 January 2016, the claimant would not have been fit to return to work unless it was at a different school. (para 27)

69. Although the claimant's grievance was rejected, he told us that he stood by his allegations. That, in our view, would have been a potential stumbling block to reconciliation. One of the most serious allegations against the Head was that of racial stereotyping (para 8) The claimant told us that he would have had to have raised this at any reconciliation meeting. The Head's explanation in relation to this matter was provided to the grievance panel and accepted by it. However it was not accepted by the claimant and he told us that his perception of those events was unchanged. Whilst a feature of "clearing the air" is to agree to disagree on matters for the sake of moving forward, that would have been particularly difficult in this instance.

70. In the 14 months that the claimant had been absent there had been significant changes to the Music curriculum and although the respondent had indicated to the claimant previously that a gentle timetable could be arranged on his return, it is possible that there would have been disagreement as to what that meant in practice. This is illustrated by what happened in September 2014 when the claimant had an extreme reaction to his new timetable for the September 2014 academic year, thereby triggering his absence. A meeting to discuss the timetable had taken place between the Head and the claimant in June 2014 and in his grievance, he claimed that none of his preferences provided at that meeting were accommodated in the timetable and that this was done by the Head deliberately in order to undermine him and actively cause him difficulty in his work. [118-119]. He has not resiled from that view. The Head's evidence, on the other hand, was that most of the claimant's preferences had been accommodated in the timetable (para 33 statement). Those divergent views suggest that a "meeting of minds" on reasonable adjustments, and indeed other matters, may not have been possible and that there was a real possibility for misunderstandings to arise.

71. Although a reconciliation meeting was repeatedly requested by JL on the claimant's behalf, there is of course the possibility that he would have been unwilling or unable to attend. For the purposes of these proceedings, the parties instructed a joint psychiatric expert to provide a report on the issue of disability. The report is dated 20 November 2016 and at paragraph 57 is the following entry:

    "It seems that his problems were all very situation specific. His inability to work related specifically to that school and he told me that, for example, if the Headmistress had left, then he would have been able to go back "absolutely". "There was no doubt that he would absolutely go back to work", but he couldn't go back whilst she was still there". [1364]. Both parties had the opportunity to comment on the report and this particular paragraph was not commented on by the claimant.

72. Whilst the report postdates the dismissal, that does not mean that the claimant did not hold the same view during employment. His obvious and enduring distrust of the Head and her motivations towards him certainly supports that possibility.

73. Taking into account these imponderables, we assess the chances of the claimant returning to work had genuine attempts been made at reconciliation at no more than 50%. There was therefore a 50% chance that he would have been dismissed fairly.

Judgment

74. The unanimous judgment of the tribunal is:

    a. The claim of disability discrimination fails.

    b. The claim of unfair dismissal succeeds but a 50% *Polkey* deduction is applied to any compensatory award.

75. A hearing to consider remedy will be listed on a date to be advised.

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Employment Judge Balogun
Date: 10 May 2017