Case No: 2302296/2015

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

MEMBERS:

Ms H Bharadia
Mr N Shanks

BETWEEN:

MS JENNIFER YOUNG

Claimant

AND

HARRIS FEDERATION

Respondent

ON: 2 - 6 October 2017

Appearances:
For the Claimant: In person
For the Respondent: Ms A Chute, Counsel

JUDGMENT

1. The claims of direct disability discrimination and harassment are dismissed upon withdrawal.

2. The claims of disability discrimination pursuant to sections 15 and 20 of the Equality act 2010 fail and are dismissed.

3. The claim of unfair dismissal fails and is dismissed.

4. The Equal Pay (like work) claim fails and is dismissed.

REASONS

1. By a claim form presented on 10 July 2015, the Claimant brought complaints of unfair dismissal, disability discrimination pursuant to sections 15 and 20 of the Equality Act 2010 (EqA) and Equal Pay (like work). Claims of victimisation were withdrawn prior to the hearing and claims of direct discrimination and harassment were withdrawn at the hearing. All claims were resisted by the Respondent and disability was not conceded.

2. The Claimant gave evidence on her own behalf. We heard evidence from the Respondent through: Sam Hainey, former Executive Principal; Christina Christodoulu, HR Business Partner and Paul Tunnicliffe, HR Business Partner. We were provided with a joint bundle plus the Claimant's supplementary bundle, with further documents being provided by both parties over the course of the hearing. References in square brackets are to pages in the joint bundle and where the reference is preceded with the letter "S" it relates to the supplementary bundle.

The Issues

3. The legal and factual issues are set out in an agreed list of issues document, as amended, and these will be referred to more specifically in our conclusions.

The Law

Disability Discrimination

4. Section 6 EqA provides that a person has a disability if they have a physical or mental impairment which has a substantial long-term adverse effect on their ability to carry out normal day to day activities.

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.

Unfair Dismissal

8. Section 94 of the Employment Rights Act 1996 ("ERA") provides the right not to be unfairly dismissed. Section 98(2) ERA sets out the potentially fair reasons for dismissal. One of those reasons is capability *98(2)(a*)

9. Section 98(4) ERA provides that in determining whether a dismissal is fair or unfair, the tribunal must have regard to whether in all the circumstances the employer acted reasonably or unreasonably in treating the reason shown by the employer as sufficient reason for dismissal.

10. In considering whether a dismissal is fair, the tribunal must not substitute its view for that of the employer but should consider whether dismissal fell within the range of reasonable responses open to the employer. The *range of reasonable responses* test applies to both the decision to dismiss and the procedure applied. Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA.

Equal Pay

11. Section 65(1) EqA provides that A's work is equal to that of B if it is:

    a. Like B's work
    b. Rated as equivalent to B's work, or
    c. Of equal value to B's work

12. 65(2) provides that A's work is like B's work if –

    a. A's work and B's work are the same or broadly similar, and
    b. Such differences as there are between their work are not of practical importance in relation to the terms of their work

13. 65(3) provides that on a comparison of one person's work with another's for the purpose of subsection (2), it is necessary to have regard to

    a. The frequency with which differences between their work occur in practice, and
    b. The nature and extent of the differences

Findings

14. Although we heard a lot of evidence from the parties, we have not referred to all of it in our judgment but have limited our findings to those matters we consider relevant to the issues.

Findings of Fact

15. The Respondent is a not for profit charity that provides education within primary and secondary Academies within London and the surrounding areas.

16. The Claimant was employed between 1 January 2012 and 24 March 2015 as a Teaching Assistant within the Special Education Needs Department (SENDS) at the Respondent's Academy in South Norwood.

17. On 10 February 2014, the Clamant was signed off work with a soft tissue injury. The Claimant says that the injury was received on 3 February 14' following an incident at work when a pupil (DP) barged into her (the "Incident"). The Claimant contends that this was a wilful and deliberate act on DP's part but the Respondent concluded, following grievance proceedings in relation to this matter, that DP's actions were accidental. For our purposes, it is irrelevant who is correct as we are only concerned with the fact of the injury, not its cause.

