Case Number: 3310975/2019-V

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms J Sealby	**v**	River Learning Trust (Gosford Hill School)

Heard at: Watford **On**: 27 April 20201

Before: Employment Judge Milner-Moore

Appearances

For the Claimant: In person
For the Respondent: Ms S Garner, Counsel

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing was not objected to by the parties. The form of remote hearing was by video using the CVP platform. A face to face hearing was not held because it was not practicable

JUDGMENT

1. The claim of ordinary unfair dismissal (Section 98 Employment Rights Act 1996) succeeds. The claimant was unfairly dismissed by the respondent.

2. The complaint of automatically unfair dismissal under Section 101(A) of the Employment Rights Act 1996 is dismissed upon withdrawal.

3. The claim of wrongful dismissal succeeds.

REASONS

1. The case was listed for a two-day hearing to deal with issues of liability and remedy in relation to complaints of ordinary unfair dismissal (Section 98 of the Employment Rights Act 1996), automatically unfair dismissal (Section 101(a) of the Employments Right Act 1996), and wrongful

dismissal. The complaint of automatic unfair dismissal was withdrawn by the claimant at the start of the hearing. The other two claims proceeded.

2. Having read the ET1 and ET3 I identified that the following issues arose for determination:

2.1 Was the claimant dismissed by the respondent?

The claimant's case is that she was dismissed with notice by the respondent and that a decision on her subsequent grievance did not result in the dismissal being overturned, rather the school made an offer of reinstatement on her original terms which she declined.

The respondent's ET3 admits that the respondent was dismissed with notice on 12 October 2018 but argues that this decision was overturned following a successful grievance process such that the dismissal "vanished". The respondent says that the claimant's employment was terminated by her resignation on 21 December 2018.

2.2 Has the respondent shown a potentially fair reason for dismissal?

The respondent did not plead a potentially fair reason for a dismissal in the ET3 but during the hearing it was suggested that the reason for dismissal was "some other substantial reason", namely the respondent's need to introduce new terms of employment.

2.3 Did the respondent act reasonably in all the circumstances in treating this as sufficient ground for a dismissal?

The claimant disputes that any dismissal was fair in the circumstances due to: a lack of any genuine consultation, failure to give prior warning of risk of dismissal, failure to consider the impacts of contractual changes proposed on the claimant, failure to consider the claimant's representations during the process and failure to provide a right of appeal.

2.4 **Should any compensation awarded to the claimant be reduced on grounds of contributory conduct?** (The respondent indicated at the outset that no reduction on Polkey grounds would be sought)

2.5 Wrongful dismissal - if a dismissal is found to have occurred, did the claimant receive the correct notice?

The claimant says that she is owed 11 days' pay because the respondent gave 12 weeks' notice rather than the three months' notice to which she is entitled under her contract.

The respondent disputes that there was a dismissal but admits that if a dismissal took place the claimant did not receive the full period of notice to which she was entitled and that she would be entitled to a further 11 days' pay.

3. Having discussed the claims being brought and the issues that arose for determination in relation to those claims, with the parties at the beginning of the hearing, the respondent's counsel drew to my attention that she had submitted a skeleton argument shortly before the hearing began. I had not received it and so had not had an opportunity to read it and neither had the claimant. The hearing was adjourned for an hour so that the claimant could read the skeleton and so that I could read the skeleton and other key documents. Having read the respondent's written submissions, it appeared that the respondent was arguing the case on a different basis to that put in the ET3 and was now contending that there was no dismissal because the claimant had been given notice that her terms and conditions would be altered and not that her employment would end. This was inconsistent with the way in which matters were put in the ET3, in which it was explicitly conceded that a dismissal had occurred by giving of notice in a letter of 12 October 2018, but it was argued that the dismissal "vanished" following the outcome of the successful grievance. The respondent's case, as set out in the skeleton argument, would therefore involve withdrawing a concession that was explicitly made in the ET3. I indicated that I considered it would therefore require an application to amend and I noted that no such application had been made by the respondent. I gave Ms Garner time to take instructions and discuss the point with her client. Subsequently, she confirmed that no application for leave to amend would be made and that the claim was being defended on the basis originally pleaded. Time taken up with these matters meant that it was not possible to begin hearing evidence until 12 o'clock on the first day of the hearing.

