



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms F Jowett

**Respondents:** 1. Hampshire County Council  
2. Governing Body of Glenwood School

**Heard at:** Exeter by Video      **On:** 1, 4, 5, 6, 7, 8 October and  
8 and 9 November 2021

**Before:** Employment Judge Smail  
Mr K Sleeth  
Mr N Knight

**Representation**  
**Claimant:** In Person  
**Respondents:** Miss Heather Platt, Of Counsel

## JUDGMENT

1. The Claimant was unfairly dismissed by the Respondent because the decision to dismiss dated 26 September 2019 without first exhausting the regime of formal warnings rendered the dismissal procedurally unfair, at least.
2. The decision not to observe the regime of formal warnings and dismiss amounted also to unfavourable treatment because of the Claimant's absences arising in consequence of her disabilities, which the Respondent cannot justify, in breach of section 15 of the Equality Act 2010, constituting discrimination arising from disability.
3. The failure to maintain the timetabling of the Claimant's PPA and non-working time on a Wednesday for the academic year from September 2019 amounted to a failure to make reasonable adjustments, contrary to section 20(3) of the Equality Act 2020.
4. All other claims made by the Claimant fail and are dismissed.
5. There will be a remedy hearing on the first available date after 4 April 2022, time estimate 1 day by Video.

6. The Claimant must send to the Respondent and the Tribunal updated details of the amounts she is inviting the Tribunal to award setting out how they have been calculated and including net and gross calculations together with updating documents in support (e.g. mitigation of loss). She must do this, if not already done by 4 pm on **4 February 2022**.
7. The Respondent shall send to the Claimant and the Tribunal a counter schedule of loss commenting on the Claimant's calculations / figures and any updating documents in support. They must do this, if not already done, by 4pm on **18 February 2022**.
8. By 4pm on **25 February 2022** the Respondent shall send to the Claimant a proposed index to a consolidated bundle of documents to be used at the remedy hearing. The Claimant shall respond as soon as possible, confirming whether the index is agreed or what changes need to be made. The parties must co-operate to ensure that an index to the bundle is agreed within 7 days of it being sent to the Claimant.
9. The Respondent must send one copy of the agreed consolidated bundle to the Claimant. This can be sent in electronic form unless a hard copy is requested by the Claimant. They must do this by **4 March 2022**.
10. The parties must exchange witness statements in relation to remedy simultaneously. They must do this by **18 March 2022**.
11. The Respondent must make sure that electronic copies of the remedy bundle and of all the remedy witness statements are sent electronically to the Tribunal by **25 March 2022**.

## REASONS

1. By a claim form presented on 21 November 2019, the Claimant claims:
  - 1.1 Automatic unfair dismissal. The alleged principal reason for which was that the Claimant made protected disclosures.
  - 1.2 General unfair dismissal.
  - 1.3 Detriments on the ground of having made protected disclosures.
  - 1.4 Discrimination arising from disability.
  - 1.5 Failure to make reasonable adjustments in respect of disability.
2. The Claimant was employed by the respondent as a Special Needs teacher until 31 December 2019. Her employment began on 1 January 2011. She was dismissed with three months' notice of dismissal immediately following a

meeting held by governors on 26 September 2019. The claim was brought as is permitted in the course of the notice period.

### **THE ISSUES**

3. These were set out in a case management summary prepared by Employment Judge Rayner at a preliminary hearing on 17 September 2021. I will record these in full for the record.
4. The first matter recorded was time limits.
  - 4.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date allowing for any extension under the early conciliation provisions is potentially out of time so that the Tribunal may not have jurisdiction.
  - 4.2 Were the discrimination complaints made within the time limit in Section 123 of the Equality Act 2010.
  - 4.3 Was the unfair dismissal/detriment complaint made within the time limit in Section 111 and Section 48 of the Employment Rights Act 1996.

The Tribunal will decide:

- 4.4 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months plus early conciliation extension of the last one?
  - 4.4.1 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
  - 4.4.2 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?
5. Unfair Dismissal
  - 5.1 The Claimant was dismissed.
  - 5.2 What was the reason for dismissal? The respondent asserts that it was a reason related to capability which is a potentially fair reason for dismissal under Section 98(2) of the Employment Rights Act 1996.
  - 5.3 The Claimant asserts the reason or the principal reason, was that she had made protected disclosures.
  - 5.4 If the reason is capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant.

