Appeal No. UKEAT/0248/17/DA
UKEAT/0249/17/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 5 & 13 April 2018

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

UKEAT/0248/17/DA

MR E REID	APPELLANT
(1) LONDON BOROUGH OF LEWISHAM (2) THE GOVERNING BODY OF HORNIMAN SCHOOL	RESPONDENTS

UKEAT/0249/17/DA

(1) LONDON BOROUGH OF LEWISHAM (2) THE GOVERNING BODY OF HORNIMAN SCHOOL	APPELLANTS
MR E REID	RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For Mr E Reid	MS SUE SLEEMAN (of Counsel) Instructed by: Slater & Gordon UK Limited 50-52 Chancery Lane London WC2A 1HL
For London Borough of Lewisham and The Governing Body of Horniman School	MR DESHPAL PANESAR (of Counsel) Instructed by: London Borough of Lewisham Legal Services Lewisham Town Hall 1 Laurence House Catford Road London SE6 4RU

SUMMARY

UNFAIR DISMISSAL - Reasonableness of dismissal

UNFAIR DISMISSAL - Polkey deduction

DISABILITY DISCRIMINATION - Disability related discrimination

An Employment Tribunal erred in law in its interpretation of **Health and Safety Executive v Cadman** as to post-termination events, and in its approach to assessing justification following a disability related dismissal.

Its approach to the **Polkey** calculation, following a justified finding of unfair dismissal, was not sufficiently reasoned in the light of the specific findings made for and against the taking of certain action.

HIS HONOUR JUDGE MARTYN BARKLEM

1. This is the hearing of two conjoined appeals brought against the Decision of an Employment Tribunal (Employment Judge Balogun, sitting with members) held at London South Employment Tribunal over five days in February 2017. The Claimant was represented before this Tribunal, as well as below, by Ms Sleeman and the Respondent by Mr Panesar, each of whom provided a helpful skeleton argument augmented by oral submissions. I am grateful to them both. Although listed for a day to include delivering Judgment, that proved optimistic. There was insufficient time for me to give Judgment on the day.

2. The Claimant - as I shall refer to him and the Respondent too, as they were before the Tribunal - had been a music teacher. He worked at the Horniman School, described by the Tribunal in its Decision as a small school, controlled by the London Borough of Lewisham with a capacity of 240 pupils. The Claimant had been employed at the school from 20 April 1998 until his dismissal on 31 December 2015 as what is described as a "*permanent unqualified teacher of music*", working three days a week.

3. On 9 September 2014, the start of the new academic year, the Claimant was signed off work by his doctor with work-related stress and did not return to work prior to his dismissal some 14 months later. In October 2014, the Claimant launched a grievance against the Head Teacher, Julie Loffstadt, whom the Tribunal referred to as "the Head"; a title which I shall adopt. The Head had been in place since the 1 January 2014.

4. The Tribunal set out the thrust of the grievance at paragraph 8 of its Reasons as follows:

> **"8. We don't need to go into the detail of the grievance but there are 2 allegations in particular that are worth mentioning. The first is that, for some unknown reason, he was treated less**

> **favourably and negatively in comparison to his colleagues by the Head ignoring him when he greeted her in the morning. [112] The second and more serious allegation relates to an incident on 6 February 2014. The claimant claimed that he was carrying a school iMAC computer from one room to another for his afternoon music session and was confronted by the Head who aggressively asked where he was going with it. The claimant says about this in his grievance that: "*I felt I had been stereotyped as a thieving black male who shouldn't have been walking around with such a valuable item. There was a clear inference that I must be up to no good …… This incident has made me extremely uneasy and destroyed my confidence and faith in Ms Loffstadt as a Head Teacher. After all if she can treat me in this challenging and inappropriate manner, how can I be confident of her treatment towards the students I mentor, mainly black boys?*" [113]"**

5. That grievance was heard by a panel of school governors and was rejected. The Reasons record, at paragraph 11, that an appeal was lodged but was subsequently withdrawn. There followed an absence management process which the Head delegated to her Assistant.

6. The Claimant was represented by his union representative Jo Laverty, referred to in the Reasons as "JL". For reasons which will become clear from the Tribunal's conclusions - which I set out below - the Claimant's employment was terminated and an appeal against termination was unsuccessful. The Claimant brought proceedings for unfair dismissal and claims of disability discrimination under sections 20 and 21 of the **Equality Act 2010** alleging a failure to make reasonable adjustments, and section 15 of the **Act** for discrimination arising from disability.

