EMPLOYMENT TRIBUNALS

Claimant: Mr D Walker

Respondent: Old Swinford Hospital School

Heard at: Birmingham Employment Tribunal **On:** 07/10/2019 to 15/10/2019

Before: Employment Judge Butler
Mr RW White
Mr D Faulconbridge

Representation
Claimant: Ms Grennan (Counsel)
Respondent: Mr Green (Solicitor)

JUDGMENT

The unanimous decision of the employment tribunal is that:

1. the claimant succeeds in his claim for a breach in the duty to make reasonable adjustments.

2. the claimant succeeds in his claim for discrimination arising from disability.

3. the claimant succeeds in his unfair dismissal claim.

4. There is no finding of a *Polkey* reduction.

5. There is no finding of contributory fault on the part of the claimant.

6. The respondent is ordered to pay Mr Walker the figure of **£85,829**. This is a figure reached following reconsideration of the agreed figures in the schedule of loss. There are also to pension losses that will be determined at a separate remedy hearing.

7. The award is made under the Equality Act provisions, and so recoupment does not apply.

8. There are still outstanding pension losses that will be determined at a remedy hearing on 9 March 2020. Nothing within this decision impacts upon that hearing.

REASONS

These are the reasons given at the request of the respondent following oral judgment and reasons delivered at the hearing.

9. The various claims in this case arise following Mr Walker having been dismissed on 29/09/2017.

10. At a case management hearing on 21/11/2018, before Employment judge Algazy, the issues of the claim were agreed between the parties and set out as part of that documentation, which I do not repeat here.

11. There was no dispute on Provision criterion or practices (PCPs), save for the application of one relating to the application of the sickness absence management policy. The substantial disadvantage listed in the issues were conceded, although length of time of the substantial disadvantage was not. In terms of reasonable adjustments, Mr Walker had listed 7 separate reasonable adjustments that he says would have alleviated the disadvantage. Again, these are as listed in the list of issues accompanying the preliminary hearing documentation, and so are not repeated here.

12. Mr Walker also brought a claim of discrimination arising out of his disabilities. There was no dispute between the parties that Mr Walker's dismissal was unfavourable treatment. There was no dispute between the parties that Mr Walker was dismissed because of periods of lateness, absences from work and a restriction on him in using what was described as hazardous machines. There was no dispute that those arose in consequence of his disability. The only dispute between the parties in relation to this claim was as to justification. The respondent put forward as justification the legitimate aim of preventing an impact on the education of the respondent's students, and amended on the morning of day one of the hearing to include further the justifications of impact on the health and safety of the claimant, students and other members of staff, and the impacting upon the support of the teachers employed by the respondent. These amendments were consented to on behalf of Mr Walker, as they were considered not to cause him any problems them being raised formally at this stage.

13. In terms of the unfair dismissal claim there was no dispute between the parties that the reason for dismissal was capability. Mr Walker essentially asserts that the dismissal was unfair as it was as a result of an act of

disability discrimination, but that in the alternative that it was unfair in the ordinary sense- both substantively and procedurally.

14. We heard from Mr Walker himself as part of the proceedings. And we took account of an agreed witness statement of Mr Bladen and attached weight to that evidence that we considered appropriate in the circumstances. For the respondent we heard from Mr Plant, who was Mr Walker's line manager, Ms Green, who was the School Bursar and had overall line management responsibility for Human Resources of the respondent but who was also the dismissing officer, and we heard from Mr Billingham, who is Vice chairman of the School Governors of the Respondent, and who sat on the panel for Mr Walker's appeal.

15. We considered that Mr Walker and Mr Billingham gave honest and reliable accounts of the events in this case, neutral view of Mr Plant- he conceded points that he could recall, but could not recall everything- and this is as expected with the passage of time. Ms Green, we considered to be less than candid, which called into question her reliability as a witness. There are numerous examples that led us to this collusion, including but not limited to, for example, her evidence on who actually took the decision to dismiss Mr Walker, and her responses when questioned around the application of the policies leading to that decision. Ms Green's answers to these questions, which we consider to be crucial matters and matters that a witness ought to be able to recall, led us to consider that Ms Green was not a very reliable witness.