18. The Claimant remained signed off work until her eventual dismissal. Subsequent sick notes cited reasons for absence variously as anxiety, stress, depression and injury to left shoulder. It is the Claimant's case that these conditions all stem from the Incident and as a result of them, she is disabled for the purposes of the EqA [538].

19. On 23 April 2014, the Claimant was referred to Maitland Medical, the Respondent's Occupational Health (OH) providers. In the report that followed, dated 12 May 2014, OH advised that the Claimant had suffered a significant psychological reaction linked to the Incident. The report also identified a number of barriers to her return to work, the main one being an outstanding grievance. [268-271] The Claimant had lodged a grievance on 26 March 14' related to the Incident and how the Respondent had dealt with it. [210-218].

20. The Respondent's Staff Attendance and Sickness Management Policy (the "Absence Policy") sets out the procedure to be followed when an employee is on long term absence. The long term absence procedure will normally be triggered where an employee has been off for a continuous period of 20 or more working days. [152-156]. The formal stage commences with a first formal absence review meeting.

21. On 28 August 2014, the Claimant was invited to attend a sickness absence review meeting on 17 September 2014. This meeting was originally due to take place on 24 April 14', but the Respondent agreed to the Claimant's request to postpone it until after the conclusion of the grievance proceedings. [253].

22. The meeting was again rescheduled, for 1 October 14', in order to allow the Respondent to obtain an up to date OH report. That report, dated 23 September, concluded that the Claimant remained unfit to return to work, again because of barriers, broadly similar to those identified in the earlier report. [378-380]

23. The sickness review meeting duly took place on 1 October 14' and the minutes are at [385-386]. The Claimant contends that the latest OH report was not available before the meeting and that when she asked for a copy during the meeting, she was handed the earlier report of 12 May 14'. Christina Christodoulou, HR Business Partner, told us that she had handed the Claimant the latest report at the meeting.

24. In relation to this dispute, we note that on 29 October 14' OH sent Ms Christodoulou a copy of the latest report by email [S122]. This was several weeks after the first review meeting and when asked by the panel why she was being sent a copy if she already had one, she replied that perhaps she had asked for it again because she had not filed a copy. We found that response unconvincing. According to Ms Christodoulou, the report had original been sent by email to Mr Hainey and if that was the case (the email was not produced in evidence) she could have obtained a copy from him. We also note that on the day before the first review meeting, OH had emailed the Claimant the May report instead of the September one [383]. It is therefore possible that they sent the Respondent the wrong report as well. In the circumstances, we accept the Claimant's evidence that she was

handed the wrong report at the first review meeting. In the event, it is of limited significance as the reports were broadly similar and both were considered, along with a later report, prior to dismissal. The only reason we have dwelt on it is because it is cited as a procedural flaw in the list of issues.

25. On 3 October 14' Mr Hitch, Vice Principal, wrote to the Claimant with the outcome of the first stage sickness review meeting. He warned the Claimant that if she was unable to return to work after her next doctor's appointment (scheduled for around 23/10) the Respondent may progress to a final stage absence review meeting and her employment may be at risk. [388]

26. On 17 October 14' the Claimant wrote to Mr Hitch raising a number of comments and queries on the outcome letter. The Claimant has highlighted the following paragraph as being significant:

> "*In view of the risk that my employment could possibly be terminated on ill health, as was made aware to me by you under obligation on 1/10/14, I would really appreciate a full explanation as to what it could mean for me. Especially, in terms of the fact that I have been paying into the pension scheme since joining HASN in January 2012"* [395].

27. The Claimant contends that this paragraph was a request about her entitlement to ill health retirement under the local government pension scheme. The Respondent did not understand this to be the case and did not treat it as such. There is no reference to ill health retirement at all in the extract and having read the email in its entirety, the tribunal finds that such a request cannot reasonably be inferred.

28. The Absence Policy provides that a final formal stage review hearing should take place where, among other reasons, medical advice suggests that an employee will not resume work within a reasonable period of time and the employer can no longer sustain the employee's continued absence. [154].