7. At the outset of the hearing a list of issues had been prepared by the parties; all but one was agreed. That concerned the provision criterion or practice ("PCP") relied upon by the Claimant which had been set out in the ET1 and in further particulars, which had been sought by the Tribunal, in the following terms: the Claimant believes Horniman's expected attendance rate of 97% - a PCP - put him at a substantial disadvantage of being subjected to an absence review/capability procedure compared with those not suffering from a disability who would not be subjected to an absence review or capability procedure.

8. At the hearing, the Claimant sought to rely on a modified PCP in the following terms: the PCP is the requirement for an employee to maintain a certain level of attendance at work in order to avoid risk of sanction under the Respondent's absence management and/or ill health capability procedures. The Claimant was placed at a substantial disadvantage, since his disability increased the likelihood of absence, therefore making it more difficult for him to comply with the PCP compared to non-disabled employees. The disadvantage suffered was more than minor or trivial. The reasonable adjustment was the mediation and/or reconciliation that would have ameliorated and reduced the ongoing disadvantage.

9. At the hearing below, the Respondent opposed the variation of the PCP. As will be seen, the Tribunal regarded the distinction between the two of no significance. To make sense of the grounds of appeal advanced by the respective parties, it is necessary to set out the Tribunal's conclusions in full:

> **"<u>Conclusions</u>**
>
> **39. Having considered our findings of fact, the parties' submissions and the relevant law, we have reached the following conclusions on the issues:**
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> **<u>Discrimination arising in consequence of disability</u>**
>
> **40. The Claimant relies on the following matters as unfavourable treatment: i) failing to promote reconciliation; ii) beginning capability proceedings without an updated OH report; and iii) dismissal. We are satisfied that all of these amount to less favourable treatment. The issue for us is whether they arise in consequence of disability.**
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> **41. In relation to (i) failure to promote reconciliation, this was not because of something arising in consequence of the disability. The issue of reconciliation arose because of the claimant's grievance which was based on alleged incidents occurring prior to the absence. There is no evidence before us of a link between any failure by the respondent to promote reconciliation and the claimant's disability. Similarly, in relation to (ii) we cannot see how the respondent's failure to obtain an updated OH report was because of something arising in consequence of disability.**
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> **42. However, we accept that the dismissal arose because of something arising in consequence of disability, namely, the claimant's long term absence, caused by his anxiety and depression which the respondent concedes is a disability.**
>
> **<u>Proportionate means of achieving a legitimate aim</u>**
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> **43. The respondent's stated legitimate aim was to ensure that staff were available and present to teach and that the School operated appropriately in relation to the same taking into account its financial obligations and obligations to other staff and pupils. We are satisfied, objectively, that this is a legitimate aim for the respondent to have.**

44. In determining the question of proportionality, we have considered whether there was a less discriminatory way of achieving the stated aim. The claimant contends that promoting reconciliation and obtaining an updated OH report would have been proportionate. However, that would only achieve the legitimate aim if it resulted in the claimant being fit to return to his role as a music teacher. In considering proportionality, the tribunal is entitled to take into account matters that occurred after the dismissal. *Cadman v Health and Safety Executive* 2004 EWCA Civ 1317. Although that case was looking at justification in the context of indirect sex discrimination, the principle is of equal application to a section 15 claim.

45. For the reasons set out under the *Polkey* heading below, we are not satisfied, on balance of probability, that the [sic] promoting reconciliation and obtaining an updated OH report would have led to the claimant's return to work in the foreseeable future. In the 14 months of the claimant's absence, the school had to rely on supply music teachers. This did not allow for continuity of teaching or curriculum development at a time when the school was required to develop a new curriculum in line with new national guidelines. The Head told us that with no-one leading music, the school was unable to move forward. That no doubt had a detrimental effect on the pupils. In those circumstances, we find that the respondent's need for a permanent music teacher who was present and available to teach outweighed the claimant's need to remain in employment and that dismissing him (thereby allowing the school to hire a permanent replacement) was a proportionate means of achieving its aim. In those circumstances, the section 15 claim fails.

Reasonable Adjustments

46. In his further and better particulars, the claimant defined the PCP as an expected attendance rate of 97%. [62] In the list of issues, the PCP had been slightly varied to the requirement to maintain a certain level of attendance at work in order to avoid risk of sanction. In our view this is a distinction without a difference as the evidence of BC was that it was the normal practice in Lewisham to apply an expected attendance rate of 97% and that was not disputed.

47. The claimant was not at a substantial disadvantage because of this PCP as it was not applied to him. By the time stage 1 of the capability procedure was triggered he had been off sick for 7 months [657] and by the time of his eventual dismissal, he had been absent for 14 months. The claimant's attendance rate was therefore significantly below 97% by the time the respondent's [sic] took formal action.