Documents & Evidence

4. I received a bundle in two parts, witness statements from the claimant and from Nigel Sellars, (the Headmaster of the school in which the claimant worked) a skeleton argument and a chronology from the respondent. In light of the evidence that I have read and heard, I made the factual findings set out below.

Facts

5. The claimant began her employment with the respondent on 12 October 2015 and worked as a school counsellor. In addition to that employment, the claimant had, at all times, a private practice, working as a therapist, seeing clients on her non-work days.

6. The respondent is an academy of which the secondary school in which the claimant worked was a part. The respondent's support staff are employed on "green book" terms. Rest breaks for support staff are unpaid.

7. The claimant's contractual terms were recorded in a letter of 18 November 2015, which states that her hours of duty per week would be eight hours each week during term-time. The claimant worked a single eight hour day. The contract was silent as to whether any rest break during the working day would be paid or unpaid. The claimant's practice from the beginning of her employment was to take a break during the working day. That time was treated as paid without any objection from the respondent and that practice continued for three years. In 2016, the claimant increased her hours of work to 24 hours per week, working three days per week. A further temporary increase was made to the claimant's hours in 2018, so that she worked to 27½ hours per week until the end of July 2018. All of these adjustments to the claimant's hours were made by mutual agreement and there was no discussion of the claimant's precise times of work or whether rest breaks would be paid, or unpaid. At the end of July 2018, the claimant was due to revert to working 24 hours per week. She wrote to the respondent proposing revised start and finish times to reflect the reduced hours. She accepts that she made an error when calculating the start and finish times set out in her e-mail, because the hours that she proposed did not add up to 24 hours, even including breaks. This caused the respondent to look at her hours of work afresh and to consider the position in relation to her rest breaks.

8. On 16 July 2018, Nigel Sellars, wrote to the claimant proposing a change in her hours and that she would work from 8 a.m. to 4:30 p.m. three days a week, which would amount to 24 hours, excluding breaks, rather than including breaks as previously. On 24 July 2018, the claimant replied to say that unpaid breaks had not formed part of her contract previously and she could not accommodate the additional time due to her parental responsibilities. She expressed the hope that the issue could be resolved quickly. The school then took some advice from an HR advisor who confirmed that it was a requirement of the Working Time Regulations that the claimant take a break of at least 20 minutes a day. However, no progress was made with resolving matters before the school holidays intervened.

9. On 4 September 2018, Mr Sellars wrote to the claimant to say she was legally required to take a 20 minute rest break and asking her to set out how she wished to work her 24 hours over three days, including the minimum break of 20 minutes. On 11 September 2018, the claimant had discussions with Mr Sellars PA, Nicola Cook. Afterwards the respondent issued a letter which proposed two options. The first was that the claimant extend her working day by 20 minutes by day and take a 20 minute unpaid rest break each day, in which case she would still be paid for 24 hours. The second option was that she retain her current length of working day but this would mean only being paid for 23 hours per week, to reflect three unpaid 20 minute rest breaks. Mr Sellars concluded:

> "I know you will be disappointed by this decision but I have to ensure that all staff are treated in the same way in accordance with Employment Legislation and the needs of the school, regardless of what may have occurred in the past"

10. On 10 October 2018, the claimant wrote to Mr Sellars making the point that her contract had been silent about unpaid breaks and that she considered that there was an established practice that she was paid for an eight hour day including any rest break. She later met Mr Sellars to discuss. During that meeting she offered a third option, that she would take a 30 minute rest break which would not be treated as paid, but she would work a 7½ hour day and still be paid the same amount. She would still therefore be present for 24 hours but working for 22½ for the same salary. The claimant accepts that this would have represented an increase in her hourly rate but considered that it was a reasonable compromise. It would serve the respondent's interests because it would have involved no additional cost to the respondent, it would not have impacted the performance of the claimant's duties, her overall salary would not have increased and it would have meant that her position was consistent with that of other support staff in not being paid for breaks. It would also meet the claimant's interests in that it would not worsen her position financially or in terms of her ability to discharge her family responsibilities.