29. On 4 December 14' the Respondent wrote to the Claimant informing her of its intention to schedule a final sickness review meeting and in advance of the meeting, the Claimant was referred to OH for a further assessment [433].

30. On 8 January 2015, OH issued a further report. The barriers identified in the previous report, and the one before that were still present and OH was unable to suggest any reasonable workplace adjustments and none were identified by the Claimant.

31. In the referral form, one of the questions asked by the Respondent was about the likelihood of the Claimant returning to work. [684]. OH responded as follows:

> "*Whilst I would hesitate to say that I cannot identify a return to work "in the future", I see no likelihood of an early and successful return to work in the foreseeable future certainly in this role and on your site, but that does not translate into a failure to return to work in any role and in any environment in the future – i.e. I do not believe we can consider permanent disability from all and every occupation at this stage".* [439]

32. On 12 February 15', the Claimant attended a final sickness absence review meeting, conducted by Sam Hainey, Executive Principal. The contents of the most recent OH report were discussed and the notes record that the Claimant agreed that she was unfit to return to work in the foreseeable future. [450-453]

33. On 20 February 15' the Respondent wrote to the Claimant advising her that she was to be dismissed on grounds of incapability due to ill health with effective from 24 March 2015. [467- 468]

34. On 2 March 15' the Claimant appealed her dismissal in a 19 page appeal submission. [476-494].

35. On 11 March 15' the Claimant wrote to the Respondent formally requesting ill health retirement under the local government pension scheme (the Scheme) [512].

36. The Local Government Pension Scheme Regulations 2013 (the Regulations) and the September 2014 Guidance on Statutory ill health retirement (the Guidance) set out the circumstances under which the entitlement to an ill health retirement pension is payable under the Scheme. It is the Claimant's case that the Respondent should have instigated the ill health retirement process before going down the dismissal route. We address this further in our conclusions.

37. The appeal was heard on 12 March 15' by Sir Dan Moynihan, Chief Executive of the Respondent, and on 20 March 15' the Respondent wrote to the Claimant informing her that the appeal was unsuccessful and that the decision to dismiss was upheld. [530-532]

38. The Claimant complains that the Respondent discriminated against her by not paying her the same wages as her male comparators, Sam Ashdown, Lenin Alegria and Alan Berzolla. The Claimant says that they were doing like work as they were all employed by the Respondent as Teaching Assistants, yet they were paid more than her.

39. The Respondent's Teaching Assistants are paid on Scales 2 or 3 and there are point levels within each grade, indicating the salary spine point. The Claimant was Grade 2 point 12. She worked term time only but her full time equivalent (FTE) starting salary was £16,974.

40. Sam Ashdown was Grade 3, point 15 and his starting FTE salary was £17,808. Alan Berzolla was grade 2, point 13 and had a starting FTE salary of £17367. Lenin Alegria was a grade 2 point 14 and had a starting FTE salary of £17484. [611]

41. The Respondent's position was that the comparators had higher salaries, which were negotiated from the outset, because of their skills and experience and because they were carrying out additional tasks outside the remit of a Teaching Assistant and were doing so regularly, over a period of time. The Respondent contends that:

42. Alan Berzolla worked for the Respondent through an Agency for one term as a Teaching Assistant before being taken on as a permanent employee. He joined the Respondent with the intention of undertaking training as a Maths Teacher on the school direct programme and from the outset, was responsible for teaching maths to pupils, both in groups and individually as part of his teaching training. This involved him planning lessons and the materials. He also had a degree in Economics. [643-650]

43. Lenin Alegra had a specialist expertise in teaching English as an additional language and taught phonics to groups of pupils with weak literacy skills. He also delivered music lessons. [624-633]

44. Sam Ashdown ran the football club which involved him doing lots of after school football training with the students, including taking them to match fixtures and competitions. This involved him working 3-4 extra hours a week.