16. The tribunal ensured that there were enough breaks throughout the hearing to ensure that all parties were able to fully participate in this hearing. All parties were reminded that if further breaks were required then all they needed to do was ask.

17. The first day of the hearing was used for reading time. The claimant was cross-examined on the second day. The respondent's witnesses were cross examined on days 3 and 4, and closing submissions were also made on day 4. Day 5 was for the tribunal to deliberate. This judgment was handed down on day 6. Matters relating to remedy were considered on day 6 and day 7. The tribunal did not need to sit on day 8.

18. A matter that arose during the hearing was that we were missing two crucial documents: the respondent's absence policy and the respondent's disciplinary policy. These are crucial documents in a case that involved a dismissal for absence reasons, and which we later discovered, the absence policy itself then refers to using the disciplinary policy when considering dismissal for absence reasons. Given that Ms Green's evidence was that these two documents were being used in relation Mr Walker, we expected them to be in the bundle. Why these were not disclosed and did not form part of the bundle is quite surprising at the very least. Mr Green is an experienced advocate, and he understands that all relevant documents to the case had to be disclosed. Here they were not, and so we are critical of the respondent's approach to the case in that respect. Although we received the absence policy on the morning of day 4, there was further delay as the

respondent's had again not disclosed the disciplinary policy. This was provided to Mr Walker's representative and the tribunal later on the morning of day 4 of the hearing. This delayed the start of evidence for that day.

19. We are grateful to both representatives for having submitted written closing submissions in advance of oral submissions. These were useful in assisting the tribunal with an understanding of the framework of how closing submissions were going to be advanced.

Findings

We make the following findings of fact, on the balance of probability based on all the matters we have seen, heard and read. In doing so, we do not repeat all the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.

20. Mr Walker started working for the respondent, initially part time, from 2 June 2014. He moved into a full-time role from 22 February 2016. His role was as a technician in the Art, Food Technology and Design and Technology Departments, although the art part of the role never really happened. He was dismissed on 29 September 2017.

21. The claimant had a disability in accordance with the Equality Act. This was in relation to two separate impairments, each of which were disabilities. There is a physical impairment of psoriatic arthritis, and the mental impairment of depression/anxiety. He was a person with these disabilities during 2016 and 2017, which are the relevant periods in this case. The respondent had knowledge of Mr Walker's disabilities during the relevant period.

22. Mr Walker had had periods of absence and lateness during 2016 and early 2017.

23. Mr Walker started a new bout of medication in or around the beginning of February 2017- this had the impact of causing nausea, dizziness and sedation, although this also had an impact on his immune system and made him more susceptible to viral illnesses. This is supported by the comments of Dr Dawes in the first Occupational Health Report, which can be found at p.350 of the bundle and referenced at box 2.

24. From around January 2017, Mr Walkers periods of absences and lateness increased, and these can be seen on the absence record at p.399 of the bundle. This was due to a change in his mental wellbeing. His absences and lateness continued to worsen due to a change in his medication in February 2017.

25. Mr Walker would ordinarily contact the respondent if he was going to be late or absent just to explain this to them. He engaged with the school, for the most, when he became aware that he was going to be late or absent.

26. Mr Plant would pass information to HR, who would record this on their systems. They had a system which included fractional days of absence, which was designed around a five lesson day. Although this system would only work in 0.1's.

27. The respondent's system of recording absences is not accurate. There are inaccuracies within the absence recording system, which was accepted by Ms Green under cross examination. This recorded leaving early for medical appointments as late, giving the impression that Mr Walker arrived to work late in the morning when in fact he had not but was attending agreed appointments. Further, we were taken to three separate absence records, two of which were produced at the same time and date, and yet the records did not match.

28. Mr Walker attended a well-being meeting on 23/06/2016. The focus in this meeting was on his wellbeing. Attendance as a disciplinary issue was not raised in this meeting.

