EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss J Smith	**v**	**1. London Borough of Haringey** **2. Governing Body of Highgate Wood School**

Heard at: Watford **On**: 19, 21 & 21 March 2018

Before: Employment Judge Andrew Clarke QC

Appearances

For the Claimant: Mr Michael Henry (lay representative)
For the Respondent: Ms Heather Platt (counsel)

JUDGMENT

1. The claimant's dismissal being fair, her claim for unfair dismissal is dismissed.

REASONS

Background

1. The claimant started employment with the first respondent on 1 April 2001. She was continuously employed until her dismissal on notice. That notice expired on 17 July 2017.

2. The claimant had latterly been employed as a Pastoral Support Officer (or latterly Mentor) at Highgate Wood School, a mixed comprehensive secondary school which has three Pastoral Support Mentors and a Lead Pastoral Support Mentor.

3. The claimant brought a claim of unfair dismissal against the first respondent in October 2017. The second respondent was added as a respondent at the first respondent's request. It is not disputed that, although the first respondent was the claimant's formal employer, by the Education (Modification of Enactments relating to Employment) (England) order 2003, any claim for unfair dismissal must be brought against the second respondent and that

body is treated as having dismissed her for the reason which it gives for terminating her engagement at the school in question.

4. It is also not disputed that the reason for dismissal was the claimant's capability. In this instance, the lack of capability in question arose from the claimant's absence record due to sickness. In the period of a little over two years from 16 March 2015 to 19 March 2017 the claimant had been absent sick for about 212 days. A working year consists of 195 working days.

5. The respondents called three witnesses. Firstly, Ms Katerina Christodoulo, a Deputy Head Teacher, who had been the person dealing the claimant's sickness absences in the context of the second respondent's Sickness Absence Management Policy since mid-2016. Secondly, Ms Brenda Allan, a Governor of the school and the Chair of the Panel which dismissed the claimant. Thirdly Ms Philomena di Leo, a Governor who sat on the appeal panel.

6. The claimant's representative cross-examined only Ms Allan. On being taken through the other two witness statements he confirmed that the accounts given of the material events were not challenged.

7. The claimant did not provide a witness statement. Instead she relied upon the text of her ET1 and a document, sent to the tribunal, which commented upon parts of the ET3s. She declined to give evidence in support of her case, both when the respondents' case closed and, again, when the new documents she had produced (referred to below) had been examined and their potential significance explained.

8. The Sickness Absence Management Procedure is a comprehensive document produced by the first respondent, agreed with its relevant Trade Unions and adopted by the Governing Body of the school. It provides for attendance review interviews where sickness absences cause concern. This is followed by a more formal three stage process if the attendance record has not improved. Those stages are, firstly a first formal meeting, secondly a second formal meeting in the absence of clear improvement following the first and, finally, an absence hearing before a panel of three Governors (or the Head Teacher) in the case of a continued lack of improvement. There is also provision for an appeal against any dismissal that may follow from that hearing.

The facts

9. The events leading to the claimant's dismissal were not in dispute. These are set out in detail in the witness statement of Ms Christodoulou. I have already noted that Mr Henry did not cross-examine her. He explained that her account of the meetings, letters and other dealings with the claimant leading up to the 20 April 2017 hearing before a panel of Governors was not in dispute, nor was her account of her involvement in that meeting as the person presenting the school's written and oral case to the panel.

10. In the period January and February 2016, the claimant was off sick for some 26 days. On return she attended an attendance review meeting with Ms Claire Allaway (an Assistant Head). She explained that she suffered from degenerative disc disease, causing considerable pain and discomfort. She was receiving treatment and more invasive treatment was said to be under consideration. Certain adjustments were discussed and agreed to assist the claimant on her return to work.

11. On Wednesday 20 April 2016 the claimant was again sick due to back pain. She returned to work on Thursday 21 April, but slipped in the corridor. She was then off sick from Monday 25 April for 55 days.

12. Due to the total number of absences in the recent past, Ms Christodoulou (who had then taken over responsibility from Ms Allaway) asked the claimant to attend a first formal meeting under the sickness absence policy. On the morning of the meeting the claimant telephoned to say that she was too ill to attend. The meeting was rearranged for 24 May, but again the claimant telephoned on the morning to say that she was sick. The meeting proceeded in the claimant's absence (as she had been told might be the case if she failed to attend on the second occasion) and it was decided to refer her to Occupational Health.