11. On 12 October 2018, Mr Sellars replied emphasising that the claimant was a valued member of staff but saying that, as a matter of law, it was required that she take a 20 minute rest break each working day and that he could not agree to this being a paid rest break as it would not be consistent with the terms of other staff. His letter did not address the claimant's third option. It concluded:

> "It is now necessary formally bring your previous contract to an end and re-issue with a new contract to incorporate the above arrangements. The new contract of employment is the same as the old one, except it emphasises your requested working hours from 4 September 2018 and ensure your working pattern is consistent with the Working Time Directive. Your continuity of employment will be unaffected. I have discussed these reasons with you and this is the last resort after we were unable to come to any agreement to vary your contract of employment. Please take this letter as notice of the change in hours, which I understand you have unilaterally decided to work from the beginning of this term. Your notice period is therefore 12 weeks from 4 September 2018 and will end on 27 November 2018. You will be continued to be paid on your historic arrangements until 27 November 2018 and your new contract of employment will take effect from 28 November 2018.
>
> Before I can issue a new contract, please could you confirm in writing how you would like to proceed. The options were set out in my letter dated 11 September, copy is enclosed for ease of reference. You have the right, if you wish, to appeal against the decision to terminate your contract of employment. If you wish to appeal, you should so, in writing within five working days of the date of this letter. Your written notice to me should state why your contract of employment should not be terminated."

12. The claimant did not receive this letter until 15 October 2018. Although the letter made reference to an appeal process, there was in fact no applicable appeal process. If the claimant wished to challenge the decision, the mechanism for doing so was to pursue a grievance under the respondent's grievance policy. It is unfortunate that the letter which terminated the

claimant's contract of employment was unclear about the appropriate steps for her to take if she wished to challenge the decision.

13. The respondent has a grievance policy which encourages informal resolution where possible. A grievance regarding the actions of the Headteacher should be referred to the Chair of Governors. The Chair of Governors would then arrange for any necessary investigation and fix a grievance hearing before a panel of three governors with no prior involvement with the issues. The grievance process required individuals to set out their complaint and any supporting evidence and to explain how the matter could best be resolved. The policy stated that mediation was an option for the resolution of grievances and could be used at any stage in the grievance process to address issues, including relationship breakdown.

14. After receiving Mr Sellars' letter, the claimant took steps to establish the extent of the pay cut that the respondent's proposal would involve and she was informed that it would be £1,095 per annum. The claimant also asked for more time to submit her appeal given the delay in her receiving Mr Sellars letter, and the respondent agreed to this. On 22 October 2018, the claimant wrote to the respondent. Whilst the claimant's letter does not explicitly state that it was an "appeal", it was clearly sent in response to Mr Sellars letter. The claimant had also made it clear that she wished to have more time to submit an appeal. The letter set out a challenge to the decision to dismiss, explained why the claimant did not feel able to accept either of the respondent's proposed options and why she considered her third option represented an appropriate compromise.

15. The respondent should have recognised that the claimant was seeking to challenge the decision to terminate her employment and should have dealt with the letter as a grievance under its policy. However, the respondent did not treat the letter as an appeal, or a grievance, but simply regarded it as an extension of the previous correspondence between the claimant and Mr Sellars. On 30 October 2018, Mr Sellars replied, reiterating that the claimant had to take a 20 minute break and that this could not be paid and that her contract would therefore need to be 23 hours per week, but he invited her to say if she wished to discuss a different pattern.

16. On 31 October 208, the claimant replied saying that she still felt that she had no response to her third option. She asked for a detailed explanation of why her third option would not suffice.

> "As we are not in agreement on this matter and you have terminated my contract, I believe that the only option is that I will be forced to leave Gosford Hill on the date specified by you."

17. On 1 November 2018 the respondent issued the claimant with a new contract providing for her to work 23 hours per week, over three days, excluding three 20 minute unpaid rest breaks.

18. On 2 November 2018, the claimant had a meeting with Mr Sellars and Richard Bellmont, the Deputy Headmaster. The claimant considers that during that meeting, Mr Sellars made some comments which she regarded as implied threats. He commented that her post had not been considered in a recent restructuring process, which she considered to be a threat she might be vulnerable to restructuring in the future. Mr Sellars denies that this comment was made as a threat. He was simply recording that had it not been considered as part of the restructuring and the inconsistency regarding the claimant's hours would come to light. The claimant also said that when she asked Mr Sellars if he could authorise her third option, he said:

> "I can do what I like"

which she again considered to be a threat. Mr Sellars says that this simply reflected that it was a matter that was in his discretion as part of the senior management of the school and not something that he needed to go to the governors about.

19. I find that these comments were made by Mr Sellars but I do not think that they were made with any adverse intent. The claimant had, by this time, formed a negative view of Mr Sellars and was I think primed to see his comments in a more sinister light than was intended. That tendency is also evidenced by her response to subsequent communications from management later in the process.