29. The absences during 2016 and 2017 triggered RTW meetings. They took place on 15/11/2016, 30/01/2017 and 20/03/2017.

30. The RTW meeting on 30/01/2017 included an action point of referring Mr Walker to Occupational Health (OH). Mr Walker attended an OH appointment with Dr Dawes on 17/02/2017. This report recommended that Mr Walker would be restricted from operation of hazardous equipment, such as circular and band saw, guillotine and forge equipment whilst his medication stabilized, which was expected to happen over the subsequent four weeks. Dr Dawes gave an indication that they would be happy to review Mr Walker in around 4 weeks from the date of that assessment. There is a second OH report produced by Dr Dawes, dated 15 March 2017. This report was simply clarification of the first report rather than based on a further assessment of Mr Walker, which was the recommendation of the 17/02/2017 report. Clarification was based on questions, found at page 362 of the bundle, sent to Dr Dawes by Ms Davey on behalf of the respondent. This report again refers to a future review of Mr Walker no sooner than 4 weeks following the last assessment.

31. Mr Walker was not aware of the clarification sought by Ms Davey, nor did he receive notice of the responses received.

32. There was no further involvement of OH with Mr Walker.

Specific findings relevant to Reasonable Adjustments

33. The respondent gave no consideration to adjusting Mr Walker's role as a technician.

34. Mr Walker was back fulfilling his role, including using all the machinery during or around April 2017.

35. Many of Mr Walker's roles could have been done at various points during the day, or on the evening before going home, and not necessarily first thing in the morning. These included preparing materials, maintaining tools and equipment, ordering material, stock work, and ensuring tools were sharp. There were occasions within the classroom environment where there was a specific need for a technician or other suitable support to be present. These included where a student had decided to unexpectedly make use of a different machine, or where the teacher would alter the lesson plan the evening before. Mr Plant's evidence was useful on this. However, there was no evidence that this had ever happened on an occasion when Mr Walker was not available.

36. The respondent did not seek Mr Walker's views on what adjustments would be necessary in order for him to remain in his current role. There was no engagement or communication with him in this respect.

37. The decision to move Mr Walker out of his role as technician had taken place by the end of March 2017. This was inferred from Para 14 Ms Green's Witness statement, which was consistent with the notes taken by Mr Walker of the meeting that took place on 14/09/2017, which we took as accurate minutes of the meeting (at p448-449 of the bundle), and the letter the Mr Walker was sent on 27/07/2017. These all place the decision to remove Mr Walker from his technician role as being close to receipt of the second Occupational Health report. This decision was communicated to Mr Walker by that letter of the 27 July 2017.

38. The letter of 27 July 2017 was the first communication with Mr Walker that he would no longer be able to remain as a technician. There was no other time where this was communicated to him, despite this decision having taken place some months earlier.

39. It was accepted by the respondent, with Ms Green's evidence on this important, that there was no reason why the processes applied to Mr Walker could not have been delayed. We find that holding these processes at the time they were was not crucial.

40. The school had a limited number of persons qualified to operate the hazardous machinery in the D&T department. Mr Walker was the only technician employed at the school. And Mr Plant would refuse to allow use of the hazardous equipment by anybody who was not properly trained. Mr Plant was consistent in his evidence on this, and we accepted this as an accurate reflection of the practices of the school.

41. The only adjustment considered by the respondent was in the form of alternative roles.

42. Mr Walker was offered two alternative positions. On each occasion these were in the form of a letter with attached job description. These was rejected by Mr Walker due to the reduction in pay, and for other reasons. However, the duties for either role were never fully explained to him. Mr Walker raised

concerns about some of the aspects of these roles in the form of questions; however, as the respondent took his response relating to pay as a definite refusal, they never addressed any of the additional reasons behind his refusals, and did not engage with adjusting these roles any further. Ms Green was consistent on this point, and this is consistent with the evidence that we saw.