13. On 5 July 2016 the claimant returned to work. This was two days prior to her Occupational Health appointment which took place on 7 July. The report concluded that she was not fit to work due to "wear and tear in her spine". She was noted also to have "probably unrelated" pathologies in both her hips and her knees. It was hoped that she would be fit to return at the start of the autumn term, providing treatment about to be undertaken was successful.

14. The claimant was off work until 5 September 2016. During her absence she attended a further formal absence monitoring meeting on 21 July, when she was still in pain and receiving treatment. At this and all other meetings she was accompanied by a Trade Union Representative. He noted that her problems with her back, hips and knees were exacerbated by the injuries resulting from the fall in April. On her return she attended a return to work meeting. It was agreed that a further such meeting should take place later in September to determine progress and also to see whether any adjustments to her duties were necessary.

15. That further meeting took place on 29 September. The claimant was still in pain, but reported that she was making progress. She was told that her recent sick record (some 134 days since early 2016) meant that if there was further such absence, a second formal meeting would be needed under the Sickness Absence Policy. A workplace assessment was schedule for 1 November, but the claimant was absent and it did not take place.

16. On 2 November 2016 the claimant began a further period of absence due to a tendon tear in her shoulder. Hence, a second formal meeting was arranged for 29 November. The claimant reported a need for an operation on her shoulder and possible ways of adjusting her duties for a period were

discussed. It was decided not to take the formal procedure any further, but to monitor the claimant's situation until 30 January 2017.

17. When the second respondent reviewed the claimant's absence record at the end of that period, the claimant was still absent having had the operation on her shoulder. She had had eleven periods of sickness totalling a little over 200 days since early 2016. However, the second respondent decided not to escalate the claimant's case further in the procedure, but to hold a further second stage formal review meeting.

18. That meeting took place on 22 February 2017. The claimant reported that she was not recovering as well as expected and the treatment was ongoing. She was also now scheduled to have surgery on one of her knees. It was decided that it was appropriate to obtain a further Occupational Health report, but that matters should go before a panel of Governors for an absence hearing under the Sickness Absence Policy due to the recurrent sickness over a lengthy period. By letter of 27 February this was confirmed to the claimant and she was told that such a panel could decide on one of three outcomes. Firstly, there could be a further absence review monitoring period, secondly adjustments to her duties or workplace could be recommended and, thirdly, dismissal on notice on the grounds of capability might take place.

19. The further Occupational Health review took place on 13 March 2017. The resulting report set out the then current situation. The claimant had a degenerative disease in her back. She had also experienced shoulder pain and an investigation had led to surgery to repair a tendon. Her recovery from that surgery was slow and could take up to six months, albeit that she could function at work if that had been her only medical problem. The degree of functioning was not investigated, no doubt because of the other problems that the claimant was experiencing.

20. Her knee was hampering her movement to such an extent and she was in such pain from it as to render her unfit for work. Improvement was anticipated in some two to three months, but she was to be seen again in three to four weeks' time in the hope that by that stage a sufficient improvement might have occurred to enable her to return to work, possibly with adjustments to her workplace or workload which would be considered at that time.

21. That further Occupational Health appointment did not take place. When the meeting with Occupational Health in March had taken place, it was in the context of her consultant having given her a fit note which expired on 10 April (i.e. about four weeks after the Occupational Health appointment). However, on the date it was to expire the claimant produced a further fit note for six weeks to expire on 22 May 2017.

22. On 21 March 2017 the claimant was (as had been indicated at the 22 February meeting) invited to an absence hearing before a panel of three Governors. That was to take place on 20 April.

23. Ms Christodoulou presented the school's case. She did so by reference to a comprehensive report submitted to both the claimant and the Governors in

advance of the hearing. All relevant documents were annexed to that report. The claimant had been absent for a total of 212 days in the period of a little over two years from 15 March 2015 to 19 March 2017 and this was specifically referred to in the report. The report also noted the significant impact on the students at the school of the reduction in the quality and content of pastoral support and the strain on other members of staff who had taken as much of her pastoral work as they could. It also noted that certain of the claimant's duties were being undertaken by agency staff. Finally, the report noted the support that the school had given to the claimant in an attempt to get her back to work, but that the claimant's substantial absences continued.