45. The Claimant was not able to effectively challenge the Respondent's evidence on the additional duties of her comparators and there was some documentary evidence before us of their skills and experience. In the case of Sam Ashdown, the Claimant confirmed that she was aware that he was involved in the football club. We therefore accept the Respondent's evidence on the comparators' additional duties.

46. Although the Claimant did not profess to undertake any of the additional duties associated with her comparators, she nevertheless contended that she was carrying out other additional duties. In support of this she relies on a comment in her appraisal document dated 30.9.13 which refers to her having run a reading/handwriting group for year 7 students. [184]. However, Mr Hainey said that this was part and parcel of the role of a Teaching Assistant. [163]

47. The Job description for Teaching Assistant sets out the duties under 3 separate headings: Classroom Support, Record Keeping and General. The Respondent contends that the so called additional duties the Claimant refers to would come under "Classroom Support" and "General" [163].

48. Having read the job description, our view is that the descriptions of the duties are sufficiently broad to incorporate the tasks referred to by the Claimant. We therefore accept Mr Hainey's evidence on this.

Submissions

49. The parties presented oral submissions. In addition, the Claimant provided us with some authorities and copies of The Local Government Pension Scheme Regulations 2013 and the accompanying guidance notes.

Conclusions

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

Was the Claimant disabled?

51. This is to be judged as at the date of the alleged discriminatory act – i.e. 20 February 2015 at the earliest (date of dismissal decision) or 24 March 2015, at the latest (the effective date of termination).

52. The Claimant relies on stress, anxiety, depression and left shoulder pains as her impairments. We are satisfied that the Claimant had these impairments as there is supporting evidence of these in the various doctors' certificates, GP notes and OH reports that we have seen. In compliance with an order of the Tribunal, the Claimant provided an impact statement setting out how her impairments affected her normal day to day activities. She cites a number of matters such as difficulty dressing, washing and undressing; lack of

energy, concentration and motivation to do things such as reading, watching TV and household chores; sleep deprivation; emotional eating; lack of social involvement; inability to sit still for long periods making driving difficult; to mention a few. [102-103]. None of this was challenged by the Respondent.

53. The adverse effect of the impairments must be substantial in order to meet the statutory definition of disability. Section 212(1) EqA defines substantial as more than minor or trivial. In deciding whether or not the impairment is substantial, we have had regard to the Guidance on the definition of disability (2011). In this case, we have had particular regard to the combined effect of the two impairments, one physical one mental, as well as the cumulative effect of the range of symptoms suffered. We have taken into account that the Claimant has been on medication for the most part and we have to consider the effect of the impairments as if she was not on medication, which, no doubt, would be worse than described. Taking all those factors into account, we are satisfied that the effect was substantial.

54. The first doctors' certificate citing these impairments is dated 16 February 2014 so by the time of the dismissal decision, and based on the substantial effect being the same, or no better, throughout this period, the effect was "long term".

55. Taking all of this into account, we find that the Claimant was disabled for the purposes of the EqA.

Reasonable Adjustments

56. In its notice of appearance, the Respondent had pleaded that the duty to make reasonable adjustments did not arise as they were unaware that the Claimant was disabled and could not have reasonably so. That point was not pursued in closing submissions, quite sensibly so in our view. The Respondent was aware of the Claimant's impairments, some of her symptoms and how long they had persisted. They therefore had constructive knowledge of a potential disability and should have sought advice from OH. At no point in any of the referrals to OH did they ask whether the Claimant was disabled, when it would have been reasonable for them to do so. In those circumstances, the Respondent cannot argue lack of knowledge as a defence to a Reasonable Adjustments claim.

57. Turning to the requirements of section 20 EqA, it is common ground that the PCP was the application of the Respondent's Absence Policy. The Claimant claims she was substantially disadvantaged by the application of the policy as she could not satisfy the Respondent's attendance requirements because of her disability.

