Case No: 3323158/2016

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mrs W Stewart **v Mitchell Brook Primary School**

Heard at: Watford **On:** 20 April 2017

Before: Employment Judge Daniels

Appearances:

For the Claimant:
For the Respondent:

JUDGMENT having been sent to the parties on 27 April 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Summary reasons only and I reserve the right to amend or supplement these if appropriate in due course.

2. We heard evidence from the claimant on her own behalf and on behalf of the respondent from the School Governor Mr Adrian Paprill. The claimant was assisted by a friend Ms Martine Ekango, and the respondent was represented by Mr Adam Ross of Counsel.

3. The claimant commenced continuous employment with the respondent in January 2001. She was considered to be an employee with a good record and an excellent Teaching Assistant. She was also, at the time of her dismissal, a long serving employee.

4. Following an incident at the school the claimant commenced a new period of sick leave in around 9 October 2014 which was back related. The claimant was subsequently informed that the Stage 3 sickness meeting would be held under the School's sickness procedures if she failed to return to work by the letter dated 19 March 2015. That followed her Stage 2 formal review meeting. The claimant has not attended that meeting or attended a rescheduled meeting following the claimant's non-attendance on 9 March 2015 meeting.

5. After holding the Stage 2 formal review meeting the Deputy Head Teacher of the respondent issued a letter which is at page 19 of the bundle waning

the claimant that she would refer her case to a formal Stage 3 hearing which her employment would be at risk should she fail to return to work by 16 April 2015. The letter of 19 March 2015 also referred to the fact that in the previous two years the claimant had also been absent due to sickness for 104 days despite having a term-time only contract. The claimant had been told nearly nine months earlier that the Stage 3 meeting would be convened if she failed to return to work. The letter also noted the fact that there had been a significant delay in convening the Stage 3 formal review hearing to w detailed investigation in to the claimant's grievances.

6. The School policy, at page 91 of the bundle, explains that the School should refer a case involving long-term sickness absence to the School's Governors no later than two months after a Stage 2 meeting. In the claimant's case the referral had been made after two months because of the claimant's grievance and the School had taken a decision to suspend the attendance management process while the grievance was investigated which was a reasonable decision to take in the circumstances.

7. The School's detailed finding in relation to that grievance was issued on 3 August 2015.

8. Mr Paprill chaired the Stage 3 formal review hearing with the claimant which considered the claimant's employment on Monday 7 December 2015 in which ultimately terminated the claimant's contract of employment being where she was issued with 12 weeks notice. The claimant did not attend that formal review hearing, she emailed the respondent 15 minutes before the meeting stating that she was unable to attend. She had sent other emails shortly before that meeting saying she was unable to attend any meetings in the mornings but did not give any clear explanation as to the reason for that. The claimant did not request a postponement of that meeting when she emailed the respondent regarding her inability to attend.

9. The respondent considered whether it should adjourn this hearing yet again but was aware that the meeting had originally been scheduled for 30 November 2015 and had already been postponed at the claimant's request. The meeting was held at that time for important reasons of the Governor's ability to attend.

10. At the hearing on 7 December 2015 the panel considered a management report regarding the claimant's absence of 27 November 2014 which is set out in detail at pages 70-73 of the bundle. That report referred to the fact that following a referral to Occupational Health on 1 October 215 the claimant had decided to withdraw her consent for the Occupational Health expert's report on her health to be sent to the School. That was a decision that she was entitled to take in accordance with her own rights of privacy but it was a decision which had an impact on the School's decision.

11. The email from Dr Preston, the Consultant Occupational Physician, confirmed that he was unable to provide further medical evidence or discuss the content of the medical physician further. Without the benefit of up-to-date medical evidence the panel felt unable to determine how much longer the claimant may be absent from work or if any adjustments might help such a return to work. Although there had been a medical note in

November 2014 suggesting that there was a possibility of a return to work with adjustments, that that medical note was consistently superseded by a series of medical notes produced by the claimant's produced by the claimant's medical advisers which stated that the claimant was unfit to work originally for a shorter period of around two weeks, then one and then for three month. At the date of dismissal a medical certificate had been produced saying the claimant was unfit to work completely for a three month period ending in mid January 2016.

12. The management report noted that the most recent Occupational Health report of April 2015 had stated that the claimant "does not see herself back at work with her current employer".

13. The panel made the decision to terminate the claimant's employment on the grounds of capability. The letter of dismissal was sent on 9 December 2015. The letter from Mr Paprill states that the conclusions of the employer were as follows: "You refused to release your latest medical report from the Occupational Health physician thus not allowing the panel to consider this as part of the final decision making. Your sickness absence has been continuous for over 12 months. You failed to attend either of your Stage 2 formal meetings. You were made aware of the possibility of dismissal as an outcome during this process, you will not provide regular and efficient service and you are not capable of fulfilling the terms of your employment contract. The sustainability of your long-term absence is no longer feasible for the School. The School needs to have substantive high level learning support assistance in post to ensure high quality teaching and learning for the pupils. The presence of supply staff as a further impact on continuity of teaching and learning to pupils. The financial impact that your long-term absence has on the School is no longer sustainable".