48. The second PCP relied upon is "*requiring the Claimant to return to work without encouraging and arranging mediation/informal discussions to facilitate the Claimant's return to work*". Firstly, this was a new PCP introduced at the hearing. It was not in the further and better particulars of claim. Secondly, the claimant appears to have conflated the concept of PCP with reasonable adjustments by treating the respondent's failure to make the suggested adjustments as the PCP. The two are separate and the duty to make adjustments is dependant upon the existence of a PCP. In most cases, a PCP will apply more widely than just to a claimant. In our case, there is no evidence before us that the respondent applied such a PCP. In the absence of a PCP, the duty to make adjustments does not arise. The section 20 claim is not made out.

Unfair Dismissal

Reason for dismissal

49. It is common ground that the claimant was dismissed for capability. The decision to dismiss with effect from 31 December 2015 was taken in July 2015 when he was put forward for medical redeployment. That is clear from the respondent's letter of 16 July 2015, which reads: "*This letter should be regarded as formal notice of termination*" and giving a termination date of 31 December 2015. [745-747] Although not expressly stated at the time, this was clearly because of his ill health [746]. If there was any doubt about the reason at that stage, the position was made clear in the stage 3 outcome letter dated 23 November 2015. [1094-1099]. We are therefore satisfied that the reason for dismissal was capability.

50. Having established the reason for dismissal, we went on to consider whether dismissal was in all the circumstances fair.

51. Two important aspects of a fair procedure in long term absence cases are i) consultation and ii) medical investigation. In reality the two are interrelated as the main purpose of

consultation is to establish the true medical position and from that the likelihood of a return to work in the near future.

52. There was no discussion at that stage with the claimant about his medical position or about the decision to dismiss before the decision in July 2015. Indeed, the respondent's position at the time was that the claimant had to be dismissed in order to be considered for medical redeployment. Whilst we were told that this was the respondent's practice, there was no legal reason why that should be so. Reserving the right to rescind the dismissal in the event that the claimant recovers sufficiently to return to work before the effective date of termination does not assist the respondent as a dismissal cannot be rescinded unilaterally; it requires the consent of the employee. Although the claimant agreed to medical redeployment, it is not the case (nor did the respondent seek to argue) that the [sic] he was, by so doing, consenting to his dismissal.

53. Although the decision to dismiss had already been taken, the respondent held a stage 3 hearing to consider whether that dismissal would in fact go ahead. The claimant was referred to OH for a further report for the purposes of this hearing, but the hearing took place before the appointment had taken place. Michael Roots, (MR), who chaired the hearing, was clearly alive to the issue as he had queried the need for an updated report with HR in early November. Despite being advised at the time by BC that a referral had been made and that if the question of the claimant's fitness was in doubt, they could defer their decision until an updated report had been received, the panel decided to proceed with the hearing. [1032]

54. At the capability hearing, the claimant had said that he was fit to return to work. All the hearing panel had by way of medical evidence at the time was the OH report of 4 June 2015 and a sick note dated 19.10.15. The OH report gave a prognosis of "…… *an adjustment disorder owing to a set of circumstances that need resolution*". The report said nothing about the likelihood of return. [687-688] The sick note signed the claimant off as unfit for work due to work related stress between 19.10.15 and 11.1.16 [971].

55. In relation to the claimant's contention that he was fit to return to work, MR says at paragraph 63 of his statement that the evidence had not suggested this and was ambiguous and inconsistent. If that was his view, then it is the more surprising that he did not adjourn the hearing to seek clarification by way of an updated OH report.

56. The appeal hearing was an opportunity to correct the situation. The lack of an up to date medical report and a willingness to engage in mediation were the key grounds of appeal. The claimant provided a further sick certificate and a GPs report for the appeal. The certificate dated 11 January 2016 signed him off until 15 February 2016 with stress at work but advised that he may be fit for work with workplace adaptations. Under "Comments" it states that mediation would be helpful in resolving the issues at work. [1168] The report from Dr Entwistle, who signed the certificate, is dated 12 January 2016 and the relevant passages are cited at paragraph 27 above. [1169-1170]. Both documents were provided to the appeal panel in advance. However, in its decision, the panel focused on the report alone, rather than looking at in context with the comments on the sick certificate. In our view, a reasonable employer faced with these documents and the claimant's contention that he was fit to return would have sought further clarification by way of an updated report from OH. The appeal panel did not do so.