20. There was, during this meeting, some discussion of option three, Mr Sellars said that he regarded it as a pay rise and was not therefore prepared to accept it. The claimant made clear during the meeting and during the letters that she was sending over this period that she was distressed by the dispute that had arisen and felt under stress as a result.

21. On 9 November 2018, the claimant wrote a letter to the Chair of Governors setting out her grievance. She alleged that the respondent was breaching her contract by attempting to compel her either to work additional hours, or to take a pay-cut. She asserted that she had been unfairly dismissed. She stated that the notice given was in breach of contract because she had been given 12 weeks' notice back-dated to September instead of three months' notice from the date of the letter terminating her contract. She also alleged that she was being bullied and harassed and relied, in particular, upon the comments made by Mr Sellars in the meeting of 2 November. Under the heading "Resolution", she wrote:

> "As a result of these incidences there is now an irrevocable breakdown in trust between me and the school as my employer. I therefore request that this matter is investigated by an independent person and mediation arranged at the earliest convenience".

22. She was later asked to submit a required grievance form and identified resolution as:

> "mediation and/or settlement to address the serious breaches listed in my letter and consequential breakdown in trust".

23. Between 14 November and 28 November, the claimant was off sick due to stress and during this period there were some communications between her and the management of the respondent. The claimant had taken steps to e-mail her line manager, Mr Bellmont about some ongoing issues with vulnerable students and she also made contact with the school to establish that there was no objection to her continuing her work in her private practice hours, although signed off. Ms Cook replied to say that any contact with the school should be routed through her and confirming that there was no objection to her continuing her private practice work. The claimant was also reminded that while she was on sick leave, she should not be working for the respondent or contacting her colleagues about work.

24. The claimant then replied to say that she didn't think that contact with Ms Cook was appropriate, given the confidential nature of her work, and she said that she would prefer to hand matters over to her line manager. There was then a brief period of delay, during which the claimant was still getting queries about work. After a while the claimant received a reply to say that her line manager was dealing with things in her absence. Her line manager made contact a few days later to arrange a time for a handover of matters.

25. The claimant raised no objection to most of this communication but she was concerned by some subsequent e-mails which she regarded as critical and undermining. On 19 November, Ms Cook e-mailed to suggest that the claimant contact her line manager:

> "to hand over details on any cases and safeguarding matters, however we would expect that anything you were dealing with that has safeguarding implications would already have been shared with Richard or John in line with our safeguarding procedures and in line with our expectations of all adults working in school. In terms of the phone calls you are receiving, if these are being made to your personal mobile, this will be discussed further when you return to school".

26. The claimant felt that these matters were critical of her and suggested that there was an implied threat of possible future action to be taken against her in relation to her competence or appropriate conduct. I find that this is a further incidence of the claimant placing an unduly negative construction on the communications from the respondent. It is normal for staff who are off sick to have contact with management to establish clear lines of communication during sickness absence and to ensure appropriate handling of matters. It is also normal for staff to be directed not to work whilst they are off sick, particularly when the sickness absence in question is stress related.

27. During this period, the claimant had some exchanges with the governors responsible for handling her grievance. Although the claimant had indicated on her grievance forms that she was interested in exploring mediation, the Governors made no attempt to pursue mediation.

28. On 23 November 2018, the claimant made contact with the respondent because, at this time, a grievance hearing was still awaited and yet her employment was due to terminate on 27 November 2018. She was uncertain as to what would happen and asked for confirmation from the respondent. On 26 November 2018, Mr Sellars wrote to the claimant extending her notice period to 4 January 2019 and stating:

> "As a good will gesture, I am writing to extend your notice period to cover the twelve week period from 12 October 2018 until 4 January 2019. Please take this letter as a revised notice of the date of changes detailed in my letter of 12 October 2018. I understand that you have taken professional advice and I hope that your advisor has discussed with you the appropriate actions to take should you wish to return to work whilst matters are unresolved"

29. Although I accept that this may not have been Mr Sellars' intention, the claimant was further aggrieved to see described as a 'good will gesture' what her contractual right, ie to receive notice running from the date on which notice of termination of employment had been issued, rather than notice being backdated. In fact, the letter still failed to reflect the correct notice period, referring to 12 weeks rather than three months, with notice running from 12 October 2018 rather than 15 October 2018, when notice was in fact given.

