



EMPLOYMENT TRIBUNALS

Claimant: Ms N Sinclair

Respondent The Governors of Bishop of Llandaff Church in Wales High School

Heard at: Cardiff **On:** 26 & 27 January 2017

Before: Employment Judge S Davies
Members: Mr Bradney
Ms Lovell

Representation:
Claimant: Mr C Howells (Counsel)
Respondent: Ms K Gardiner (Counsel)

JUDGMENT on REMEDY

Judgment on Remedy was given orally at the hearing and in writing on 30 January 2017. Full reasons were given orally at the hearing.

REASONS

1. These written reasons are provided at the request of the claimant on 1 February 2017. Regrettably the request was not referred to the Employment Judge until 3 April 2017, which led to delay in the provision of written reasons.
2. It was the unanimous decision of the Employment Tribunal that future loss was awarded on the basis of career length loss, subject to a 20%

deduction for the chance of a non-discriminatory dismissal on grounds of absence due to ill health.

Background

3. This Remedy Hearing was originally listed for 7 November 2016 but was postponed on the application of the Respondent who wished to adduce its own medical evidence (having previously indicated that it did not wish to do so). That postponement was granted on the basis of my direction that Judgment by Consent should be issued in respect of basic award, notice pay, injury to feelings and costs; those Judgments by Consent were issued on 2 and 28 November 2016. As such, steps were taken to ameliorate the Claimant's difficult financial circumstances whilst waiting for the relisted Remedy Hearing.
4. Shortly prior to this hearing the Claimant successfully applied for ill health retirement under the Teachers' Pension Scheme. There was some delay in obtaining final figures as to the value of that pension, which necessitated a variation in the directions previously given for exchange of submissions. This resulted, along with another factor - the availability of Dr Singh the Respondents medical expert, in an application for postponement made by the Respondent which was rejected by Employment Judge Beard on 19 January 2017.
5. Due to a short further delay from the Teachers' Pension Scheme, the Claimant sought a further extension of 1 day for the exchange of submissions which was objected to by the Respondent and led to a Telephone Preliminary Hearing (TPH) on 25 January 2017 before me. By the time of the TPH, calculations from the Teachers' Pension Scheme had been received and the parties cooperated in agreeing directions to swiftly exchange submissions and other documentation ahead of this hearing. I record the fact of this TPH taking place here in place of a separate record (this has not been produced due to the proximity of this Remedy Hearing).

Remedy Hearing

6. We heard from the Claimant who produced an updated Witness Statement. Additionally, on her behalf we heard from Dr Jenkins, who produced two versions of a medical report, the second of which was dated 28 October 2016.
7. On behalf of the Respondent we heard from Ms Maunder, HR professional. The Respondent's medical evidence was submitted in documentary form only, in the report of Dr Singh.

Factual background

8. The facts regarding this claim are set out in our liability Judgment of 27 May 2016 and we do not repeat them here.
9. Following the Claimant's hospitalisation in May 2015 for a period of 6 weeks, the Claimant has not undertaken paid work, save for 2 bar shifts at a pub which she was unable to complete.
10. The Claimant has attempted to engage in voluntary work, for example re-establishing the student debating club (which she had previously run at the Respondent school) in her own time and becoming involved in community engagement projects in Grangetown, the area she used to live in. However, the Claimant has not felt well enough to continue with these voluntary activities.
11. The Claimant has engaged in mindfulness sessions at the Hamadryad Mental Health Facility at which she shares her experience of bipolar with others. The Claimant described this as being a useful process both for herself and for the others in attendance.
12. We conclude that the Claimant has made consistent attempts either to return to employment, and not being able to do so, has also made attempts to find useful voluntary work but has been prevented by her ill health from even doing that.
13. Following her discharge from hospital, the Claimant and her husband made the decision to live separately. The Claimant's husband suffers from severe anxiety and they felt it better to live apart for a while whilst they both recovered. This decision has meant that her husband stayed living in the Claimant's previous home. Whilst the Claimant claimed benefits initially and lived in a flat, those benefits were removed, once a claim was made on insurance for mortgage payments on the house that her husband was occupying. This then led to the Claimant living with friends and family for a period and then moving to a caravan. The caravan site is not open for residence over a full 12 months every year and so she is currently of no fixed abode.
14. Turning now to the medical evidence, the Claimant has had 2 previous incidents of lengthy absence from work in 2012 and 2014; one manic and the other depressive episodes. It was not until May 2015 that she received a diagnosis of bipolar disorder and describes learning since then about her condition and how she must manage it.
15. We highlight a chronology of particularly relevant medical evidence:

- 16.10 December 2012: a letter from a Consultant Psychiatrist, Dr Kaleekal. He notes that the Claimant was going through an acutely stressful time contributed to by inter-personal difficulties with her husband and equally difficult times at school (page 73).
- 17.9 October 2014: the Claimant attended the GP for a review and described 'enjoying being back in school and coping well' whilst noting that she was approached by the Head of Wellbeing at the school as 'some staff raised concerns about possible signs of manic behaviour' (page 60). We note that this document was brought to the attention of the Claimant and her witness during cross examination, to support the suggestion that she was becoming unwell at this stage. However, this does not appear to be borne out by the Claimant's own presentation to the GP as noted in the report above and in the following entry from Dr Curran.
- 18.12 November 2014: Dr Curran, Consultant Psychiatrist viewed the Claimant as being in remission, that her mood was stable and she responded appropriately in the circumstances, there was no evidence of manic symptoms such as pressure of speech and she had good insight (page 97).
- 19.31 March 2015: the Claimant attended outpatients clinic and was seen by Dr Fapohunda a locum Consultant Psychiatrist, who wrote to the Claimant's GP (page 99). The Claimant attended with her husband; at one point the Claimant asked her husband to leave, she then explained her support job was going to come to an end and she felt that her husband had significant anxiety problems.
- 20.24 April 2015: the Claimant attended her GP and was noted as being tearful at one point; described a 'long story of her dismissal from sec school as an English teacher after 21 years but accepts she wasn't well', that she had taken on a teaching assistant's job and several other jobs, so was manically working, but admits she wasn't coping and wants to be able to stop (page 67).
- 21.1 May 2015: Dr Curran noted that the Claimant seemed euphoric, productive, talking, energetic with a reduced need for sleep and multiple plans. Dr Curran's view was that she had an emerging manic illness and that the Claimant was relapsing (page 102).
22. May to June 2015: the Claimant was hospitalised and sectioned under the Mental Health Act.
- 23.8 March 2016: Dr Curran wrote to the Claimant's GP noting that on review the Claimant's mood was 'more or less stable at the moment, but she still has occasional insomnia with early morning wakening and ruminations'

managed by her medication and relaxation techniques. Upon review, she was 'reactive and euthymic' and a review was scheduled for 2 months' time (page 121).

24. 27 June 2016: (pages 123-4) the Claimant attended a clinic as she was experiencing palpitations and a letter was subsequently sent to her GP by the Cardiac Physiologist in which there was reference to 'all of her symptoms resolving after a successful Employment Tribunal'. We note that during evidence Dr Jenkins pointed out that this evidence was provided by someone who was not a psychiatrist and so we treat the evidence it contains with regard to mental health with some circumspection.
25. We were also shown medical opinions regarding the Claimant's health. On 22 February 2016 Dr Curran was asked whether in her view the Claimant would have relapsed into a manic episode in 2015 had she not been dismissed. Her response was that it was difficult to answer the question 'other than to say that stressful events such as dismissal from work can act as a trigger for someone to become unwell. As this was a significant trigger and there were no other triggers at the time, it is likely that this is what precipitated her relapse'. In Dr Curran's view her loss of work and search for alternative employment acted as triggers which perpetuated her illness. Dr Curran's view at that time was that whilst the Claimant was in remission she was still displaying symptoms of fluctuation of mood and it was impossible to predict whether she would recover sufficiently to return to full time employment (at page 97 – 98).
26. Dr Jenkins provided his report on 28 October 2016 and at page 135k states it is 'very difficult to predict what work the Claimant may become capable of, if any, in the future. The prognosis to return to a professional job, carrying nearly three decades of experience is not a physical possibility in time'.
27. Dr Singh summarises his view at paragraph 64 of his report, "in my view as she was unwell and her teaching was compromised because of her illness, more robust support and supervision from occupational health, would have been advisable, and she could have been on leave because of her mental health condition until she was fit enough to return." (page 135BB).
28. We note the Claimant's successful application for ill health retirement was made in December 2016; she was granted enhanced ill health benefits from 28 April 2016 retrospectively. Such benefits were granted on the basis that the Claimant is incapable of any work (page 200xx).