24. The Chair of this panel and a member of the appeal panel gave evidence, but as noted only Ms Allan (who chaired the panel which dismissed the claimant was cross-examined). It was clear that Ms Allan and her colleagues had carefully considered the impact on the school (pupils and staff) of the continued employment of the claimant and the fact that the claimant was a valued and long serving member of staff, whom they were loathe to dismiss, was in the forefront of their minds.

25. The conclusion that Ms Allan and her colleagues reached came after a debate between them lasting for over an hour. They had regard to a range of factors listed in the dismissal letter of 25 April 2017. In particular, I note that they had regard to;

    25.1 The length of absences in the past two years;

    25.2 The fact that the claimant's recovery from the two instances of surgery in 2017 were slow, with no definite likely return date;

    25.3 The fact that the claimant had significant ongoing problems with her spine, her hips and knees in addition to the problems arising from the surgeries;

    25.4 That in July 2016, after the accident in April 2016, which might have caused or contributed to certain of her problems, return in September 2016 had been forecast, but whilst the claimant had briefly returned, since then there had been further substantial periods of absence. Hence, the prognosis was uncertain and it was clear that certain of the causes of the claimant's problems would not be resolved by the resolution of any acute problems which might have been caused by the fall in April 2016;

    25.5 The second respondent was unable to provide the service to its students that it wished to do and which it would have been able to provide had the claimant been in post and working. This was having a significant impact on vulnerable students;

    25.6 In order to provide some additional support to the claimant's colleagues, an agency worker or workers had been engaged to undertake some of her duties. This was expensive and the provision, particularly services of a pastoral and mentoring nature, still had to

be provided by members of staff who were undertaking this in addition to their ordinary duties and were therefore under additional stress;

25.7 The claimant had been very good at her job and was a valued and effective member of staff with an unblemished record;

25.8 It was necessary to seek to balance her interests and those of the second respondent.

26. Crucial to the decision to dismiss was that the panel doubted that the claimant (however willing) would be able to return to work in the near future and sustain a period of work. They reached that conclusion having regard to the claimant's history of absences, the failure to meet anticipated return dates and the fact of her significant degenerative condition. Given the serious impact on the school, its staff and students, they considered dismissal to be appropriate. They were aware that the claimant had not quite exhausted her right to sick pay (she was on half pay and would be so until the expiry of the then current fit note) but in the circumstances, they did not consider that this was a decisive factor against dismissal.

27. The appeal which followed concentrated upon three matters raised by the claimant. First it was said that the estimated recovery time had not been taken into account in dismissing her. It was pointed out that the claimant was signed off only until 22 May and that she had made clear before the panel of Governors that she hoped to be fit and able to return to work by then. The appeal panel felt that this matter had been carefully considered. That the claimant hoped to be fit at the end of this period was never in dispute. The concern of that panel was that she had been in that position several times in the past and that which she hoped for had not materialised. The panel had formed its view based on the history of the matter and the claimant's serious underlying degenerative condition.

28. Secondly, on appeal, it was said that the school should have been more supportive of her. It was suggested that the school had not been supportive. However, it had adjusted her workload and duties to facilitate a previous return and was ready to respond to any suggestion from Occupational Health as to further changes (whether temporary or permanent) which might facilitate her return on this occasion. However, consideration of those matters was premature because, as the second Occupational Health report made clear, the time to consider any possible adjustments was when she was about to return and, at present, the claimant was still unfit to return when dismissed.

29. Thirdly, it was said that there should not have been consideration of dismissal until after the further Occupational Health report anticipated by the second report had been obtained. The appeal body considered that the first panel had been right to reject this point. Having a further report would be valueless they felt at that particular point in time. The further report had been intended to deal with a return to work anticipated around 10 April when the then current

sick fit note expired, but the claimant had then been signed off again to 22 May.

30. One member of the appeal panel was a Consultant Surgeon. He made clear his support for the approach taken to the claimant's medical condition and the view taken of her being unlikely to be fit to return to regular work on 22 May, or at any predictable date thereafter.

31. In that context I note that further medical documents were produced by the claimant on the morning of the second day of this hearing. These demonstrate a number of matters of relevance. Firstly, that the claimant's symptoms flared up again at about the time the fit note expired on 22 May. Secondly, as a result, further investigations took place and osteoarthritic changes in her knee were found of a moderately severe nature, causing severe chronic pain even when resting, with degenerative tears to ligaments. By October 2017 these conditions were not responding to treatment and a report at that time linked the symptoms to degenerative joint disease.

