AG

EMPLOYMENT TRIBUNALS

Claimant: **MM**

Respondent: **St Elizabeth Roman Catholic Primary School**

Heard at: **East London Hearing Centre**

On: **20 November 2018 (in chambers)**

Before: **Employment Judge Elgot**

Members: **Mr D Kendall**
Dr J Ukemenam

Representation

Claimant: In person

Respondent: Ms K Fudakowski (Counsel)

The Tribunal having reserved its decision on remedy it now gives judgment as follows. Written reasons are attached.

RESERVED JUDGMENT ON REMEDY

The Claimant is entitled to compensation for unfair dismissal in the total amount of £ calculated as follows: -

Basic award £

Compensatory award £

Total £

REASONS

1. As a result of an ammonisation order made on 18 September 2017 reference to the Claimant (NM) in this judgment and written reasons is anonymised so that she cannot be identified publicly.

2. In the Tribunal's reserved judgment dated 19 September 2018, the claim of unfair dismissal succeeded. The claim of disability discrimination did not succeed and was dismissed. At a separate remedy hearing heard at East London on 8 November 2018, the Claimant gave evidence herself and there was one witness for the Respondent, Ms D Southgate, Employee Resourcing's Team Leader for Tower Hamlets Counsel and a manager at the people resourcing team. The Tribunal also had the benefit of oral submissions from Ms Fudakowski on behalf of the Respondent and from the Claimant herself. There were short supplementary written submissions from both parties dated 13 and 16 November 2018 respectively. There was an agreed remedy hearing bundle. In accordance with its usual practice the Tribunal read only those documents in the remedy hearing bundle to which it was specifically referred by the parties, their representatives or the witnesses.

3. The Claimant provided a re-calculated schedule of loss (as at 23.10.2018) at pages 162-165 of the remedy hearing bundle. The Respondent provided a counter

schedule at page 167A and some handwritten calculations of the Claimant's earnings in a temporary job at Marks & Spenser and then at Swanlea School over the period of October 2017 to July 2018. Those handwritten calculations were added to the bundle at pages 165A and 165B. The Respondent has helpfully provided a re-calculated counter schedule incorporating those handwritten calculations and that was sent by email to the Tribunal and to the Claimant on 13 November 2018. The Claimant has thus had the opportunity to respond to it when she wrote to the Tribunal on 16 November 2018 by email which was also copied to the Respondent.

4. We adopt the analysis put forward by Ms Fudakowski at the remedy hearing that there are six distinct periods since the Claimant's dismissal on 7 July 2016 with an effective date of termination of 7 September 2016. Those periods are as follows: -

4.1 7 July 2016 - 10 October 2017 (approximate date) the Claimant did not work and had no earnings although she received notice pay until 7 September 2016.

4.2 From approximately 24 October 2016 until 28 March 2017 the Claimant worked part-time in temporary jobs with Marks & Spencer Ltd in Islington and in Hackney.

4.3 From March 2017 until October 2017, the Claimant did not work and received no earnings. She has been in receipt of universal credit. In

October 2017 she obtained employment on a temporary basis as a Teaching Assistant at Swanlea School and worked there until the end of the summer term in July 2018.

4.4 She worked at Swanlea School from October 2017 to July 2018.

4.5 On July 2018 until the date of the remedy hearing on 8 November 2018 the Claimant was not employed and received no earnings.

4.6 She makes a claim for future loss of earnings for a further 6 months until 7 April 2019.

The claimant obtained her post at Swanlea thorough an agency named GLS.

5. Our findings of fact of the Claimant's loss are as follows.

6. She was 41 years old at the effective date of termination and had worked for the Respondent for 9 complete years. The multiply is therefore 9. We adopt the Respondent's calculation of the Claimant's gross weekly salary with the Respondent's school which was £305.25 per week. Her net weekly salary was £270.85 per week. In addition, the Claimant has lost the employer's pension contribution which is £48.23 per week. Thus her net weekly plus benefits when she worked for St Elizabeth's school was £319.08 per week.

Basic award

7. Utilising the figures stated above the basic award is £2,747.25 i.e. 9 weeks x 305.25 gross weekly pay.

8. The Respondent applies for a reduction of the basic award by 50% based on the Claimant's conduct.

9. Section 122(2) Employment Rights Act 1996 provides that:

'*where the tribunal considers that any conduct of the complainant before the dismissal… was such that it would be just inequitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly'.*

10. For the reasons set out in paragraphs 70.1-70.4 of the liability judgment dated 19 September 2018 (sent to parties on 27 September 2018) we are satisfied that it is just as equitable to reduce the basic award by 50%.