The Law

Personal injury

29. The Respondent is liable for injury caused directly by discrimination and the Claimant must show that the injury arose directly from discrimination. We need to take into account the possibility of multiple causes for the injury either as to its onset or to its extent. We must decide whether the injury is divisible, if not, the Respondent is liable for all of it. If it is divisible: to what extent was the injury caused by the Respondent? We need to take into account whether the Claimant has a pre-existing condition. If the Claimant's underlying mental condition made it likely she would have developed a similar injury absent discrimination, we need to assess that likelihood and reduce the award. The converse point is aggravation, where the discriminatory conduct has made a pre-existing condition worse, the Claimant recovers only for the additional injury caused.
30. We referred to the Judicial College Guidelines and the parties agreed that the Claimant's injury fell within the 'moderately severe' psychiatric damage band; the recommendation being for awards between £15,950 and £45,840.
31. We were mindful to guard against 'double counting' where injury to feelings is also awarded. We note that parties previously agreed an injury to feelings award, by way of Consent Judgment, in the sum of £14,000.

Chance of a fair / non-discriminatory dismissal

32. This is referred to as the **Polkey** point in submissions, albeit that **Chagger v Abbey National (2010) IRLR 47** applies to discriminatory dismissal. We are required to compensate the Claimant on a tortious basis, putting the Claimant in the position she would have been, insofar as that is possible in monetary compensation, had the discrimination not occurred.
33. Compensation is awarded for loss arising from the act of discrimination, in this case, failure to make adjustments to support lesson planning, the act of formal lesson observation and dismissal.
34. The question we need to ask is: what would have occurred had there been no unlawful discrimination? If there is a chance of dismissal occurring in any event that must be factored in to the calculation of loss. The Court of Appeal in **Chagger** accepted that in many cases the starting point in a case of a discriminatory dismissal will be the period for which the employee would have been employed by the discriminating employer. It will be for the employer to show that dismissal would have occurred in any event.

35. We were also referred to the guidance on the consideration of chance, in the context of an unfair dismissal claim, summarised in **Software 2000 v Andrews (2007) ICR 895** and the following principals emerge. When we assess compensation, our task is to assess the loss flowing from dismissal using our 'common sense, experience and a sense of justice'. That requires us to assess for how long the employee would have been employed but for dismissal. If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively, would not have continued in employment indefinitely, it is for them to adduce any relevant evidence that they wish to rely on. However, we must have regard to all the evidence when making that assessment, including any evidence from the employee herself. There will be circumstances where the nature of the evidence which the employer wishes to adduce is so unreliable that the Tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. Whether that is the position is a matter of impression and judgment for the Tribunal but in reaching that decision we must direct ourselves properly and need to recognise and have regard to any material and reliable evidence which might assist us in fixing just compensation, even if there are limits to the extent to which we can confidently predict what might have been. We must appreciate that there is a degree of uncertainty with that exercise.

Conclusion

Personal injury

36. The Claimant had a long-standing career, in a position she has held since her mid-twenties, at the same school and the loss of that role has had a great impact on her personally.
37. The Respondent acknowledges responsibility for causing personal injury but submits that other factors were at play, including the Claimant's personal relationship with her husband and concerns about losing a temporary teaching assistant's role. It was submitted that these concerns, unrelated to the Respondent's treatment of the Claimant, account for a 40% contribution to the personal injury suffered.
38. The Judicial College Guidelines provide that we consider the following factors: the injured person's ability to cope with life and work, the effect of the injured person's relationships with family, friends and those she comes into contact with, the extent to which treatment would be successful, future vulnerability and whether medical help was sought.

39. Dealing with the last point first; it is clear that medical help has been sought by the Claimant over a prolonged period.
40. We consider there has been a very significant impact on the Claimant's ability to cope with life and work. With regard to work, she has been unable to sustain any paid position found following her dismissal, whether that is a professional role as a teaching assistant or working in a bar or dog walking. We note the evidence of Dr Jenkins and the Claimant, that the Respondent's treatment of her has left her with anxiety and trepidation about a return to teaching. It is notable that even regarding the voluntary efforts she has made within her community or by setting up the debating club, the Claimant has been unable to participate or continue these activities consistently due to her ill health.
41. With regard to relationships with family and friends, the most evident example of difficulty in relationships is the separation from the Claimant's husband, which was initially a short-term situation whilst recovering from respective ill health. It is now almost two years on and they are still living apart, after 20 years of marriage. This is clearly a very significant change in the Claimant's personal circumstances.
42. As for the extent to which treatment might be successful, Dr Singh at paragraph 36 of his report, lists medications that the Claimant is currently taking including Diazepam, Zopiclone, Sertraline and Quetiapine. Dr Jenkins report at 3.10, notes there is a high risk of relapse and manic depressive episodes particularly as a result of stress. Dr Jenkins confirms that the Claimant is receiving appropriate treatment for her mental health on the NHS, but despite receiving this treatment Dr Jenkins concludes that the breakdown in May 2015 has destroyed the Claimant's ability to return to teaching. 'Her experiences at the school have scarred her so much that the thought of returning to teaching again fills her with trepidation and anxiety' (page 135J). He then says it is very difficult to predict what work the Claimant may become capable of if any. Dr Jenkins said in evidence that the Claimant had not made the improvement that they would have hoped for in a period of almost 2 years since her hospitalisation. In conclusion despite receiving appropriate treatment, the Claimant's ability to work has not improved and she remains vulnerable to relapse.
43. Dealing with her future vulnerability, Dr Singh suggests at paragraph 63 of his report that it is possible that the Claimant could go back to teaching in a different school and even suggests that she might go back to teaching at the Respondent school in a limited fashion. We think this latter assertion, in light of the findings of discrimination in our liability Judgment, is highly questionable. Dr Jenkins acknowledged that there should be some improvement in her mood once the Employment Tribunal proceedings had come to an end, but was unable to predict a return to health sufficient for