32. Of course, that evidence was before neither the original panel nor the appeal panel. However, I regard it as evidence supporting the reasonableness of the view that those panels reached as to the likelihood of the claimant being able to resume work in the near future.

The law

33. The reason for dismissal is agreed to be capability. This is one of the potentially fair reasons for dismissal in section 98 of the Employment Rights Act 1996. The conclusion that the claimant's capability was impaired was reached following a detailed procedure set out above.

34. The issue in this case is whether the dismissal was fair in all the circumstances as provided for by section 98(4) of the 1996 Act. I have to ask myself two closely related questions. Firstly, was the procedure adopted by the second respondent a fair procedure? In other words, was it one which a reasonable employer could fairly adopt faced with the circumstances of this case. Secondly, was dismissal a sanction falling within the range of reasonable responses which an employer could adopt at the conclusion of that procedure (assuming it to have been a fair one)?

35. I begin by reminding myself of statements of guidance from two former Presidents of the Employment Appeal Tribunal. These two passages are ones to which I drew Mr Henry's attention before he made his closing submissions.

36. In Spencer v Paragon Wallpapers Ltd [1997] ICR301, Phillips J commented as follows:

> "Every case depends on its circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?"

37. In Lynock v Cereal Packaging Ltd [1998] ICR670 Wood P said as follows:

> "The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in our judgment – sympathy, understanding, compassion. There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture. Secondly, every case must depend upon its own facts, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably had been difficult decision, include perhaps some of the following – the nature of the illness; the likelihood of recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the employer for the work to be done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the exercise carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching. These, we emphasise, are not cases for disciplinary approaches; these are for approaches of understanding."

The submissions

38. The claimant's submissions followed the argument advanced in the grounds of appeal. Mr Henry characterised the second respondent's managers as concerned with process and not with the individual and criticised their failure to offer any relevant adjustments or a trial period of work in an environment where the claimant would not have to move about.

39. The respondents submitted that the matters considered by the two panels were the very matters that a reasonable employer was obliged to consider (and that the EAT had indicated should be considered) and that the conclusion reached was one which a reasonable employer could reach in the circumstances.

Applying the law to the facts

40. Do I consider that the second respondent approached this situation with the sympathy, understanding and compassion that the then president of the EAT indicated ought to be the hallmarks of a fair approach? I consider that this employer did.

41. At each stage relevant information was gathered, there was a meeting at which that information was discussed with the claimant (accompanied by a Trade Union Representative) and the outcome and possible future actions were clearly set out in a letter following each meeting. The two hearings before Governor panels were conducted in accordance with that procedure. At each there was a full consideration of the evidence from both sides, followed by an informed debate. The claimant's hitherto valuable and unblemished service was taken into account.

42. The claimant complains that the further Occupational Health report which the report of 13 March 2017 had foreshadowed was never obtained. This was because the situation had changed. The author of the March report had hoped that the claimant would be able to return to work (possibly on a phased basis) at the end of her current fit note, that is in early April. However, at the end of the period the claimant was signed off for a further six weeks, because progress towards recovery from the operation continued to be very slow. In context (of the claimant's degenerative spine condition and overall absence history) it was open to a reasonable employer to determine the matter without a further Occupational Health report.

43. I am satisfied that both Governor panels regarded this as a difficult matter and carefully weighed the relevant factors. Having heard the Chair of the dismissing panel cross-examined, it is clear to me that the key factors which were debated were those set out in my findings of fact above. I consider that those were the factors appropriate to be balanced, having regard to the circumstances of this particular case and the guidance from the EAT referred to above. In short, I am satisfied that this range of factors encompassed all of those which a reasonable employer would have considered in this context. I am also satisfied that those same matters (with particular emphasis on the three points raised before them) were considered by the appeal panel.

44. I now turn to the question of whether dismissal was within the band of reasonable responses. I emphasise that it is not for me to ask myself what I would have done in these circumstances. I have to consider the reasonableness (or otherwise) of what the second respondent actually did acting by its panel of Governors.

45. The fundamental question is whether a reasonable employer could have dismissed when the latest fit note lasted only another five or six weeks, when the claimant had not yet exhausted her sick pay entitlement, when she was expressing a determination to return at the conclusion of that fit note period and when she was a valued and experienced employee. I conclude that a reasonable employer could dismiss this employee in those circumstances. Not every reasonable employer would have done so, but I am satisfied dismissal did fall within the band of reasonable responses.