14. The letter proceeded to give a right of appeal against that decision.

15. In making its decision the respondent says that it took into account the guidance of s.31 of the Policy it applied in this case, which is at page 93 of the bundle, suggesting that there was no reasonable anticipated day for the claimant's return to work after more than 12 months of continuous absence.

Relevant legal provisions.

16. In approaching a case of unfair dismissal the employment tribunal is obliged to follow s.98 of the Employment Rights Act 1996. Section 98(4) states:

> " In any other case whether the employer has fulfilled the requirements of sub section (1) the determination of the question of whether the dismissal was fair or unfair (having regard to the reasons 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."

17. There is very detailed case law helping an employment tribunal work out what is the proper test to apply. The case of Post Office v Foley [2000] IRLR 827 CA gave further guidance. In that case it was held:

> "It was made clear in Iceland Frozen Foods (that case) that the statutory provisions did not require such a high degree of reasonableness to be shown that nothing sort of a perverse decision by an employer to dismiss can be held to be unfair. The case also made clear that the members of a tribunal must not simply consider whether they personally think that dismissal was fair and must not substitute their decision as to what was the right course of adopt for that of the employer. Their proper function is to determine whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted."

18. In cases of capability due to ill health it is established that ill health can be a fair reason for dismissal of an employee. The case of Spencer v Paragon Wallpapers Limited [1976] IRLR EAT states:

> "In cases where an employee is dismissed on grounds of ill health the basic question that has to be determined when looking at the fairness of the dismissal is whether in all the circumstances the employer can be expected to wait any longer and, if so, how much longer? Matters to be taken in to account are the nature of the illness, the likely length of the continuing absence, the need of the employer to have done the work which the employee was engaged to do and the circumstances of the case."

19. That was the guidance I had to follow in approaching this case.

Conclusions.

20. In deciding whether the employer's approach fell within the band of reasonable responses, in summary the following information was significant. Firstly the claimant had withdrawn consent for an Occupational Health report to be provided on an updated basis; that was a decision which was permissible to the claimant and was her own choice but it meant that the respondent had not up-to-date medical evidence suggesting that she was fit to return to work. In fact the latest Occupational Health report of March 2015 indicated that the claimant was not fit to return to work and did not see any future returning to work.

21. The claimant had been off work for a very lengthy period of time since October 2014, this was not a situation where the claimant had only just started sick leave but there had been a long period of absence. Although at the initial stages there was a suggestion that possibly with reasonable adjustments the claimant may be able to return to work, none of he subsequent medical certificates made any reference to reasonable adjustments being appropriate or things which would allow the claimant to return. In fact the medical certificates became increasingly worse moving from one week, to two weeks, to one month, to three months of absence suggesting that, very unfortunately, the claimant had a significant condition which was not improving. If anything it was deteriorating, that was through no fault of the claimant but that was the situation that was faced. There was no evidence that there was any second opinion pending at the time of the

date of dismissal; there was no appointment apparently made with a neurological physician which would facilitate a new report; the claimant was not saying I am a few days or weeks away from getting an updated opinion which may say I am fit to return to work or that there is an immediate solution. If fact no other medical information was expected within a reasonable period. There was no factual evidence that the claimant was relying upon. All that was available to the respondent suggesting that there was a likely change in the circumstances. I anything the claimant's position had, most unfortunately, deteriorated. This was not a situation where the claimant was improving and was very close to being able to return to work.

22. There were reasonable arrangements made y the respondent to attend and make representations over an extended period of time as exemplified by a complete suspension of the dismissal process so that the claimant could have her grievances heard and I note that those grievances were dealt with in detail by the respondent; concessions and admissions were made in her grievance process of things that should have been done better, in other words a fair grievance process was conducted, and that was to the benefit of the claimant as it allowed her to air all of those issues without that period counting against her.

23. Having carefully considered the facts I consider that there was ample opportunity given to the employee to set out her case in relation to her health, her ability to return or ways of avoiding dismissal. I also note that the claimant did not appeal in time which is somewhat inconsistent with the idea that this was an extremely unfair and unreasonable decision. Even when the claimant did appeal, the claimant did not set out reasons for the delay in appealing and her grounds of appeal were hard to follow. For example, she said that the respondent did not take in to account a second opinion which she attached to her appeal but that second opinion said she was not unfit to work, so that second opinion was of no assistance to the claimant at all, it could only harm her case of saying that you should take more time. The report which was one can understand the claimant making but that is entirely inconsistent with the idea that she should be returning to work. The respondent wanted an employee who could return to work not someone who wished to retire on medical grounds.

24. When balanced with those facts there had been a very extended period of absence which inevitably must have caused disruption to pupils and staff. Further resources were being expended on agency staff by the School and the School had been reasonably patient in trying to see a loyal and excellent Teaching Assistant whether she could made a recovery but there was no sign of a recovery as at the date of dismissal.

25. This was a very unfortunate situation of a loyal and dedicated employee who was an excellent Teaching Assistant who had become unable

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Employment Judge Daniels

Date: 29 June 2017

Judgment sent to the parties on
5/8/2017
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J Moossavi
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For the Tribunal office