the Claimant to work. He describes her condition as a severe and enduring mental disorder and as such we conclude the Claimant remains vulnerable.

44. We do not consider it would be appropriate to reduce the award for a chance that such personal injury would have been sustained absent discrimination. Although the Claimant has a pre-existing medical condition we are satisfied that her particular injuries were predominantly caused by the actions of the Respondent, certainly in the past the Claimant's previous periods of ill health did not lead to such injury. The Claimant had been able to return to work after bouts of ill health and it appears the particular circumstances of a formal lesson observation and dismissal were predominant factors causing such serious injury to the Claimant.
45. Turning now to other potential factors leading to personal injury, the Respondent suggested that the Claimant's concerns about the loss of a temporary teaching assistant role had contributed to her hospitalisation, but we do not consider a deduction would be appropriate for this factor as we consider it is directly linked to the Respondent's treatment of the Claimant. The Claimant would not have been in temporary employment had it not been for the dismissal.
46. We consider however that the Claimant's personal relationship with her husband was a contributing factor to an extent. This was a long-standing issue. There is reference to it in her medical notes dating back to 2012. It appears that the issue with the Claimant's husband had become more marked in 2015, as is evidenced now by the fact that they separated and remain living apart.
47. We uphold a personal injury award of £30,000 subject to deductions, noting the Judicial College Guidance which states that the majority of awards should fall somewhere near the middle of the bracket.
48. The Respondent suggests a deduction of 40% for two external factors. Taking this into account and noting the contribution we found with regard to the personal relationship issue and its impact on the Claimant's mental health, we consider a deduction of 20% is appropriate giving a total award of £24,000.

Polkey / Chagger

49. Turning to the question of when, and if, a fair and non-discriminatory dismissal might have occurred. We remind ourselves that our task is to use our common sense, experience and sense of justice. In discharging this task the Tribunal benefits significantly from the industrial experience of the non-legal members. We have reminded ourselves that in many cases

the starting point where there is a discriminatory dismissal, will be the period for which the employee would have been employed by the discriminating employer. We conclude in light of the Claimant's age, length of service, mental health issues and those of her husband, she is likely to have remained in the employment that she knew so well. We consider that she would have been highly likely to remain in the school's employment until normal retirement age.

50. Turning to the oral evidence on behalf of the Respondent from Ms Maunder, it is contended that the Claimant would have been placed on a performance improvement plan and that by 31 December 2015 at the latest she would have been dismissed. This date being the longest date under the terms of the capability policy which provides for an overall period of 12 months for performance management.
51. However, the question we must ask is what would have happened **absent the discrimination found**, which includes the failure to make reasonable adjustments with regards to lesson planning and imposing a formal lesson observation, as well as discrimination arising from disability in respect of formal lesson observation and dismissal.
52. The primary purpose of performance management is to improve performance and we must consider what would have happened had a supportive programme been put in place with appropriate adjustments, including dedicated assistance with lesson planning. We note our findings at paragraph 13 of the liability Judgment with regard to the particular performance issues raised, which largely seemed to arise from a lack of understanding by pupils of the terminology used by the Claimant. Upon her return to work the Claimant had taken a step back from her TLR responsibilities and perhaps needed some time and support to adjust her teaching style to her new groups. It is not apparent to us that the sort of complaints identified were insurmountable in terms of the Claimant's ability to effectively discharge her duties, had the appropriate support been in place.
53. We consider that Ms Maunder's evidence is too speculative for us to confidently predict that the Claimant would have been dismissed in any event; just because a performance plan was going to be commenced does not mean that the inevitable outcome will be dismissal, particularly when one considers the primary purpose of performance management and the need to implement appropriate adjustments for this particular disabled employee.
54. We also take into account the Claimant's previous resilience and ability to return to work after periods of ill health in 2012 and 2014. In the light of those indicators, had performance management been dealt with