58. The Claimant contends that the Respondent should have made a reasonable adjustment by discounting all of her disability related absence. In our view, that would not have been reasonable as it would have meant dis-applying the Absence Policy in its entirety and keeping the Claimant employed indefinitely, regardless of whether she was able to carry out her role. That goes beyond what is required by the EqA. At most, an employer would be expected to show some flexibility in the application of the Absence Policy by not sticking rigidly to any timescales or stages. In our view, there was some flexibility shown by the Respondent. Even though the long term sickness absence process kicks in after 20 days absence, the first formal absence review did not take until the Claimant had been absent for

almost 8 months. That was to accommodate her request that the process be suspended pending the conclusion of the grievance process.

59. The Respondent raised the question of reasonable adjustments with OH and with the Claimant. No adjustments were recommended by OH and non were suggested by the Claimant.

60. In the list of issues, the Claimant complains that the Respondent failed to consider a part time phased return with arrangements such that she did not have to interact with DP and that it also failed to consider redeployment to another of the Respondent's Academies. None of these were suggested by the Claimant at the time. In fact, the Respondent did suggest a phased return to work in its outcome letter following the first absence review meeting but the Claimant did not respond to that suggestion. Indeed, she complained to us that it was raised for the first time in the letter without having been discussed at the meeting. Whilst that may be so, it was subsequently raised at the final review meeting and on that occasion, the Claimant said she was not prepared to discuss it until she was feeling better and off her medication. When asked at the final meeting what support the Respondent could offer to facilitate a return to work, the Claimant said that any support offered now would be too late.

61. The other point to make is that the section 20 duty is not a duty to consider, but a duty to make adjustments. Given that the Claimant was not fit to return to work, on any basis, at the time of her dismissal, a phased return or redeployment would not have been practicable adjustments.

62. In the circumstances, we find that the Respondent was not in breach of a section 20 duty to make reasonable adjustments.

Discrimination arising from disability – section 15 EqA

63. The Claimant's dismissal amounted to unfavourable treatment for the purposes of this provision. The something arising in consequence of the Claimant's disability was her sickness absence.

64. We find that the Respondent's stated aim of ensuring the smooth running of the Academy, by having staff available and present at work is a legitimate aim.

65. In considering the issue of proportionality, we have asked ourselves whether dismissal of the Claimant was reasonably necessary to achieve that aim. 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 dismissal.

66. 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 said, for the reasons expanded upon in the unfair dismissal section below, we are satisfied, on balance of probability, that the respondent's need for a permanent teaching assistant to be available to meet the complex special educational needs of the students outweighed the claimant's need to remain in employment. We find that dismissal was proportionate.

Unfair Dismissal

67. It is common ground and we are satisfied that the reason for dismissal was capability due to the Claimant being unfit to carry out her role as a Teaching Assistant due to ill health.

68. 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. We have considered these along with the general procedure adopted by the Respondent.

69. The Claimant contends that there was insufficient medical enquiry undertaken by the Respondent as it should have contacted her GP so that it could be fully informed of her medical condition. An employer is entitled to rely on its OH for medical advice and the Respondent made 3 referrals to OH over the period of the Claimant's absence. The advice received from OH was not challenged by the Claimant and there was therefore no reason for the Respondent to seek a second opinion. In relation to the last report, when asked by Mr Hainey at the final absence review whether she agreed with Dr Brennan's advice that she would not be able to return to work in the foreseeable future, the Claimant said yes. Had the Claimant considered the advice inadequate, she could have presented further medical evidence at any stage but did not do so.

70. The Claimant's main argument is that the dismissal was unfair because the Respondent failed to consider ill health retirement as an option. She contends that the Respondent had a statutory obligation to do so under the Regulations.

71. Under clause 35 of the Regulations, an early retirement pension will only be payable if the member satisfies the conditions at subsection (3) and (4). Subsection (3) provides that the member is, as a result of ill health or infirmity of mind or body, permanently incapable of discharging efficiently the duties of the employment the member was engaged in. Subsection (4) provides that the member, as a result of ill health or infirmity of mind or body, is not immediately capable of undertaking any gainful employment.

72. Regulation 36 provides that a decision as to whether a member is entitled to an ill health retirement pension shall be made by the employer after they have obtained a certificate from an independent registered medical practitioner confirming that the conditions at (3) and (4) of the Regulations are satisfied.