- 5.5 Was the decision to dismiss a fair sanction? That is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts.
  - 5.6 Did the respondent adopt a fair procedure? The Claimant challenges the fairness of the procedure.
    - 5.6.1 We know she says it was connected with safeguarding concerns that she had raised in her case.
    - 5.6.2 Her ill health, she says, was caused by the detriment resulting from whistleblowing about a head teacher not acting in respect of the disclosures.
    - 5.6.3 Fundamentally, in respect of general unfair dismissal, the Claimant challenges the process.
  - 5.7 If it did not use an appropriate procedure would the Claimant have been fairly dismissed in any event and/or to what extent and when?
  - 5.8 If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove on the balance of probabilities that the Claimant actually committed the misconduct alleged.
6. Protected Disclosure
- 6.1 The respondent accepts that the Claimant made protected disclosures. The first is that on about 9 January 2018, the Claimant disclosed to the Head Teacher Ruth Witton concerns that a child had sexually assaulted another child and members of staff.
  - 6.2 The respondent accepts that in March 2018 the Claimant contacted Caroline Wilkins of Hampshire County Council to complain that the Head Teacher and the Chair of Governors were in collusion and that the Chair of Governors was not following a whistleblowing policy and was attempting to cover up the concerns the Claimant had raised.
  - 6.3 Although not recorded in these issues, it is nonetheless clear that the Claimant made a third disclosure, and this was also accepted in the course of the chronology of events as a protected disclosure, when on or around 16 April 2018, the Claimant made a safeguarding complaint about the fact that a child was subjected to a violent assault on a school corridor resulting in significant injury.
7. The respondent in effect accepts for the sake of argument that those are all protected disclosures, but it submits that those protected disclosures did not have a causal effect in relation to the decisions that fall to be analysed in this case. I have already dealt with the respondent's position on dismissal.
8. In terms of detriment on the ground of protected disclosures the Claimant raises seven detriments, six and seven of which were added by way of

amendment because in an earlier ruling the Tribunal accepted that these had been missed off the list of issues inadvertently. The detriments alleged are:

- (1) Commencing a redundancy process without their being a genuine need for any redundancy (16 March 2018).
- (2) On or about 16 April 2018, selecting the PSHE teaching role held by the Claimant as being at risk of redundancy.
- (3) Failing to redeploy the Claimant until 13 July 2018, when she was redeployed into the English teaching role.
- (4) Instituting disciplinary action against the Claimant.
- (5) Instituting capability procedure against the Claimant.

Both of those we interpret relate to the capability proceedings brought by Ms Payne in 2019.

- (6) An unannounced observation on 13 February 2018.
- (7) An unannounced observation in October 2018.

Both of those the Claimant suggests had in effect a victimising intent by reason of the fact she had raised protected disclosures.

9. Disability Discrimination.

9.1 The respondent concedes that the Claimant was a disabled person at the material times. In her disability statement the Claimant talked only of depression. There are references in the Occupational Health material also to ME. On the balance of probability, it has been accepted by Occupational Health and the respondent that at all relevant times the Claimant was disabled by reason of depression and/or ME.

9.2 Discrimination arising from disability. The unfavourable treatment relied upon is dismissal. Sickness absence is said to arise in consequence of the Claimant's disability. Was the dismissal because of the sickness absence? If so, can the respondent justify the dismissal as a proportionate means of achieving a legitimate aim? The legitimate aim relied upon is the proper functioning of the school as against a background of the school being assessed by Ofsted as 'in need of improvement' and being close to a failing school. Was the decision to dismiss a proportionate means of achieving that aim? We return to that issue later.

9.3 Failure to make reasonable adjustments. Did the respondent apply the following PCPs (Provisions, Criteria or Practices)? The practice of timetabling teachers to teach on all days of the week. Secondly, expecting staff to attend on all days for meetings and other duties. Thirdly, the application of the sickness absence procedure and the triggers within it.

9.4 Did those PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disabilities in that the Claimant needed a break from attendance at school to work from home mid-week for example?