57. It is clear to us from the notes of the appeal hearing, the appeal outcome letter and the evidence we heard from Rosemary McGrath, one of the appeal panellists, that there was a fundamental misunderstanding by the panel of the distinction between mediation associated with the grievance and mediation/reconciliation to clear the air between the claimant and the Head in order to facilitate a return to work. It was the latter that the grounds of appeal were addressed at and which the sick certificate alluded to, as had previous OH reports. A constant refrain of the respondent was that mediation was voluntary under the grievance procedure and that the Head could not be compelled to engage in it against her will.

58. Because of this misunderstanding, the respondent failed to properly address this aspect of the claimant's appeal. Indeed, it appears to us from the notes of the hearing that when it came to the issue of reconciliation, the panel had a closed mind. When JL and the claimant tried to raise this, the panel, and MR, were quite defensive in their responses, querying why the questions were being asked and seeking to close down further discussion on the matter. The exchanges recorded on pages 1208-1209 of the bundle between the parties illustrate the point.

59. Further, there appears to have been little challenge of the respondent's case on reconciliation by the appeal panel. They seemed to accept the respondent's case that reconciliation was being dealt with by SH as part of the absence management process. That was abundantly clear from the evidence we heard from Rosemary McGrath who, when asked what evidence the appeal panel had of reconciliation efforts by the school, she referred to the actions by SH. The reality is that apart from telling the Head about the discussion on the subject at the absence review meeting (see pare 13 above), nothing was done by SH to progress the matter.

60. The appeal panel also appears to have accepted without question, the Head's evidence at the stage 3 hearing that no reconciliation meeting took place because an OH report had said that she was the cause of the claimant's stress and she did not want to cause him further stress by meeting him. [1077] There was good reason, in our view, for that account to be challenged based on the evidence available to the panel at the time. The OH report referred to is the one dated 29 April 2015 and although there is a reference in it to work related stress, it does not expressly state that the Head is the cause of it. In any event, this OH report was not seen by the respondent (and therefore the Head) until 19 May 2015, more than 2 months after the feedback from the absence review meeting. Yet there was no query from the panel as to the lack of action by the Head in the intervening period.

61. It is clear from JL's email to BC of 29/6/15 that in response to her many enquiries for suggestions as to how the relationship between the claimant and the Head might be repaired, she was repeatedly told by BC that it was up to the claimant to come up with a solution and manage this. [707] In cross examination, the Head told us that she was prepared to meet with the claimant but there was no response. This suggests to us that, like BC, she saw it as the claimant's responsibility to instigate reconciliation and not hers.

62. It is apparent from a number of email exchanges between the Head and BC following receipt of the grievance that she had a degree of antipathy towards the claimant. [142, 168, 201]. Her seemingly lukewarm approach to the idea of reconciliation suggests to us that those feelings had not diminished with the passage of time, despite her vindication by the grievance outcome.

63. None of these matters appear to have featured in the appeal panel's deliberations. Indeed it is noteworthy that [the] appeal outcome letter makes no reference at all to reconciliation even though this was a main ground of appeal.

64. In our view, the respondent failed to properly deal with the claimant's appeal. No consideration was given to reconciliation and no up to date OH advice was sought on how reconciliation might impact on the claimant's ability to return to work.

65. In all the circumstances, we find that the dismissal was unfair.

Polkey

66. Having found that the dismissal was unfair, we have gone on to consider what the chances would have been of the claimant returning to work and therefore remaining in employment had a fair procedure been followed.

67. The general medical consensus at the time was that some form of mediation or reconciliation may [Tribunal's emphasis] have been of assistance and it is likely that had an updated OH report been obtained, it would have expressed the same view. OH would probably have been unable to provide an assessment of the claimant's likely return to work in the foreseeable future without first knowing how successful the reconciliation attempts would be. That, however, is the assessment that we are now required to make.

68. The claimant's unfitness for work was directly related to the situation at the school. It is therefore reasonable to assume that in the event of successfully reconciliation [sic], there would be no medical reason preventing his return to work. Conversely, if reconciliation failed, then, based on the GPs report of 12 January 2016, the claimant would not have been fit to return to work unless it was at a different school. (para 27)

69. Although the claimant's grievance was rejected, he told us that he stood by his allegations. That, in our view, would have been a potential stumbling block to reconciliation. One of the most serious allegations against the Head was that of racial stereotyping (para 8). The claimant told us that he would have had to have raised this at any reconciliation meeting. The

Head's explanation in relation to this matter was provided to the grievance panel and accepted by it. However it was not accepted by the claimant and he told us that his perception of those events was unchanged. Whilst a feature of "clearing the air" is to agree to disagree on matters for the sake of moving forward, that would have been particularly difficult in this instance.