30. On 28 November 2018, the claimant was asked by the Governors to provide specifics of bullying and harassment and also to provide a more detailed timeline of events, which she did. Some of the bullying and harassment matters related to the handling of the termination of her contract and others to the exchanges that I have set out above.

31. On 3 December 2018, the claimant attended the grievance panel. The chair asked the claimant "how do you think this matter could be resolved?". The claimant replied that initially matters could potentially have been resolved by her third option but that she now felt that she wanted to leave because she felt she had been unfairly treated and that trust had broken down. She said that she considered that a financial settlement would be appropriate.

32. On 20 December 2019, the claimant received the outcome of her grievance. Her bullying and harassment complaint was not upheld. The governors came to the conclusion that the correspondence relating to the proposed new terms was 'professional and business like' and based upon professional advice given to the school aimed at achieving parity with other staff . The governors did not consider that the e-mails that had been sent to the claimant during her sickness absence were bullying or harassing. However, the claimant's grievance regarding the change to her contract was upheld and the panel stated:

> "we have recommended that this proposed change of contract be withdrawn with immediate effect. We wish to reiterate to you that you continue to be a valued member of staff and should be employed under the terms and conditions which existed prior to the reissuing of your contract. We recommend that the school now

> give careful consideration to your proposal on 2 November to normalise your working hours to 7½ based on your current salary as a way of resolving the situation and enabling all parties to move forward".

33. The governors made no reference to the claimant's concerns about the breakdown in the working relationship and made no proposals that steps should be taken to the repair the working relationship, for example by mediation.

34. On 21 December 2019 Mr Sellars wrote to the claimant:

> "It was previously felt necessary to bring your contract to an end and re-issue you a new contract to incorporate the working hours which you wish to work and associated remuneration. I set out the reasons for this decision in my letter of 18 October and revision in my letter of 26 November. However, as a result of your grievance, the governors have deemed that this is not necessary and I have agreed to reinstate your original contractual arrangements."

35. On 21 December 2019, the claimant wrote stating that she was not prepared to be reinstated:

> "this is unacceptable given that you have previously terminated my contract and since July have managed this process in a way that has destroyed all good-will and professional trust between us and has led to a significant toll on my health and wellbeing"

36. In the early January 2019, Mr Sellars wrote to the claimant again, asking her whether she wished to reconsider her position regarding her "resignation." The claimant was insistent that she would not return to work for the respondent.

The law

37. Section 95 ERA:

> "1. For the purposes of this part an employee is dismissed by his employer if (and subject to sub-section 2, only if)
> (a) the contract under which he is employed is terminated by the employer (whether with or without notice)".

38. Section 98(1):

> "1. In determining the purpose of this part whether the dismissal of an employee is fair or unfair, it is for employer to show 1a, the reason (or if more than one, the principal reason), for the dismissal and 2b, that it is either a reason falling within sub-section 2 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 sub-section 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 as a sufficient reason for

> dismissing the employee; and b) shall be determined in accordance with equity and the substantial merits of the case".

39. As a general principle and subject to certain limited exceptions, where notice of dismissal has been given, such notice cannot be unilaterally withdrawn, even where the notice period has yet to expire. Any withdrawal of notice must be by mutual agreement (Harris & Russell Ltdv Slingsby 1973 3 All E.R 31). One such exception is where words are spoken in haste and swiftly retracted but that does not apply here. The concept of the "vanishing dismissal" is the other exception. The principles relating to vanishing dismissals were established in a series of cases (including Folkestone Nursing Homev Patel [2019] ICR 273) which relate exclusively to the legal effect of appeals against disciplinary dismissals. One of the leading cases (Roberts v West Coast Trains Ltd [2005] I.C.R 254) summarises the position as follows:

> "after the dismissal and pending the outcome of the successful disciplinary appeal an employee as treated as suspended without pay. If the appeal fails dismissal takes effect from the original dismissal date. But if the appeal succeeds, the dismissal falls away, the individual is reinstated with continuous employment and is entitled to back pay and in consequence the tribunal's jurisdiction to hear a complaint of unfair dismissal also falls away"

40. Where there is a contractual power to demote as an alternative to dismissal, then on a successful appeal, demotion may occur. Where the contractual power to demote requires consent and such consent is withheld, the dismissal stands. (Saminadan v Barnet, Enfield & Haringey NHS Trust EAT 0018/08).