9.5 What steps should the respondent had taken to avoid the disadvantage? The Claimant suggests the failure to maintain the earlier reasonable adjustment that she work Wednesday morning from home and that she was not timetabled to teach at all on Wednesday afternoons was a failure to make reasonable adjustments. Raising the triggers for the Claimant under the sickness policy is put forward as a further adjustment. The fundamental point here is that the Claimant was seeking in the new school year in September 2019, that adjustments previously allowed in the previous year were maintained in terms of the timetabling of her contract. Did the respondent fail to take those steps?

## **THE LAW**

### **Public interest disclosure**

- 10 By s.43A of the Employment Rights Act 1996 a protected disclosure means a qualifying disclosure as defined by the Act. By s.43B(1) a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following - (a) that a criminal offence has been committed, is being committed or is likely to be committed; (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; (c) that a miscarriage of justice has occurred, is occurring or is likely to occur; (d) that the health or safety of any individual has been, is being or is likely to be endangered; (e) that the environment has been, is being or is likely to be damaged; or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed
- 11 By section 103A of the Employment Rights Act 1996 if the reason or principal reason for the dismissal is that the Claimant made a protected disclosure, the dismissal is automatically unfair.
- 12 By section 47B of the ERA 1996 an employee has the right not to be subjected to any detriment done by an employer on the ground that the employee has made a protected disclosure.
- 13 A claim for detriment has to be brought ordinarily within 3 months. By s.48(3) of the Employment Rights Act 1996, an employment tribunal shall not consider a complaint under this section unless it is presented—
  - (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
  - (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

- 14 By subsection (4), for the purposes of subsection (3)—
- (a) where an act extends over a period, the “date of the act” means the last day of that period, and
  - (b) a deliberate failure to act shall be treated as done when it was decided on; and, in the absence of evidence establishing the contrary, an employer ... shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

### **Disability Discrimination**

- 15 Discrimination arising from disability is provided for under Section 15 of the Equality Act 2010. That provides at subsection (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.
- 16 The duty to make reasonable adjustments is set out in sections 20 – 21 of the Equality Act 2010, and in Schedule 8. Section 21 establishes that a failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments. Section 20 sets out the requirements. Under s20 (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.
- 17 Burden of proof under the Equality Act 2010 is covered by section 136. In effect, once the Claimant establishes a prima facie case of discrimination, the burden transfers to the employer to show that discrimination has played no role in its decision-making whatsoever. If the employer does not discharge that burden, the Tribunal must find discrimination.
- 18 In terms of time limits, by section 123(1) of the Equality Act 2010, a complaint to an Employment Tribunal may not be brought after the end of (a) the period of three months starting with the date act which the complaint relates, or (b) such other period as the Employment Tribunal thinks just and equitable. By subsection (3) of section 123 conduct extending over a period is to be treated as done at the end of the period. This provision consolidates the pre-existing limitation law on discrimination claims.

## General Unfair Dismissal

19. The Tribunal has had regard to section 98 of the Employment Rights Act 1996. By section 98(1) it is for the employer to show the reason, or if more than one, the principal reason for the dismissal. A reason relating to the capability of an employee is a potentially fair reason. By section 98(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.
20. In Iceland Frozen Foods v Jones [1982] IRLR 439 (EAT) guidance was given on the meaning of s. 98(4). The starting point should always be the words of s. 98(4) themselves; that in applying this section an Employment Tribunal must consider the reasonableness of the employer's conduct, not simply whether they, the employment Tribunal, consider the dismissal to be fair. In judging the reasonableness of the employer's conduct an employment Tribunal must not substitute its decision as to what was the right course for that of the employer. 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, whilst another quite reasonably take another. The function of the Employment Tribunal, as an industrial jury, 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 is outside the band, it is unfair.

## **FINDINGS OF FACT ON THE ISSUES**

### Protected Disclosures

- 21 The Claimant was dismissed by a panel of governors chaired by Gordon Duff on 26 September 2019. Mr Duff and his colleagues did not know the detail of the protected disclosures. We accept what Mr Duff told us about that. In the hearing the Claimant did make reference to having raised protected disclosures, but Mr Duff and his colleagues did not have advance notice of those. We are satisfied that they placed no reliance on the fact that the Claimant had made protected disclosures in their reasoning on their decision to dismiss.
- 22 The panel of governors was concerned about the Claimant's absences and her ability, indeed willingness, to return to work. The protected disclosures played no role whatsoever in the decision to dismiss the Claimant. Similarly, the new Head in post since April 2019, Josie Payne, brought the Claimant to a governors' panel to consider dismissal solely because of the Claimant's pattern of absences and the consequent effect this was having on the school.