43. Just to be clear, we find that there were a number of reasons why Mr Walker turned these roles down. Including financial, but not limited to this, and included some of the specific duties of the roles not being suitable and the impact that the roles would have on his ability to spend time with his daughter.

44. On the face of the job description of the second role, at least, there would have been a conflict with Mr Walker's existing duties as House Tutor. We accept that there may have been scope for flexibility in the Maintenance Operative role, however, this was not discussed.

Specific findings relevant to section 15 justification

45. The legitimate aims put forward by the respondent are implicit aims in the policies of the school and are referred to in various meetings and correspondence with Mr Walker, including at p.408 in the bundle, which concerns the meeting of 24/08/2017. Legitimate aims were not an issue in dispute between the parties.

46. There was no evidence presented that showed that the lateness/absences of Mr Walker or his inability to use hazardous machinery in the short term impacted upon students' teaching experience

47. There was no evidence presented that showed that the lateness/absences of Mr Walker or his inability to use hazardous machinery in the short term impacted upon the Health and Safety of students, staff or Mr Walker.

48. There was no evidence presented that showed that the lateness/absences of Mr Walker or his inability to use hazardous machinery in the short term impacted upon teacher support.

49. And there was no evidence presented to show that dismissing Mr Walker, which is the unfavourable treatment complained of, was an appropriate and necessary action to attain any of the aims submitted.

Specific findings relevant to unfair dismissal

50. The respondent's absence policy was invoked, and this was the correct policy that was to be applied to Mr Walker in circumstances where there was issues relating to absences and lateness. This was supported by the evidence presented on behalf of the respondent. Under this policy the Line

manager has several specific responsibilities. However, Mr Walker's line manager, Mr Plant, did not comply with these responsibilities as he had no knowledge of them. Mr Plant accepted that he knew that there were some policies but that he had never read them.

51. Mr Plant as Line Manager was telling the claimant throughout this period to his face that everything was ok, that he didn't need to worry, and that he was just to get himself better. At no point did anybody in a managerial sense warn the claimant that his patchy attendance or lateness was causing any problem. There were no warnings on the impact of absence and lateness, and there was no discussion on how to manage this situation. The evidence on this was consistent between the parties.

52. Initially the dismissal meeting was arranged to take place on the 25 September 2017. This meeting was rearranged for the 28 September 2017 as Mr Walker emailed on 22 September 2017 signalling that he would not be able to attend this meeting as he 'had been off work sick with stress and anxiety, due to the events of the school's threat to terminate' his contract. And he explains that he was 'not currently in a position to completely undertake and constructively partake in such a life changing meeting'. Mr walker could not attend this rearranged meeting due to his health, and having been signed off work with work related stress and anxiety by his doctor, and on his doctor's advice that he should refrain from partaking in stressful situations. His sick note was due to expire on the 8 October 2017. He requested a delay to this rearranged meeting.

53. The respondent decided that they would not grant a delay to this rearranged meeting.

54. There was no formal dismissal meeting that took place, but Mr Walker's dismissal was simply actioned when Mr Walker rejected the second role, and it became clear that he was not intending on appearing at the meeting that was arranged. Ms Green's evidence was unclear on this matter, despite her being the dismissing officer, and this being the only occasion where she has been involved in dismissing a member of staff. However, she accepted that had there been a formal meeting, then there would ordinarily be minutes. The lack of minutes helped us reach this conclusion.

55. The respondent's disciplinary policy was not applied or followed throughout the dismissal of Mr Walker.

56. Mr Walker's attendance/absence record, on whichever record we accept as the accurate record, if any, improved from around the end of the Easter break 2017, until the 27 July 2017, when he received a letter from Ms Green informing him that he could no longer remain in his current role. The decision that Mr Walker was no longer to remain in his post, which ultimately led to his dismissal, did not take account of this improving period of absence, nor did it take into account that restrictions on Mr Walker's duties were considered to be short term, nor did it take into account that Mr Walker had returned to using the hazardous machinery.

57. Mr Walker's role as a Non-residential Boarding Tutor automatically ended as a result of his primary employment ending. There was no consideration given as to whether this could continue at this point. This was accepted as being the case by Ms Green.