70. In the 14 months that the claimant had been absent there had been significant changes to the Music curriculum and although the respondent had indicated to the claimant previously that a gentle timetable could be arranged on his return, it is possible that there would have been disagreement as to what that meant in practice. This is illustrated by what happened in September 2014 when the claimant had an extreme reaction to his new timetable for the September 2014 academic year, thereby triggering his absence. A meeting to discuss the timetable had taken place between the Head and the claimant in June 2014 and in his grievance, he claimed that none of his preferences provided at that meeting were accommodated in the timetable and that this was done by the Head deliberately in order to undermine him and actively cause him difficulty in his work. [118-119]. He has not resiled from that view. The Head's evidence, on the other hand, was that most of the claimant's preferences had been accommodated in the timetable (para 33 statement). Those divergent views suggest that a "meeting of minds" on reasonable adjustments, and indeed other matters, may not have been possible and that there was a real possibility for misunderstandings to arise.

71. Although a reconciliation meeting was repeatedly requested by JL on the claimant's behalf, there is of course the possibility that he would have been unwilling or unable to attend. For the purposes of these proceedings, the parties instructed a joint psychiatric expert to provide a report on the issue of disability. The report is dated 20 November 2016 and at paragraph 57 is the following entry:

"*It seems that his problems were all very situation specific. His inability to work related specifically to that school and he told me that, for example, if the Headmistress had left, then he would have been able to go back "absolutely". "There was no doubt that he would absolutely go back to work", but he couldn't go back whilst she was still there*". [1364]. Both parties had the opportunity to comment on the report and this particular paragraph was not commented on by the claimant.

72. Whilst the report postdates the dismissal, that does not mean that the claimant did not hold the same view during employment. His obvious and enduring distrust of the Head and her motivations towards him certainly supports that possibility.

73. Taking into account these imponderables, we assess the chances of the claimant returning to work had genuine attempts been made at reconciliation at no more than 50%. There was therefore a 50% chance that he would have been dismissed fairly."

The Grounds of Appeal

10. I set out first the Claimant's appeal. Grounds 1 to 4 concern the PCP, it being asserted that the Tribunal (1) materially misstated the relevant section, (2) misapplied it, (3) misdirected itself in identifying the PCP, failed to make necessary findings and failed to provide reasons for this, and (4) applied the incorrect PCP and/or failed to provide adequate reasons. Ground 5 concerns the section 15 claim and asserts that the Tribunal misapplied the authority of **Health and Safety Executive v Cadman** [2004] EWCA Civ 1317, and/or failed to provide reasons for its findings.

A

11. Turning to the Respondent's appeal, ground 1 asserts that the Tribunal failed to determine whether the Respondent acted within a range of reasonable responses in three respects: (1) rejecting the Claimant's grievance and its approach to the rejection of that grievance on mediation at the time of the dismissal; (2) imposing a timetable which triggered the Claimant's absence which resulted in dismissal; and (3) not requiring the Head to take further steps to resolve the Claimant's grievance with him. Ground 2 asserts, in essence, that the finding of unfair dismissal was one which no reasonable Tribunal could have reached. Ground 3 makes the same assertion in respect of the decision that there was a 50% chance that the Claimant would have returned to work had genuine attempts at reconciliation been made; in short, **Polkey v A E Dayton Services Ltd** [1987] IRLR 503.

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12. Skeleton arguments of each party went into great detail in respect of each of those grounds. I mean no discourtesy to the parties in not rehearsing them in this Judgment. I have read them all carefully and have taken everything into account in reaching my conclusions.

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13. I turn first to the Claimant's appeal and the PCP. My starting point in dealing with the grounds of appeal relating to this issue is that my conclusion is that the proportion of working time when the Claimant was absent played no part in the process which the Respondent applied to his absence on sick leave. He was absent from the start of the summer term in 2014 until the termination of his employment over 14 months later. I was told by Ms Sleeman that the amended PCP which he formulated was based on the judgment of Elias LJ in **Griffiths v Secretary of State for Work and Pensions** [2017] ICR 160, and in particular paragraph 47 of that judgment. That case concerned an employee who had been absent from work for 66 days, of which 62 were due to a disability. She was given a formal warning in accordance with the employer's attendance management policy. She asked her employer to disapply the days when

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her disability was being diagnosed and a treatment plan formulated and to modify its policy to allow her in future to have longer periods of absence before facing the risk of sanctions. In the Court of Appeal, Elias LJ said at paragraph 47:

> **"47. In my judgment, the appropriate formulation of the relevant PCP in a case of this kind was in essence how the employment tribunal framed it in this case: the employee must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. That is the provision breach of which may end in warnings and ultimately dismissal. Once the relevant PCP is formulated in that way, in my judgment it is clear that the minority member was right to say that a disabled employee whose disability increases the likelihood of absence from work on ill-health grounds is disadvantaged in more than a minor or trivial way. Whilst it is no doubt true that both disabled and able bodied alike will, to a greater or lesser extent, suffer stress and anxiety if they are ill in circumstances which may lead to disciplinary sanctions, the risk of this occurring is obviously greater for that group of disabled workers whose disability results in more frequent, and perhaps longer, absences. They will find it more difficult to comply with the requirement relating to absenteeism and therefore will be disadvantaged by it."**

14. Both in the skeleton arguments and in oral submissions before me a great deal of time and argument was devoted to this ground of appeal, how and when the pleaded PCP was revised and the Tribunal is criticised for failing to deal with this.

15. In my judgment, an attendance policy that requires, aspirationally, that an employee be present at work for a minimum number of days can ordinarily be susceptible to a temporary adjustment to allow for a disabled person's additional absence, such that the attendance requirement is adjusted to reflect the fact of such additional absence as may be necessitated by the disability. However, I do not consider that the provision of mediation and/or reconciliation is a reasonable adjustment of the sort described in **Griffiths**. In any event, the Claimant in this case had not been at work for many months. There is no reference in the findings of fact in the Tribunal's Reasons to the 97% attendance policy ever being discussed, far less formally engaged, throughout the process.

16. In response to a question I posed, Ms Sleeman expressly disclaimed any suggestion that a disabled employee can never be the subject of an attendance policy. The Tribunal's finding at

paragraph 47 of its Reasons (see above) reflects that reality. Whether the PCP was of a 97% attendance rate or one adjusted in line with **Griffiths** is simply irrelevant where, as here, there was a 0% attendance rate for a period of 14 months, odd though that expression sounds. I do not consider that the Tribunal materially erred, as is asserted on the Claimant's behalf, in describing the provisions of section 20 of the **Equality Act** at paragraph 5 of the Reasons. And even if I am wrong in that, such misstatement could have had no practical effect.

17. It is accepted that the attendance policy existed, but it did not place this Claimant at any disadvantage far less substantial disadvantage as he was not subjected to it. I reject the argument that the words "*it was not applied to him*" at paragraph 47 of the Reasons was a misapplication of the section. For those reasons, I reject the Claimant's appeal on grounds 1 to 4.

18. In relation to ground 5, the Tribunal's reasoning is set out at paragraphs 43 to 45 of the Reasons. Paragraph 45 cross-refers to the reasoning later in the Reasons to the decision on the **Polkey** issue. Issue is taken as to the extent to which the Tribunal was entitled to have regard to matters which arose after the dismissal and to its approach to the decision in **Cadman**. The Tribunal is also criticised for its adoption of a "balance of probabilities" test as to obtaining a further Occupational Health report or promoting reconciliation. The correct approach, it is argued, is one to be found in **Allonby v Accrington and Rossendale College** [2001] IRLR 364 - approved by the Court of Appeal in **Cadman** - in the following terms:

> **"29. … Once a finding of a condition having a disparate and adverse impact on women had been made, what was required was at the minimum a critical evaluation of whether the college's reasons demonstrated a real need to dismiss the applicant; if there was such a need, consideration of the seriousness of the disparate impact of the dismissal on women including the applicant; and an evaluation of whether the former were sufficient to outweigh the latter. …"**

19. Ms Sleeman argues that **Cadman** is not authority for the proposition relied upon by the Employment Tribunal, namely that, in considering proportionality, it was entitled to take into account the matters that occurred after the dismissal. Ms Sleeman says that this is an oversimplification of the passage in **Cadman** and paragraphs 27 to 29, which read:

> **"27. This criticism is to the effect that the employment tribunal misdirected itself when it rejected justifications on the basis that they were "after the event" arguments rather than matters that had been considered by the HSE at the time.**
>
> **28. The following passages from the decision of the employment tribunal are material:**
>
> > **"25. The test referred to in *Bilka* … uses the word 'chosen' rather than 'adopted' or 'taken'. In the opinion of the tribunal this necessitates that the employer must have applied his mind to the existence of the pay differential and adopted measures, which at the time were adopted for the reasons subsequently advanced by the employer to explain the differential. Therefore, the tribunal unanimously concluded that as on the evidence at no stage had the employers consciously addressed in their documentation the justification issue and explained it or justified it then it could not be said that the pay differentials that existed in this case had been 'chosen' by the employer to recognise pre-existing service of predominantly male employees. It was instead a justification after the event.**
> >
> > **28. … At no stage either generally or specifically in relation to [the Applicant] and Mr H had it been advanced at any stage until these proceedings were commenced as a justification for the difference … The service and experience correlation had only ever been put forward once the differentials had been identified so specifically as they had in these proceedings …**
> >
> > **29. … It was clear that the continued existence of the incremental pay scale reflecting service which continued into the new pay system after the job evaluation exercise had not been adopted as a conscious decision on the part of the [Respondents] as a means of rewarding service within either the grade or within the organisation. At no stage in the documentation … had the [Respondents] identified the need to find some element in the continuing pay scales to reflect that historical aspect of service within the band and the organisation …**
> >
> > **30. The real need referred to by the [Respondents] had never been identified nor the business case advanced nor had the [Respondents], when confronted with the pay differentials, attempted to justify it throughout the discussions and negotiations since 1995. Instead, what had happened is that an explanation that it fitted with recognition of historical service was advanced as a justification …**
> >
> > **31. … the tribunal was not satisfied that in respect of the comparison of [the Applicant] with Mr H that the [Respondents] had shown that there had been a conscious decision to reward the three to four years additional service of Mr H nor had it been demonstrated that this corresponded to a real need on the part of the [Respondents] to reward service either to retain staff or to prevent staff turnover."**
>
> **Before the Employment Appeal Tribunal Ms Gill conceded that there is no rule of law that the justification must have consciously and contemporaneously featured in the decision-making processes of the employer. Clearly the legal position is that expressed by the appeal tribunal in these terms [2004] ICR 378, para 86:**
>
> > **"the existence of objective justification could not be determined against an employer, however strong the evidence in favour of the justification, because he did not have the justification contemporaneously in mind when the measure was chosen or adopted, whereas another employer on the same facts who did have the justification contemporaneously in mind would succeed."**

> **29. On analysis the conclusion of the appeal tribunal was that, whilst para 25 of the decision of the employment tribunal amounted to a misdirection, it was not fatal to the decision as a whole because the later passages in the decision treated the absence of conscious and contemporaneous justification as having merely evidential significance. Mr Underhill submits that that was over-charitable to the employment tribunal. He refers to the later passages which we have set out and contends that the legal error in para 25 permeates the later passages which cannot properly be interpreted as using the "after the event" point on a merely evidential basis. In our judgment, this criticism is valid. Paragraph 25 was a clear misdirection and we cannot escape the conclusion that it infected the later passages. Once the employment tribunal had taken the view that "after the event" justification was impermissible as a matter of law, it is difficult to interpret the later passages on any basis other than the one which was conditioned by that misdirection."**

20. I accept that in **Cadman**, which was an equal pay case, the Court of Appeal was simply saying an argument in favour of justification could validly be advanced before the Tribunal, notwithstanding that it was not the reasoning of the employer at the time of the decision in question. It does not bear the meaning that the Tribunal said it did. Ms Sleeman argues that the Tribunal failed to carry out a critical evaluation as to whether the Respondent's reasons demonstrated a real need to dismiss the Claimant and, considering the seriousness of the impact of the dismissal on him, whether the former was sufficient to outweigh the latter. She argues that the reasons disclose no consideration of the seriousness of the impact on the dismissal of the dismissal on the Claimant.

21. It seems to me that the Tribunal's misconstruction of **Cadman** is an error of law which casts doubt as to the appropriateness of the conclusions then reached. However, there is a further concern, which arises from the reference at paragraph 45 of the Reasons given in the section of the Decision dealing with **Polkey**. This is the subject of ground 3 of the Respondent's appeal to which I turn out of sequence, but for simplicity. I find it impossible to reconcile the conclusions at paragraph 45, which held that on the balance of probability promoting reconciliation and obtaining an updated Occupational Health report would not have resulted in the Claimant's return to work in the foreseeable future, with the finding at paragraph 73 that had genuine attempt at reconciliation been made there was a 50% chance of his

returning to work. Although I was initially sceptical of Ms Sleeman's suggestion that this meant that the Tribunal found that, in relation to the section 20 claim, that there was a less than 51% chance that the claim would have been reinstated, however, in relation to **Polkey**, found that it was in fact a slightly lesser proportion, namely "*no more than 50%*".

22. Although it does seem an astonishingly finely balanced Decision, on reflection it does seem to me likely that that is indeed what the Tribunal intended by these findings. The difficulty is, as Ms Sleeman asserted, that the question of justification involves a balancing exercise, and it is not something which either party has to "*prove on the balance of probabilities*". Taken together with the misstatements, as I found it, as to the effect of **Cadman**, it seems to me that the finding in relation to the section 20 claim cannot be upheld, involving as they do two separate errors of law.