- 23 In addition to the absences was the Claimant's failure to abide by sickness certification procedures and also the fact that she had not prepared, as we find, schemes of work in English for the forthcoming academic year. Mrs Payne was not influenced in any way whatsoever by the historic protected disclosures which predated her arrival in the job. Accordingly, the reason for dismissal was solely capability in the form of absences and was not the fact, as she had, that the Claimant had made protected disclosures.

The Protected Disclosure Detriment Claim

- 24 It is right that the school decided that the PSHE stand-alone teaching post was the post that would be at risk of redundancy. Substantive subject post holders were not put at risk of redundancy such as Maths, Science and English and for a while it seemed that the Claimant may be selected for redundancy. In the event, as communicated to her in July 2018, she was redeployed to the English Teacher role.
- 25 The events around the redundancy however were discreet issue decisions made by the former Head Teacher who was, in part, the subject of disclosures made by the Claimant.
- 26 There is a three months time limit for bringing claims of protected disclosure detriment. The extension provisions are the same as those for unfair dismissal; they are not the more generous allowance allowed for discrimination claims.
- 27 For there to be an argument that these detriment claims, concerning the redundancy and the alleged conduct by the former Head, to be in time, they would have to be connected as a matter of fact with the capability procedure brought by Mrs Payne in September 2019. They were not as a matter of fact connected with that decision; that decision was down to absences and was not down to protected disclosures. Even if the Claimant could argue prima facie that the redundancy process was linked to protected disclosures, that episode was not linked to the sickness absence capability procedure (also described as a disciplinary procedure). The time limit for presenting those claims around redundancy and around unannounced observations expired no later than January 2019. This claim was presented on 21 November 2019 and so those claims are at least ten months out of time. It was reasonably practicable for the Claimant to bring a complaint about those matters within the time limit. She was in contact with union representation, she is an intelligent woman who has researched and was capable of researching her own employment rights and remedies.
- 28 Accordingly, the detriment claims 1, 2, 3, 6 and 7 are out of time and fail at least for that reason.
- 29 The detriment claims around instituting disciplinary action and instituting the capability procedure, which we interpret as relating to the actions of Mrs Payne in September 2019, fail because the reason for them was not protected disclosures in any way whatsoever. The respondent shows that the reason was concerns about attendance.

Disability

30 The respondent concedes that the Claimant was a disabled person at all material times. The Claimant was disabled with depression and/or with ME. In her own disability impact statement, she talks only of depression and being prescribed Fluoxetine for it, but we see from the Occupational Health reports that ME is also cited frequently. The Claimant was disabled at all material times with depression and/or ME and the respondent knew this at all material times.

Absences

31 The Claimant has a long history of regular intermittent significant absences going back to 2011. We are only concerned with the history from, say, the end of 2017 through 2018 and 2019. This is because the relevant decision makers do not make reference to any absences prior thereto. Mrs Payne was the new Head of the school coming into service in April 2019. The school was struggling, Ofsted had inspected it as in need of improvement. Mrs Payne was concerned that the Claimant's absences were having a detrimental effect on the school's performance.

32 Mrs Payne decided, as the new Head, that she was going to tackle an issue which had not been tackled formally in the months and years previously. She set out her justification for bringing the matter to the governors in an invitation to a governors' dismissal letter. The terminology under the school procedure is a governors' dismissal committee which makes clear that dismissal is an option. In her letter Mrs Payne focussed upon the absences which had started in July 2019 which had led up to the end of that school year and which had continued the following school year. It is perhaps instructive to go into some detail of the recent history of absences and Occupational health involvement. It is to be noted that in her invitation to the governors' dismissal committee Mrs Payne only started in references in July 2019, the governors in their decision go back into 2018 but it is instructive the Tribunal thinks to go back to the end of 2017 and try and set the scene from them. Matters of fairness and procedure will be considered in due course.