58. The appeal by Mr Walker was not was never going to succeed whilst the claimant was on medication, irrespective of anything else. There was no consideration given to Mr Walker's improving absence/lateness record from May 2017 when considering dismissing him or during his appeal. The appeal panel had no awareness that the claimant had a disability when considering his case. The appeal panel did not take account of Mr Walker's disability during this process. This was conceded by Mr Billingham under cross examination.

59. The appeal panel were unanimous in their decision making.

60. There has been a significant breach of procedure throughout the management of the absence and the dismissal of Mr Walker.

We have been taken not of the case law and that form part of Ms Grennan's submissions, and even if not referred to directly, it has been considered.

Applicable Law- Discrimination

61. Mr Walker brings her disability discrimination claim in two different ways, as a failure by the respondent in their duty to make reasonable adjustments, and as discrimination arising from her disability. The relevant statutory provisions, alongside important case law considered, are as follows:

> **20. Duty to make adjustments**
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. ...
>
> **21. Failure to comply with duty**
>
> (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
>
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

62. The case of *Cosgrove v Caesar and Howie* [2001] IRLR 653 (EAT), amongst others, is an important case for the tribunal to consider in the circumstances before it. At paragraph 6, it was made clear that the duty to make adjustments is on the employer not the employee.

15.Discrimination arising from disability

(1) 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.

63. Ms Grennan helpfully reminded the tribunal of the principles laid down in *MacCulloch v ICI* [2008] IRLR 846, as approved by the Court of appeal in *Lockwood v DWP* [2013] EWCA Civ 1195. Which we took account of.

64. Elias LJ in *Griffiths v SWWP* [2015] EWCA Civ 1265, lays down some useful guidance when considering justification of a section 15 claim, in circumstances where the unfavourable treatment for the purposes of that claim is dismissal and that dismissal is linked to a failure in the duty to make reasonable adjustments:

> '[26] An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment - say allowing him to work parttime - will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified.'

65. Further guidance is provided by the Equality and Human Rights (EHRC) Code of Practice, para 5.21:

> 'If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified.'

136. Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

66. The case of *Project Management Institute v Latif* [2007] IRLR 579, EAT, was considered. Of importance is the dicta of Elias P. Although Elias P is referring to the old Code of Practice under the Disability Discrimination Act, his words are still of relevance today. Elias P observed that:

> 'In our opinion, the Code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be some evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the claimant would have to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not'.

Unfair Dismissal

67. The test of unfair dismissal is set out in section 98 of the Employment Rights Act 1996:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> > (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> >
> > (b)that it is either [conduct] or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. ...
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> > (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> >
> > (b)shall be determined in accordance with equity and the substantial merits of the case.

68. Although referring to long-term medical absences in the sense of a continuous absence, the case of *Spencer v Paragon Wallpapers Ltd* 1977 ICR 301, EAT, provides this tribunal with some guidance. In particular, when

considering dismissing an individual in these circumstances, Philips J noted that the size and resources of the employer is relevant, as well as 'the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do'. And these are factors that have applied time and time again in such dismissals.

69. We also had to consider the procedure adopted in light of s.98(4). Under the case of *Polkey v AE Dayton* [1987] IRLR 503 HL, where the dismissal is unfair due to a procedural reason but the tribunal considers that an employee would still have been dismissed, even if a fair procedure had been followed, it may reduce the normal amount of compensation by a percentage representing the chance that the employee would still have lost her employment.

Conclusions

Duty to make reasonable adjustments

70. There is a difference in adjustments contended for, a-d and f-g adjustments in the list of issues, which we treated as having the same outcome, and e which we considered was different in the way it was dealt with by the respondent during this case. And we reach different conclusions in respect of them, although it does not change the overall decision.