23. I am also troubled by the reasons given in relation to the **Polkey** finding. If I am right in adopting Ms Sleeman's interpretation of the findings at the paragraphs mentioned, and I accept that I might not be, the strength of the findings at paragraph 45 taken with the considerable reservations expressed, for example in paragraphs 69 to 72, required in my judgment a more detailed explicit explanation for the highly marginal percentage difference. I am also troubled by the expression "*no more than*" in front of "*50%*". In my judgment, if a Tribunal is persuaded - highly unusual in my experience - that the evidence that drives it to conclude that the chance of a given event are precisely 50%, there could be no need to qualify that by the words "*no more than*". Although arguably no more than unfortunate language, as I intend to remit the justification issue to the same Tribunal I propose also to remit the **Polkey** issue. I find that, given the strength of the matters adverted to which militated against reconciliation

working, as against the relatively weak comments made in the other direction, the finding is, in any event, not **Meek**-compliant and thus there has been an error of law.

24. Turning to the remainder of the Respondent's grounds, it is clear that the Tribunal decided that the unwarranted decision by the Respondent to dismiss the Claimant, in order that redeployment could be considered, was unfair. It is impossible to read paragraph 52 of the Reasons in any other way. The holding of a stage 3 hearing when, as the Tribunal puts it "*the decision to dismiss*" had already been taken, seems to have had no obvious purpose, although it is of note that the Tribunal found that the Claimant said at that hearing that he was fit to return to work.

25. As the Tribunal recorded at paragraph 54, the appeal hearing was an opportunity to correct the situation. At paragraph 56 the Tribunal found that, "*In our view, a reasonable employer faced with these documents and the claimant's contention that he was fit to return would have sought further clarification by way of an updated report from [Occupational Health]*". That it did not do. The Tribunal went on to note the misunderstanding of mediation and reconsideration in the context, on the one hand, of a formal grievance procedure and, on the other, to "*clear the air*" to facilitate a return to work. The Decision goes on at some length as to why this did not happen, concluding with paragraph 64. I reject the suggestion advanced at ground 1 of the Respondent's appeal that the Tribunal failed to make adequate findings of fact. Its rationale was straightforward and the reasons are abundantly clear from a fair reading of the Reasons as a whole.

26. The argument that, because of the serious nature of the allegations made against the Head, which had been rejected by the panel hearing the grievance, that there was thereafter no

prospect of an accommodation being reached going forward, is not one which I accept. Neither do I accept that the Tribunal had to make specific findings as to the grievance and its outcome. Although the Head had declined for reasons which she gave, as recorded at paragraph 10, that she wanted a formal structure behind her to give her support to engage in mediation at the outset of the grievance, by the stage 3 meeting the Head was saying that the reason no reconciliation meeting had taken place was because an Occupational Health report had said that it would cause the Claimant stress. Finally, at paragraph 61, the Tribunal noted that the Head had confirmed in cross-examination at the hearing that she was prepared to meet with the Claimant.

27. Turning to ground 2, whilst it is true that the Tribunal held, in relation to the section 20 claim, that on the balance of probabilities reconciliation would not have achieved the return to work, that is not an answer to the reasoned conclusion that the dismissal was unfair. Indeed, in the circumstances described above, it is hard to say what could conceivably have been fair about a process in which, for no legal reason as the Tribunal found, the Claimant was required to be dismissed before relocation could be considered. The unfairness in the appeal process was a failure, in the teeth of the Claimant saying that he was now fit to work, to engage with the medical evidence taken as a whole.

28. As to ground 3, I have already indicated that I find it impossible to reconcile the views expressed by the Employment Tribunal in the section dealing with **Polkey** with the conclusion in section 20, and also my unease as to how a "*no more than*" 50% chance was expressed. I find that the Tribunal erred in law in that regard and that its Reasons were not **Meek**-compliant.

29. I discussed with counsel at the hearing, the disposal of the appeal in certain eventualities. It was agreed that the appropriate course, should I allow the appeal against the section 20 justification and **Polkey** findings, would be to remit them to the same Tribunal if that Tribunal is available. It seems to me that it is unlikely that further evidence would be required, but I leave that decision to the Tribunal and, as I say, I remit it to the same Tribunal if that is possible. As the Respondent was not able, for time reasons, to submit a written skeleton argument in closing, I would recommend to Tribunal that written submissions directed only to the issues which have been remitted should be permitted from both parties.