33 On 23 November 2017, there was a managerial support meeting with Mr Illingworth the Deputy Head Teacher and he recorded that the purpose of the meeting was to set out the school's concerns regarding the sickness absence in the last twelve months in 2017. The Claimant had fifty-two days of absence owing to sickness. The position of the adjustment on Wednesdays was first made in 2017; the Claimant went down from a full-time contract to a 0.91 equivalent contract meaning she had Wednesday afternoons off and she only came in for the early part of Wednesdays. In the fullness of time, the position was PPA (preparation time) on Wednesday mornings at home, Wednesday afternoons off. The Claimant approved of this change because it gave her a timetable of two days on, one day off in effect, although she had to do some work from home and two days back. This was first introduced in July 2017 and was observed intermittently up to September 2019.

- 34 In advance of the new school year in 2019, Mrs Payne timetabled this allowance for Friday afternoons rather than Wednesdays. This was the subject of complaint by the Claimant.
- 35 In January 2018 Mr Illingworth instructed OH, who reported in June 2018 to the effect that adjustments were in place relating to absence triggers and timetable. The disabilities of depression and anxiety and ME were concerned. There were absences in October 2018. The Claimant made reference to the protected disclosures and at that stage said she was actively looking for other jobs; but that was expressly stated in connection with the fall-out from the protected disclosures. Between October 2018, and February 2019, the Claimant was off work for an extended period. Prior thereto, performance concerns had been raised by the school. Ruth Witton, the former Head Teacher, and colleagues listed various performance concerns that were held in respect of the Claimant's work. There is a list in a letter dated 27 September 2018 of ten matters of performance that were of concern to Ruth Witton. These were:
- (1) Using your personal mobile phone during lesson time.
  - (2) Sending your LSA (Learning Support Assistant) out of the room when they should be deployed to support pupils learning.
  - (3) Failing to plan adequate lessons.
  - (4) Not marking books in line with policy.
  - (5) Not taking class register.
  - (6) Failing to complete adequate notes in a timely manner.
  - (7) Not leaving a reason for absence.
  - (8) Having poor attendance record including choosing not to attend on a Wednesday when there was a planned support session booked.
  - (9) Not following protocol at the end of the day.
  - (10) Unprofessional conduct during support and feedback session with Hampshire experts on improving performance at the school.
- 36 We know the Claimant criticises the former Head in respect of protected disclosures and will say that anything negative expressed in relation to her by the former Head was connected with protected disclosures; but notwithstanding that there is a history of significant performance concerns.
- 37 The Claimant towards the end of 2018 as indeed in 2019, did not submit sick notes in time; she had to be chased for sick notes on 16 November 2018, 21 December 2018. An Occupational Health report in January 2019 said she was fit to perform the role with adjustments. There were across March 2019 attempts at introducing phased returns to work details of all of which were not necessarily successfully implemented. This resulted in a further referral to Occupational Health for absences in March and the latest Occupational Health

report we have is dated 9 April 2019. It is one of the Claimant's criticisms that an Occupational Health report was not obtained by the governors prior to the hearing in September.

- 38 The report of 9 April 2019 stated the Claimant was fit to perform the role with adjustments. There should be a phased return to work. The Claimant was described as disabled within the meaning of the Equality Act. The respondent should have known that. The Occupational Health practitioner said "Given the current medical information, it is my opinion that the criteria for disabilities defined by the Equality Act 2010 is likely to apply. However, this is ultimately a legal decision and not a medical one. Management may wish to take into account as a reasonable adjustment that someone with a known disability is likely to have a higher level of sickness absence related to that disability than someone without that disability. It is up to management to decide what acceptable attendance is and what cannot be tolerated even with the application of the disability legislation that asks for reasonable adjustments". In many ways that is the issue in the case.
- 39 In terms of the phased return to work projected in April 2019, the practitioner wrote "in addition, it would be prudent to carefully manage work demand and complexity throughout the phasing period, and perhaps for some time afterwards, to ensure that work demand is matched to Fiona's hours and that she is not being overwhelmed by work. There may be a need to discuss this with her and devise a strategy for prioritisation to ensure that appropriate support is available to handle any issues that may arise". A meeting with the Claimant on a weekly basis was suggested to identify those matters.