71. The burden in this case rested with the Respondent to discharge the duty in relation to s.20 and 21 of the Equality Act. They knew the PCP's, they knew the substantial disadvantage and they knew of the adjustments being contended for as being capable of alleviating the disadvantage. Guidance to the tribunal is provided in the EHRC Statutory Code of Practice for the Equality Act 2010. Of particular importance are paragraphs 6.28 and 6.29, which lists factors to be considered, including the effectiveness of steps in preventing the substantial disadvantage, the practicability of the step, costs and disruption caused by making the adjustment, extent of employer's financial or other resources, availability of assistance to make adjustments, type and size of the employer.

72. Bearing all of these in mind, the case put forward on behalf of Mr Walker, and the lack of objective evidence put forward by the respondent in respect of the reasonableness of the adjustments listed at a-d and f-g of the list of issues, this tribunal had little choice but to find a breach in respect of this duty. Put simply, the claimant satisfied the initial burden of proof placed upon him by s.136 of the Equality Act, but the respondent failed to discharge that burden.

73. In respect of e- we considered that the evidence presented by the respondent did satisfy us that this would have been an unreasonable adjustment, given the need for training or appointment, which would have had to have been done in a short period of time, and not one that could have been predicted in these circumstances.

74. The respondent focussed their evidence on alternative roles. Although offering an alternative role is undoubtedly a potential adjustment that could and should have been considered by the respondent, this case was not about that, and as such we make no finding on this. However, what we do find is that the respondent did not engage with the adjustments contended for, save for adjustment e, by Mr Walker.

75. In relation to a-d and f-g, no objective evidence questioning the suitability of the adjustments to alleviate the disadvantage the claimant was subjected to or unreasonableness of them was presented. There was a breach of the duty at this point.

76. For the sake of clarity, a substantial disadvantage may be alleviated by several alternative and differing adjustments, more than one of which can be deemed reasonable. The reasonableness of one, does not automatically determine the reasonableness of a different one. Reasonableness of adjustments are not considered as a choice between options, with only one being possible to be found as a reasonable adjustment, with all others not.

Discrimination arising from disability

77. The adjustments contended for, in line with the comments of Elias LJ in *Griffiths*, would have enabled the employee to remain in employment, therefore the dismissal itself was discriminatory, and therefore this is a dismissal that could not be justified by a legitimate aim.

78. If we are wrong on that, we find that the respondent provides no evidence to support that the action taken was appropriate and necessary to achieve the legitimate aims being applied at the time of dismissal. Whether that be of protecting on health and safety grounds, ensuring the education of students, or ensuring adequate support for teaching staff. Put simply, the respondent has not discharged its burden, which rested firmly with them on this matter.

Unfair Dismissal

79. The starting point, as always with unfair dismissal claims, is to establish the reason for dismissal. The reason given, and not in dispute in this case, is that of long-term illness, which falls within the bracket of capability.

80. Turning to the question of reasonableness of the decision to dismiss. The decision did not take account of the short-term nature of Mr Walker's restrictions, nor does it take account of the improving absence and lateness record, and nor does it check the accuracy of those records when they were questioned.

81. We remind ourselves that it is not for the tribunal to substitute our view as to whether or not we would have dismissed the claimant in the same circumstances. In *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 it was held that:

> "...in many (though not all) cases there is a "band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another; ...the function of the [Employment Tribunal] ... is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

82. This approach applies to dismissals generally and is not limited to cases of misconduct. Overall, we conclude that the decision to dismiss the claimant by the respondent, based on the factors outlined above, does not fall within the band of reasonable responses.

83. The respondent did not engage with its own procedures. There was no investigatory meeting, no warning, no improvement plan. And the appeal process was little more than an attempt to look like a correct procedure was being followed. Procedure was found wanting in this case, and the dismissal was also procedurally unfair.

84. We have reserved finding on *Polkey*, contributory fault and uplifts until after hearing from both parties in relation to remedy.

REMEDY

In relation to remedy, we make the following findings, based on the evidence that we have read, seen and heard, and based on the submissions made by each parties' respective representative:

85. Following a fair procedure would not have led to the same outcome. No submissions were made on behalf of the respondent on *Polkey* reductions, and there was no compelling evidence that supported that such a reduction would have been appropriate in these circumstances.