46. I so conclude for the following reasons:

    46.1 The present absence has to be seen in the context of the number of previous absences and the reasons for them. At the end of the fit note period the claimant would have been absent for about 250 days in the previous two years. The reasons for absence were not all related to her physical condition, but the vast majority were. Those that were related to her physical health were related to degenerative changes principally (as it was then thought) to her spine. Some were caused by those changes, others related to them because recovery from surgery (the need for which might or might not be related totally or partly to those changes or to the slip in April 2016) was certainly impaired by them;

46.2 The second respondent was entitled to conclude that given the degenerative changes to the claimant's spine, the chances of her being able to resume work for a substantial period in the near future was small. Previous suggestions (or hopes) that she might be able to do so had turned out to be false (although I emphasise by no fault of her own);

46.3 The second respondent had treated the claimant sympathetically and sensitively. It had not (as was suggested on her behalf) slavishly followed its Absence Policy with no regard to her particular individual circumstances. On the contrary, it had done all that it could to assist her and it was prepared to make any adjustments that Occupational Health might suggest. The fact is that, in 2017, none was suggested. That was to await the claimant being ready to return and she never was. I understand that the claimant feels that more could have been done. I understand (indeed I commend) her determinations expressed to the second respondent to return to work at the end of the fit note period concluding in May 2017 and previously. I am sure that on each occasion that she, or Occupational Health, or her Doctors, expressed such a hope, she herself hoped and believed that what they said was to be the case. Sadly, her physical condition did not permit this, despite her (and their) best efforts. I also note (see above) in this context that that which was foreshadowed by the Governor panels was indeed the case. The claimant's health did not improve and was not likely to do so, due to the degenerative changes in her spine and elsewhere already referred to;

46.4 Her absence was a considerably drain on resources, not merely financial resources, but the human resource of her co-workers. They were shouldering a considerable extra burden. Furthermore, she was not someone producing a commodity on a production line. Her valuable skill was in mentoring and counselling vulnerable students and the demand for such services at this school was not being adequately met. The school needed a permanent functioning member of staff in her role. It believed, for good reason (see above) that the claimant would not be able to fulfil that requirement.

47. For those reasons I find that her dismissal was fair and that her claim for unfair dismissal cannot succeed.

Costs

48. At the conclusion of the announcement of the judgment and reasons, the respondents made an application for costs under schedule 1 of the Employment Tribunals (Constitution and Rule and Procedure) Regulations 2013. The basis (under regulation 76(1)) is that the claimant acted unreasonably in the conduct of the case.

49. Two instances of alleged unreasonableness are relied upon. Firstly, not informing the respondents in advance of the claimant's intention not to cross-examine two of the three witnesses and not herself to give evidence. It is said that this would have enabled the case to have been dealt with in a much shorter period of time had the respondents (and the tribunal) been aware of this. Secondly, rejecting an offer made on 6 March 2018 of £7,500 to settle the case.

50. As regards the first of those matters the claimant and Mr Henry tell me that the decision not to cross-examine and the decision that she should not give evidence were decisions not taken until discussions in the employment tribunal waiting room on the day of the case. Given the scope of the employment tribunal's enquiry and its focus on the reasonableness of what the second respondent did, I consider that that was understandable attitude. Of course, it would have helped had it been a decision made rather more in advance, but I bear in mind that the claimant is not legally represented. In those circumstances I do not consider that behaviour to be unreasonable.

51. As regards the rejection of the offer it is said that this was because the claimant thought that she had a good case. I bear in mind again that she was not legally advised or represented and that this is not like a case of dismissal for misconduct where a claimant may, for example, be found to have committed acts that they otherwise denied or had challenged witnesses as untruthful whom the tribunal find to be a truthful witness. As Wood P reminded parties and tribunals in the passage already referred to, ill health dismissals and the enquiries of a tribunal following them are not matters which take place in the disciplinary context. I do not consider it unreasonable for a claimant who undoubtedly believed that she had not been fairly treated to ask the employment tribunal to examine matters and to reach a conclusion. That is what has been done.

52. In the circumstances, and for those reasons, the application for costs fails.

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Employment Judge Andrew Clarke QC

Date: 13 April 2018

Sent to the parties on: .....

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For the Tribunal Office