#### Arrival of new Head Teacher Mrs Josie Payne April 2019

- 40 Mrs Payne then arrived at the school. She has prepared a chronology of attendance matters, which was an internal document, but which has been shared with us and sets out how Mrs Payne saw things. In particular, she wanted to establish whether the Claimant's working within the school was viable or not. She was aware of the history of absences but decided she would as best that she could take control of the matter. In April 2019, she met the Claimant for a return to work interview and risk assessment. The Claimant seemed very positive about returning to work. A planned phased return was agreed to be reviewed on 10 May.
- 41 On 29 April 2019 Mrs Payne records checking in with the Claimant every day that she was in. On 30 April the Claimant phoned in sick saying she had a bad night and would not be coming in. On 2 May 2019 there was a return to work interview and triggers were discussed. Mrs Payne stuck with the triggers provided for in the procedure. Mrs Payne said that she informed the Claimant that should she have six or more days off in the next twelve months it would trigger the first stage of formal absence procedures. Fiona asked if she should get more days because of her ME. Mrs Payne's position was that the decision to increase the amount of days off will be at her discretion and at the moment she was sticking with the procedure because the school needed to know if her job was sustainable. The Claimant accepted that, but this shows that Mrs Payne knew what the procedures were. The next stage in the procedure was stage 1, formal warning 1, stage 2 formal warning 2, Stage 3 the dismissal meeting.

- 42 On 10 May 2019, they met to see how the Claimant had been getting on. This appeared to be a positive meeting. In that meeting, the Claimant said she had been leaving school before the bell had gone, she wanted to go before the pupils went to help with her anxiety, that was agreed for the rest of the term.
- 43 On 14 May 2019, at approximately 1:30pm, the Claimant came into the office to ask if she could leave as she was exhausted. Mrs Payne said they were short on staff. She was required to teach her last lesson if she felt she could. She could leave at the end of the day and miss the staff meeting.
- 44 In May, June and July 2019, Mrs Payne recorded in detail the absences which led to her putting the Claimant in front of the governors. She records a series of situations that were managed by conversations or emails, examples include performance, showing inappropriate films to year 11 which apparently frightened some of the pupils, leaving the school site during lesson time.
- On 11 June the Claimant phoned in sick.
  - 12 June phoned in to say she was not feeling right.
  - 24 June called in to say that her son was in hospital with a piece of metal in his arm.
  - On 28 June there was a meeting between J K Katelyn and Kiara.
  - July the Claimant did not teach afternoon lessons as she had a migraine.
  - 11 July the Claimant called in sick.
  - 12 July the Claimant called in sick.
  - 15 July the Claimant called in sick.
  - 17 July off work till Monday.
  - 22 July the Claimant called in sick.
- 45 The Claimant was meant to prepare schemes of work in advance of the new school year in September. We find that she did not. She certainly did not send any to Mrs Payne.
- 46 Further, Mrs Payne timetabled the Claimant's non-working time on Fridays not Wednesdays for the academic year starting September 2019. The Claimant did express concern at that. It was challenged by the Claimant and the Head responded - "well get your union involved". The Head expected some feedback from the union. That did not happen. The Claimant went into the following year believing that her Wednesday arrangement had not been honoured. It would not have been difficult for Mrs Payne to preserve the status quo on the timetabling.

- 47 The Claimant did not attend training. She stopped sending in sick certificates. This being the beginning of a new year, and Mrs Payne being desirous of sorting the school challenges out, she put the Claimant before the governors with view to dismissal at stage 3 of the procedure. That is a controversial step to take. We have looked carefully at the school's procedures.

Extracts from school's Attendance Management Procedures

- 48 Paragraph 5.1 deals with long-term sick absence. It provides that 'in cases of long-term sickness absence where an individual is not able to return to work over an extended period, there is no formal procedure of warnings and appeals that can be applied. In managing such cases the head teacher/senior manager will ensure Occupational Health advice is sought before proceeding further'. We had the Occupational Health report from April. We did not have one in September.
- 49 Paragraph 5.7 provides that a school may proceed to stage 3 head teacher governors committee hearing or a mutual agreement prior to the entitlement of occupational sick pay being exhausted *where there is no reasonable prospect of the employee returning to work in the foreseeable future or within a reasonable timescale*. The terms of the Occupational Health report that was obtained in April is not consistent with a view that there was no reasonable prospect of the employee returning.