86. There was no contributory fault on the part of the claimant in this case. Again, no submissions were made on behalf of the respondent in respect of this.

87. Dismissal was not because of any culpable conduct of Mr Walker, which precludes the application of an ACAS uplift.

88. The treatment and dismissal of Mr Walker exacerbated his anxiety and stress. This was to the extent that he was too ill to work from that point. This continued to be the case whilst Mr Walker was engaging in a claim before

the tribunal. It would have been unreasonable to expect Mr Walker to have returned to work until these proceedings had been completed. In reaching this conclusion we paid particular attention to Mr Walker's witness statement, which was unchallenged on his post-employment condition, Mr Walker's sick notes and the report of Mr White, the jointly instructed independent medical expert in respect of this case. Mr Walker's past losses therefore extend from the date of his dismissal until the date of this hearing.

89. No reductions for a failure to mitigate losses are made. The burden rests with the respondent in respect of failure to mitigate losses. The respondent provided no evidence that Mr Walker had failed in that respect, and so failed to discharge this burden.

90. In terms of future loss of earnings, it is expected that the claimant should have returned to work within 12 months, and therefore his loss of future earnings is limited to this period. This, on balance, is likely to be with an educational establishment, which would have an equivalent defined benefit scheme. In reaching this conclusion we took account of the recommendations by Dr White, who expected the claimant to be able to return to work full time on completion of these proceeding with appropriate support, the indication by the claimant's representative that Mr Walker is nearing the top of the list for counselling, and Mr Walkers circumstances, including his age, impairments and qualifications.

91. In line with that above, pension losses will be limited to the period from 29/09/2017 until 15/10/2020, which is 12 months from the date that this decision was handed down orally, and a period just exceeding 3 years.

92. The pension losses will be calculated using the complex method. Having considered the period of the losses, that there was no *Polkey* reduction or contributory fault found, and taking account of the Presidential Guidance on Pension Losses and the Principles for Compensating Pension Loss, in particular paragraphs 4.30, 4.32, 4.33, 4.34 and 5.41 this was the conclusion. Pension losses will be considered at a separate remedy hearing.

93. Having considered carefully the evidence of the impact that the discriminatory treatment had on Mr Walker, an award of £16,000 for injury to feelings is made.

94. In light of the above findings, the parties agreed quantum, save for the pension losses, which will be subject to a separate hearing, and which is listed for 9 March 2020.

95. The parties agreed that the respondent would pay Mr Walker a total sum of £79,084. And this consisted of the following:

a. Past loss of earnings	£33,955
b. Future loss of earnings	£17,929
c. Pension losses	TBC

d. Past loss of free meals	£2,220
e. Future loss of free meals	£1,110
f. Injury to feelings	£16,000
g. Interest on injury to feelings	£2,625
h. Interest on financial losses to date	£2,274
i. Basic award	£1,710
j. Loss of statutory rights	£500
TOTAL LOSSES (WITHOUT CREDIT FOR BENEFITS OR GROSSING UP)	**£78,323**

96. Credit of £6,896.58 was then given for state benefits.

97. The figure of £71,426 was then grossed up, giving a grossing up element of £7,658.

98. However, this is an award being made for an act of discrimination. Recoupment is not applicable in these circumstances. I am therefore reconsidering the award in light of having identified that the agreed schedule included recoupment, which should not have been included.

99. The figure of £78,323 should have been considered for grossing up, rather than £71,426. Given that the first £30,000 is tax free, and Mr Walker had already used £1,707 of his personal allowance, the calculation for grossing up is as follows:

    (78,323- 30,000- 12,500 + 1,707) = £37,530
    £37,530 x 0.2 = £7,506

100. The grossing up element is therefore amended to a figure of £7,506.

101. The total award, save for the pension losses which will be determined at a separate hearing, is therefore amended to (78,323 + 7,506 =) **£85,829.**

Employment Judge **Butler**

16 October 2019

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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