11. This reduces the basic award to £1,373.63.

Compensatory award

12. The Claimant is entitled to £500 for loss of her statuary employment rights. This is part of the compensatory award.

13. Looking at period 1 which is the 6.7 weeks between the effective date of termination and the commencement of the Claimant's part-time work with Marks & Spencer, her loss is 6.7 x 319.08 (gross weekly pay + Benefits).

14. We are satisfied that given that she was unfairly dismissed, had certified sickness absence until the end of July 2016, suffered from depression and anxiety and an inevitable loss of confidence and self-esteem as a result of being dismissed in July 2016. The Claimant was unable to obtain a full-time Teaching

> Assistant role at a comparable salary to that which she earned with the Respondent until the beginning of the new term in January 2017. In the intervening period she obtained a part-time role as a Christmas period Sales Assistant at Marks & Spencer whilst she, in effect, recovered her energy and motivation. We are however satisfied that by the beginning of the January term, as in fact occurred when she quite quickly obtained a Teaching Assistant role via the GLS agency she could have obtained either agency work or full-time work as a Teaching Assistant in a school at the beginning of 2017 and ended her period of financial loss.

15. The evidence from Ms Southgate at the remedy hearing was clear; she stated that there are, in her professional judgment, 'plenty of jobs out there for TAs' and she suggested that the Claimant could have applied not only within Tower Hamlets where she feared she might be rejected having been dismissed but also in Hackney, Islington and Newham. Ms Southgate confirmed 'there's a lot of vacancies here' pointing to the list of vacancies for Teaching Assistants in Tower Hamlets and she confirmed that one

or two new advertisements were entered on to that list every week. In those circumstance we award the continuing loss of £125.08 per week which is the difference between the Claimant's salary with the Respondent (plus benefits) at £319.08 per week and the average weekly salary she earned at Marks & Spencer, which is £194 per week. From 24 October 2016 to 8 January 2017 which would be the approximate beginning of a new academic term is 11 weeks. 11 x £125.08 is £1,375.88.

16. Thereafter, from January 2017 we do not accept there would be any continuing or future loss for the Claimant because we are satisfied that she would have been able to obtain full-time work as a Teaching Assistant at the same remuneration she obtained from the Respondent. The amount carried forward is therefore loss to 24 October 2016 £2,137.83. Loss from 24 October 2016 to 8 January 2017 which is £1,375.88 plus £500 for loss of statuary rights = £4,013.71.

17. We need to address the Claimant's argument that she could not have in fact obtained full-time work as a Teaching Assistant In Tower Hamlets or elsewhere because she did not have a satisfactory reference from the Head Mistress of the Respondent School Ms Angelina John. Our findings are as follows:-

18. The Claimant did not in fact ask for a reference until 27 April 2017. The failure to obtain a reference in order to seek work has contributed to her failure to mitigate her loss. Nevertheless, when she did apply the document which is at page 268 of the remedy hearing bundle and which was sent to Red Box Teacher Recruitment Ltd, an agency, is not, we find, a reference likely to prevent or inhibit the Claimant from obtaining the work for which she was qualified and experienced as a Teaching

Assistant. Ms Southgate described it as 'not at all bad' and we agree. It does not, as the Claimant has asserted, state that she is medically unfit to teach. Instead it makes reference to Ms John's understanding of the provisions of the Equality Act 2010 declining to comment on the nature and extent of the Claimant's disability. It states that she would recommend the Claimant for long-term employment, that she would recommend the Claimant for employment involving special needs children and confirming that the Claimant has not been the subject of any disciplinary action, allegations or concerns. The scoring matrix in that reference, taking the 9 factors has one which is not completed, two which are average and six which are good or very good. The Claimant also had the benefit of a glowing and excellent reference which appears at page 269 completed by Oona King who previously employed the Claimant for child care. We cannot therefore agree that the Claimant was disadvantaged by a poor or unfair reference from Ms John nor do we agree that the document at page 271 is a refusal by Ms John to provide a reference. The email at page 271 of the remedy hearing bundle is sent by Ms John to Red Box stating that she is unable to provide a reference for NM because she has already provided one. The Claimant accepted that during the course of the remedy hearing. The Claimant agrees that Ms John also gave a reference, a copy of which we have not seen, to the GSL agency.