Meeting before the Governors

- 50 The governors were persuaded, having heard the Head and the Claimant, that dismissal was appropriate, and it is important to highlight passages in the dismissal letter and also the minutes of the meeting. In their dismissal letter of 3 October 2019, the following was written on behalf of the governors, who were fully consulted:

- "The Head Teacher made a statement providing full details of your absence from your role as Teacher since commencing her role as Head Teacher on 23 April 2019, which to date amounted to 29 days, 38 percent absence which is ongoing. She also referenced your previous period of long-term absence due to sickness which you confirm to be 10 October 2018 until February 2019. She referred to your supportive phased return to work in February and March 2019 and the adjustments the school continued to make during summer term 2019. Although she had not cited the Occupational Health reports, she undertook a risk assessment with you and acted upon all the recommendations that you advised her Occupational Health had recommended.
- These included support from Hampshire IAS in the teaching of English [those are specialist advises to raise standards], working at home on a Wednesday, leaving school early at the end of the day, not having a tutor group, not having a UPS [specific] responsibility for any subject area and not attending weekly staff meetings. All of those were then put forward as adjustments.
- The Head stated that you have not followed the school's absence management procedures for notification nor had you provided medical

certificates to cover your period of absences since 15 July 2019 to date. She explained the impact of your absence on colleagues on the budget and most particularly on pupils with special educational needs who rely on staff who knew them and formed relationships with them.

- The governors' conclusion was that having given full consideration to the documentary evidence and the verbal submissions they concluded that despite the phased return and the ongoing support provided to you during the summer term you were still unable to sustain your attendance. You remained absent to date and did not provide the hearing with any indication of a potential return to work. Due to the significant impact your absence was having on colleagues and the budget but most significantly on the pupils, it is with regret the governors accept that the level of absence cannot be sustained and therefore you should be dismissed on the grounds of capability due to ill health".

51 They had gone to dismissal as though this were a level 3 case. The Claimant had argued in front of them her interpretation of the procedures which is that you have to go down warning level 1 and level 2 before you get to level 3.

52 Reference was then made in the letter to the Claimant's presentation and the fact that the Claimant had stated that she agreed with the Head Teacher regarding the impact that her absences were having on pupils, staff and the budget. It was recorded that she also agreed that she had not fulfilled her obligations in relation to the sickness policy.

53 Mr Duff was clear in his evidence that he did not rely on any misconduct. It seemed at one point to the Tribunal that these were allegations not just of capability but also of misconduct. Mr Duff was clear that was not the position. On his position, it was all to do with absences arising from disability and in those circumstances, it would be difficult for the Tribunal to turn to issues of contributory fault.

54 The Claimant did not help herself in the meeting. She can blow a little hot and cold, we saw that for ourselves in the Hearing; she can say things on the one hand and then contradict them on the other. The Head Teacher having set out her clear belief that the matter was not sustainable and that the Claimant needed to be dismissed, the Claimant did say things such as she agreed that the situation had become untenable for all the reasons the Head Teacher had given; she accepted that she would need to leave as she could not sustain working in this post as things stood. However, she did not want to be dismissed. The Tribunal were not entirely sure whether she was seeking to negotiate a package in that statement or whether she was saying she wanted the adjustments of prior to September 2019 back in place, for example, to accommodate Wednesdays. In this context, the Claimant submitted that reasonable adjustments had not been made, there had been a difference between a supportive return to work and reasonable long-term adjustments. She said there had been a lack of care from the local authority over the whistleblowing. She also said that she acknowledged she had not been a very good English teacher and that she felt the switch from PSHE to English had not gone well; she said she did not have much training.

- 55 There is no doubt that the Claimant gave contradictory messages. We have full sympathy with the governors for the difficult position they were in. We also have full sympathy with Mrs Payne. We understand what she was trying to do. There had been a long-standing problem with the Claimant's attendance and Mrs Payne was going to sort it out. We understand the motivation. It was not acting in bad faith. We have thought long and hard however, as to whether what the Head did, and what the governors were doing, was in breach of the procedures. We have concluded they were in breach of the procedures. We think the Claimant is right that there was not a basis for jumping to stage 3; this was not a case if you took Occupational Health evidence into account for saying that there was no reasonable prospect of the employee returning to work. In our judgment, the only fair interpretation of the procedures was to go down the formal warning procedures designed to apply in cases such as this.
- 56 In the previous eleven years the school had failed to get so far as a stage 1 formal meeting. That does not reflect well on the previous management. Mrs Payne was fully aware, as we know from her own notes, of the availability of taking the matter to stage 1 but she tried, for intentions that we understand but cannot condone, to bring the matter to stage 3.