41. Most of the cases concerned *contractual* disciplinary processes but there is some commentary (referring to a first instance case in Gerrards Scottish Borders Housing Association) which suggests that, even where an appeal process *is non contractual*, the effect of a successful appeal will be that the original dismissal vanishes. It was considered implicit that an employee, by embarking on an appeal under a process intended to overturn the dismissal, is deemed to consent to the dismissal being withdrawn and to remaining employed if the appeal succeeds. However, it is relevant to note that, even where a dismissal is withdrawn, it is possible that the facts surrounding the dismissal may give rise separately to a constructive dismissal (Thompson v Barnet Primary Care Trust EAT 0247/12).

Conclusions

42. I received closing submissions from the parties. I have not separately detailed the submissions made by the parties, but I have endeavoured to address the key points raised in the submissions in the conclusions that follow.

Was the claimant dismissed by the respondent?

43. I find that the claimant was dismissed by the respondent. Mr Sellars' letter of 12 October 2018 explicitly terminates the claimant's contract of employment with notice. It was therefore a dismissal for the purposes of Section 95 of the Employment Rights Act 1996. Such notice of dismissal could not be unilaterally withdrawn by the respondent. It could be withdrawn only with consent and it is clear that the claimant did not consent. Absent showing that the concept of a vanishing dismissal applies in this case, the claimant had been dismissed by the respondent.

44. I did not consider that the principles relating to vanishing dismissals could be applied to a case such as this, relating to the outcome of a grievance process. The concept that underlies the authorities dealing with vanishing dismissals is that, either by virtue of the operation of a *contractual* disciplinary policy, or by *implied consent* in a *non-contractual* disciplinary process, both the employer and employee have agreed to be bound by the outcome of the appeal process so that, if the dismissal is overturned, the employer is bound to continue to employ the employee and the employee is bound to continue in employment. The overturning of a dismissal is the entire purpose of a disciplinary appeal. However, I consider that the position is different in relation to a grievance process. Grievances may be brought in relation to a much broader range of circumstances and employer decisions and, correspondingly, the range of remedies sought by an employee in such a process is much broader. Grievances will often be brought where individuals are still employed and where there is no question of employment ending. Individuals may also elect to pursue grievances after leaving employment and yet without any wish that their employment should be continued. It is not inherent in the pursuit of a grievance, even where employment has been terminated, that an individual agrees to be bound by the outcome of the grievance and to remain employed.

45. It is also clear that the claimant's grievance was not seeking the simple reinstatement of her old contract and the overturning of her dismissal. There was no implicit acceptance that were she to succeed in her grievance she was agreeing to remain employed. The outcome that she sought through the grievance was mediation or an agreed settlement. It is possible that a successful mediation might have repaired the working relationship and that she would have been willing to remain employed by the Respondent. However, the claimant did not suggest that that merely withdrawing the notice of termination would resolve matters to her satisfaction.

46. The respondent's counsel referred to me the case of Taylor v OCS 2006 I.C.R. 1602 in submissions but, with no disrespect to Counsel, I did not consider this case to be relevant here. Taylor v OCS deals with the effect of an appeal against dismissal in a misconduct case and exhorts tribunals not to focus on the technical question of whether or not the appeal took place by review or by way of re-hearing but to focus on the substantive question i.e. whether or not any procedural defaults were cured by the

appeal in whatever form it took and, considering matters in the round, the dismissal was fair. Although the grievance decision here was that the proposed new contract should be withdrawn, that alone could not cure matters. The fact remained that the respondent could not unilaterally withdraw the notice to terminate and the grievance did not have the effect of repairing the working relationship so that the claimant would agree to that notice being withdrawn.

Has the respondent shown a potentially fair reason for dismissal?