19. We note that from 28 March 2017 the Claimant was in fact able to obtain temporary work as a Teaching Assistant via an agency at Swanlea School a month before she had a reference from Ms John.

Contributory fault: compensatory award

20. The wording of section 123(6) Employment Rights Act 1996 differs from the wording applicable to contributory fault as a reduction to the basic award (section 122). Section 123(6) states as follows:-

> 'Where *the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportional as it considers just inequitable having regard to that finding'.*

21. We have therefore applied our minds to the question as to whether any action of the Claimant caused or contributed to her dismissal and in particular whether her actions in relation to the school trip to Joss Bay on 24 June 2016 as described in paragraph 70 of the liability judgment, did in fact cause or contribute to the Respondent's decision to dismiss her. We first note that there is no reference to her conduct in relation to that school trip either in the letter of dismissal dated 7 July 2017 or the appeal outcome letter dated 22 September 2016. Both of those items of correspondents only refer to dismissal not for any kind of misconduct but for absence. The colour timeline upon which the Respondent relied and which is described and referred to extensively in the reasons for the liability judgment makes no reference to the Claimant's conduct causing or contributing to her dismissal. Indeed, the colour timeline records the wrong date for her final date of sickness absence, it shows it to be 27 June when in fact it was 24 June 2016. We find therefore that it was not in the consideration of the Respondent that the Claimant's failure to obey Mr Stuart's instruction or misrepresentation as to the reason why she did not come to work on 24 June 2016 was ever in the mind of the Respondent at the time of the dismissal as being reason for her

to have her employment terminated. In those circumstances we find that the test in section 123(6) if not met we make no reduction to the compensatory award.

22. We cannot agree with Ms Fudagowski's submission on behalf the of the Respondent that had there been a fair dismissal on the basis of recorded sickness absences only, then during the course of that hypothetical hearing, it would have emerged that the Claimant's account of the circumstances of her absence from the Joss Bay trip were less than credible then it is more likely than not that Ms John would not have carried out such an investigation in such detail. This was a final absence review meeting triggered by one more day of sickness absence and that would have been sufficient.

The Polkey reduction

23. The Polkey reduction is a short hand way of referring to the Tribunal's, power where it considers it just and equitable in all the circumstances, to take the view, as first described in the case of *Polkey v AE Dayton Services Ltd* [1988]. It may take a view as to the likelihood that an employee would have still have been dismissed in any event had a proper fair dismissal procedure been followed. A Polkey decision reduction can be made of any percentage up to 100% where a tribunal decides that a Claimant would have been dismissed anyway if it had not been the case that there had been an error in the way in which she was dealt with by the Respondent. The Respondent in this case argues that there was a 100% chance of the Claimant's dismissal in any event if, on 5 July 2016, a fair and proper procedure had been followed by Ms John.

24. We have made it clear in paragraphs ____ of the reserved liability judgment that the claim was dismissed unfairly because, in summary, the Respondent took into account, when carrying out a sickness absence dismissal, other absences which was not entitled to include in the total and thereby acted unfairly. The question therefore is whether the Respondent had followed its own sickness absence policy and take into account any sickness absences the Claimant would inevitably have been dismissed anyway at the final sickness absence review meeting on 5 July 2016.

25. The Claimant was dismissed after the meeting on 5 July 2016 which was a final absence review meeting because she had had one more day of sickness (self-certified) on 24 June 2016. At page 171 of the original bundle, there is a letter dated 23 May 2016 from Ms Augustin, making it clear that she is issuing a final written caution (FWC) in accordance with the school's sickness absence policy and that 'this is a caution that if you are absent from work at all in the period of next 6 months you will be at risk of dismissal'.

26. The Claimant did not query or appeal that caution. She then did have one additional day sickness and hence was called to the final absence review meeting with

Ms John., the Head Mistress.

27. We have asked ourselves, whether had that final absence review meeting been conducted fairly and only sickness absence having been taken into account, had

the school absence policy been applied rigorously and conscientiously, would the Claimant have been dismissed anyway. We are satisfied that she would. Therefore a 100% Polkey reduction is applied. We are satisfied that she would have been dismissed fairly on 5 July 2016 in all those circumstances. The compensatory award is reduced

to nil.

28. The grand total therefore payable by the Respondent to the Claimant within 28 days is the reduced basic award only, in a total amount of £1,373.63

Employment Judge Elgot

Date : 6 December 2018