73. The guidance to the Regulations provides at paragraph 9: "*Under regulation 35, the appropriate Scheme employer is required to consider and decide a number of questions before entitlement to an ill health retirement benefit under that regulation can be awarded (my emphasis)……..*"

74. We have considered the relevant provisions of the Regulations and the guidance and on a reasonable construction of their terms, we do not consider that they apply unless the employer is making a positive case for ill health retirement benefit or, at the very least, there is some prospect of the employee being entitled to such a benefit. That interpretation is consistent with the references to ill health retirement in the Absence Policy. Paragraph 15.5 of the Absence Policy cites ill health retirement as one of the potential outcomes of a final formal review meeting. Paragraph 16.1 provides that where ill health retirement is being

actively considered (my emphasis), the employee will be referred to OH for advice as to whether the employee is permanently incapable of efficiently carrying out their duties due to ill health [155]

75. The Respondent was not actively considering ill health retirement because of the advice of Dr Brennan, OH, that he did not consider the Claimant to be permanently disabled from carrying out her role. In those circumstances, the Respondent was entitled to form the view that the conditions for an early retirement pension were unlikely to be satisfied. We consider this case distinguishable from First West Yorkshire Ltd t/a First Leeds v Haigh 2008 IRLR 182, referred to us by the Claimant, which turn on its own facts.

76. The Claimant submitted that the appeal was dealt with in a perfunctory and biased manner and that the decision was predetermined. She deals with this at paragraph 148 and 149 of her witness statement. She refers to the fact that the Respondent had made annotations on her grounds of appeal as evidence of predetermination. However, Mr Tunnicliffe, the HR Business Partner present at the appeal, explained that this was done to indicate those matters that were relevant to the appeal. That is because the Claimant's grounds of appeal document included matters that had previously been raised and dealt with as part of her grievance. The Respondent's refusal to deal with those matters as part of the appeal is also something the Claimant complains about. However, we are satisfied that the Respondent was entitled to limit the appeal to matters relevant to the decision to dismiss rather than treat it as an extension of the grievance process, which is what the Claimant was effectively trying to do. There are no notes of the appeal hearing but we have read the outcome letter, which sets out the matters considered and the rationale for the conclusions reached. This was expanded on in the evidence of Mr Tunnicliffe. There is no evidence to support the claimant's assertion of predetermination or bias and it does not appear to us from the evidence that the appeal was dealt with in a perfunctory manner.

77. The Respondent has an established procedure for dealing with long term absence and we are satisfied that the process it followed was in accordance with its Absence Policy. As already mentioned above, the Respondent applied some flexibility in agreeing to the Claimant's request to suspend the process while her grievance was in progress.

78. By the time of dismissal, the Claimant had been absent for over a year, on full pay (albeit backdated) and there was no likelihood of her being fit to return to work in the foreseeable future. Mr Hainey told us that the Claimant had a key role in supporting students with special educational needs and in order to meet those complex needs, it was necessary to have sufficient provision of staff in place and available. The Claimant's absence meant that they did not and they were unable to wait any longer for her return. The Respondent was entitled to take that view.

79. We are satisfied that, in all the circumstances, the Claimant's dismissal for capability was fair.

Equal Pay claim

80. Based on our findings at paragraphs 39-48 above, we are satisfied that the additional tasks carried out by the Claimant's comparators meant that their work was different to hers. Further, we find that the differences were of practical importance as, when carrying out the additional tasks, the comparators were performing as Teachers, with the responsibility that

entails, rather than assisting the Teacher. We are also satisfied that those tasks were not intermittent but a regular part of the comparators' work routine over an extended period.

81. Having considered the quality and frequency of the comparators' additional tasks, and in the absence of equivalent duties on the Claimant's part, we find that the Claimant was not doing like work with her comparators. The like work claim is not made out.

Judgment

82. The unanimous judgment of the tribunal is that all the claims fail and are dismissed.

Employment Judge Balogun
Date: 11 October 2017