- supportively and sensitively it seems that the Claimant may well have been able to sustain her long held career, maintaining performance at an adequate level. We take into account that previously the Claimant had been a very well regarded teacher (findings at paragraph 7 of our liability Judgment). An adequate level of teaching performance may not have been at quite the level of her previous work, but nonetheless have been satisfactory to discharge her duties properly.
55. Turning now to the question of whether there might have been a capability dismissal for absence due to medical reasons, the Respondent invited us to consider whether the Claimant's illness would have manifested itself in any event and employment would have been fairly and non-discriminately terminated at some point due to absence.
56. We note the Claimant's previous ability to deal with significant life events such as her brother's sad death in 2010. We note that stress can trigger episodes of either mania or depression and we note Dr Jenkins evidence that the Claimant is at risk of relapse. However, such relapse might not necessarily mark the end of a career if dealt with supportively. Dr Jenkins' evidence is that the breakdown in May 2015 destroyed the Claimant's ability to return to teaching work. Dr Jenkins' evidence, which we accept, is that this is predominantly because of the Respondent's treatment of the Claimant. We also note what Dr Singh says at paragraphs 51 – 53 of his report: 'the nature of bipolar disorder is that there are relapses and remissions. In some people, regardless of any pressure, people can have a relapse, but, in other people, the external pressures and internal pressures do contribute to the relapse.'
57. The Claimant has an underlying condition and there is a risk of relapse regardless of external triggers, that said, we note that in the past the Claimant has shown resilience in the face of significant life events and been able to return to work. It is now 20 months since her hospitalisation and she remains too unwell to work or participate in voluntary work and her condition has a remaining significant impact on her personal life.
58. We note the Claimant's submission that she has previously been able to withstand stressors within her life but conclude that in the extended period of time from dismissal until normal retirement age there must be some chance, with such a serious condition, that a fair and non-discriminatory capability dismissal for absence is a possibility. In seeking to balance the uncertainty of predicting the future in circumstances where the medical experts are unable to clearly assist us with confident predictions, we conclude that there is a small but significant chance of a fair, non-discriminatory dismissal. This should be factored in by a reduction of 20% to future loss.

Future Employment

59. In concluding the Claimant's future loss should be calculated on a career loss basis, we also conclude that she will never be in a position of being able to obtain professional employment at an equivalent level as she enjoyed with the Respondent. The medical professionals disagree as to her future prospects for work, with Dr Jenkins unable to indicate whether she would be able to undertake any work in future and conversely Dr Singh suggesting that she may be able to return to teaching, even at the same school, provided the pressures she felt were not there. We prefer the evidence of Dr Jenkins and conclude that Dr Singh's opinion must be treated with caution as it appears not to fully recognise our findings of discrimination and the severe impact of the Respondent's treatment on the Claimant's ability to return to a teaching role.
60. The Claimant is currently unable to work; based on her evidence and that of Dr Jenkins it is unclear if she will ever work again. The Claimant has sought to engage with Remploy to seek work alternatives but this avenue has not been successful. We note and accept the Claimant's evidence at paragraph 53 of her Witness Statement as to an inability to hold down paid work. We also accept the Claimant's evidence at paragraph 56 that she feels unable to see herself being able to work in the short to medium term. The Claimant's inability to work in the short to medium term is supported by the fact that the Teachers' Pension Scheme has accepted her ill health retirement on an enhanced basis, i.e. on the basis that she can perform no work at all.
61. It was suggested that the resolution of Tribunal proceedings will bring about an improvement in the Claimant's mental health. We accept Dr Jenkins' evidence that there should be some improvement in mood; common sense would suggest that the end of a litigation process would relieve some stress for the parties involved, regardless of any underlying mental health condition. However, we concur with the submission of the Claimant, that it is the liability hearing concluding that is likely to relieve most stress. Despite the liability outcome, the Claimant's capacity to work is still not improved now. The security that financial compensation brings alleviates some stresses in life but cannot wholly compensate for the damage done to the Claimant's mental health in terms of her confidence and ability to hold down paid employment. We concur with the submission on behalf of the Claimant that an assessment of the likelihood of a return to work, identifying the nature of duties and at what level of pay involves too much speculation for the Tribunal to make a proper assessment.

62. Judgment on Remedy was issued based on figures agreed between the parties.

Employment Judge S Davies
Dated: 24 April 2017

JUDGMENT SENT TO THE PARTIES ON

24 April 2017

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

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