## **CONCLUSIONS**

- 57 The Claimant was not dismissed for making protected disclosures. She did make protected disclosures when Ruth Witton was the Head Teacher in January, March and April 2018. The details of these were not known by the decision-makers in September and October 2019. The governors dismissed for capability and the Claimant's longstanding poor attendance record. Mrs Payne was not motivated by the disclosures when instigating the procedures leading to the Claimant's dismissal. The alleged detriments around the proposal to make the Claimant redundant in 2018, which did not materialise, were out-of-time and had no relationship with Mrs Payne's concerns around attendance.
- 58 We have concluded that the dismissal by the governors at the meeting on 26 September 2019 was not fair in that they did not follow their own procedures. What should have happened at that meeting is that the formal warnings procedures that were designed to apply be followed. They acted at stage 3 missing out formal warnings at stages 1 and 2.
- 59 There are further consequences to that finding also. Most of the absences were down to disability. If you are not going to treat the matter of failing to serve sick notes as a matter of misconduct - and they chose not to do that - then the bulk of the absences were down to disability. Being absent arose from the disability and dismissing without exhausting the right procedures seems to us to be unfavourable treatment connected to disability which cannot be justified, because the respondent cannot justify failing to observe its own procedures. That is the decision, after some intense reflection, that the Tribunal unanimously has come to. You cannot justify not following your own procedures when the procedures are there to be followed.



- 60 We also agree with the Claimant that there was a failure to maintain the reasonable adjustment of accommodating the Wednesday working. We hear what Mrs Payne says that if the union had got back to her, she would have altered it; but it was imprudent in the first place to timetable this to be at the end of a Friday rather than to maintain it in the middle of the week so that the Claimant could reboot her energies. The PCP was timetabling PPA and non-working team at any time in the week. That was a substantial disadvantage to the Claimant because she required the timetabling in midweeks to as to boost her energy in dealing with her disabilities. It was reasonable for the Respondent to maintain this adjustment.
- 61 In summary, we do find that the Claimant at that point as at September/October 2019 was unfairly dismissed in that the school had failed to follow its procedures. That decision to dismiss without going down the warnings procedures was unfavourable treatment connected and arising from disability which cannot be justified and to that extent was disability discrimination. Similarly, the failure to maintain the Wednesday Accommodation adjustment was discrimination in the form of failure to make reasonable adjustments. The PCP was timetabling PPA and/or the non-working element of an employee's contract on any day of the week. That caused the Claimant a substantial disadvantage because she needed that to be timetabled midweek. It was reasonable for the employer to maintain that which was previously agreed.
- 62 What should have happened we find, is that at the governors' meeting the Claimant should have been put on a level 1 warning with a target of trigger points. Consideration then would have been given as to whether the trigger points as set out in the procedure, that is to say four occurrences of sickness absence totalling six days in twelve months or nine days in total in twelve months would have been adopted or a warning with trigger points adjusted with some tolerance for disability absence, and the Claimant's attendance would be reviewed on an ongoing basis.
- 63 The issue in this case in terms of remedy is whether, and how long would it have taken before, the Claimant would have been put on a level 2 warning and would ultimately have been dismissed.
- 64 In short:
- (a) The Claimant was unfairly dismissed because the warnings procedure was not exhausted under the attendance management policy.
  - (b) She was not dismissed for having made protected disclosures.
  - (c) She did not suffer actionable detriments in time for having made protected disclosures.
  - (d) She suffered discrimination arising from disability by the school not following the warnings procedure and dismissing without following exhausting it first.
  - (e) There was a failure to make a reasonable adjustment by not maintaining the Wednesday timetabling of the PPA time and non-

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working time in the proposed timetable for the school year beginning in September 2019.

Employment Judge Smail

Date: 10 January 2022

Judgment & Reasons sent to the Parties: 12 January 2022

FOR THE TRIBUNAL OFFICE

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