47. I do not consider that the respondent has shown a potentially fair reason for dismissal. The dismissal which needs to be justified is the decision of 12 October 2018 to terminate the claimant's employment on notice. Although no fair reason for dismissal was pleaded in the ET3, it was suggested that I should find that the reason dismissal was some other substantial reason. I accept that there were business reasons for the respondent's proposals to make changes to the claimant's working arrangements. In particular, the respondent wanted to ensure that the claimant was taking breaks, as required under the Working Time Regulations, and that she was treated in a way that was consistent with other support staff. However, I do not consider that the respondent had established a *substantial* reason for dismissal. The respondent's objectives could have been achieved through the claimant's proposed option three. It is not clear why the respondent rejected this option, beyond the fact that it represented a notional increase for the claimant (she would have received no additional salary but would have been paid at a higher hourly rate). I am reinforced in my conclusion that the respondent had not established a substantial reason for dismissal by the fact that the governing body also found, and the respondent subsequently accepted, that there were not good grounds for terminating the claimant's contract on 12 October 2018 and that the claimant could have remained employed, either on basis that her breaks would be paid (as before) or on the basis of her proposed option three. In those circumstances I do not consider that the respondent has established a substantial reason of a kind such as to justify the dismissal of an employee in the claimant's position.

Did the respondent act reasonably in all the circumstances in treating this as sufficient grounds for a dismissal?

47.1 The respondent's primary case in submissions was that no dismissal had occurred. I rejected that submission for the reasons already given. Having done so, I considered whether or not the respondent had acted reasonably in all the circumstances. I considered that it was not within the range of reasonable responses for the respondent to have dismissed the claimant on 12 October 2018. The respondent's objectives (ensuring compliance with the Working Time Regulations and consistency with other members of staff) could have been achieved by the claimant's option three, so there was an alternative to dismissal that the respondent could have pursued. I also considered that the processes followed by the respondent fell outside the range of

reasonable responses and that this had impacted on the fairness of dismissal. Although the respondent engaged in some discussion with the claimant during September 2018, it failed to warn the claimant that it was contemplating dismissal if agreement could not be reached. The termination of her contract came as a shock to the claimant. Although the respondent at various points indicated a willingness to continue discussions about the precise nature of the variations to be made to the claimant's contract this occurred after the claimant had already been given notice of termination. This limited the effectiveness of any consultation because, by that point, the clock was already running towards the date of termination of employment and relations with the claimant had already been damaged. The respondent also acted unreasonably in purporting to back date the start of the notice period and so curtailed the claimant's notice period. The respondent also acted unreasonably in failing to recognise that the claimant's letter of 22 October 2018 was a challenge to the decision to terminate her contract and in failing to deal with it as a grievance as its policy required. As a consequence the resolution of the matter was delayed and this further damaged the working relationship.

Contributory conduct

48. The question is whether the claimant engaged in culpable conduct before her dismissal, such that a reduction to the basic award would be appropriate (Section 122(2) Employment Rights Act 1996), and/or whether such conduct contributed to her dismissal such that a reduction to the compensatory award would also be appropriate (Section 123(6) Employment Rights Act 1996). I do not think that there is any basis to the respondent's suggestion that the claimant was at fault because she closed her mind to compromise. I do not consider that the claimant's refusal to agree to revised terms was blameworthy, it was understandable that the claimant objected to an attempt to reduce her terms of employment in a way that would either leave her suffering a loss of income, or that would have made it difficult for her to perform her parental responsibilities. The claimant attempted to find a compromise position by proposing her option three. It is fair to say that the claimant did begin to place an increasingly negative construction on her engagement with the respondent but these matters occurred after the respondent had given notice to terminate her contract of employment on 12 October 2018, so cannot have contributed to her dismissal by the respondent.

Polkey reduction

49. At the outset the respondent's counsel had agreed that there was no basis for proposing a Polkey reduction in this case. However, in her oral closing submissions, she suggested that this was a case where Polkey would be appropriate. In making a Polkey reduction, a tribunal is asked to speculate about what would have happened, had a fair process been adopted. I consider that had a fair process been adopted in this case, then there would have been more extensive consultation with the claimant before any

decision to dismiss] was taken. The respondent would have given serious consideration to the claimant's option three. The claimant would either not have been dismissed, or had she been dismissed and had her challenge to dismissal been viewed as grievance and dealt with appropriately and swiftly, then the position would have been unpicked by the governors at a point in time when the working relationship could be repaired, if necessary by mediation. I therefore consider that had a fair process been adopted, the claimant's employment with the respondent would have continued and a Polkey reduction is therefore inappropriate.

Wrongful dismissal

50. It follows that the claimant was wrongfully dismissed because the respondent gave 12 weeks' notice, rather than three calendar months and the parties have agreed that, in consequence, 11 days' pay is due to her.

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Employment Judge Milner-Moore

Date:17 June 2021 ……

Sent to the parties on: 18 June 21

For the Tribunal Office