EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MR APLIN	**V**	**THE GOVERNING BODY OF TYWYN PRIMARY SCHOOL**

HELD AT: **CARDIFF** **ON:** **HEARING 15 OCTOBER 2019**

BEFORE: **EMPLOYMENT JUDGE W BEARD**
MEMBERS **MR P CHARLES**
MRS M HUMPHRIES

REPRESENTATION:
FOR THE CLAIMANT: **MR A SUGARMAN (COUNSEL)**
FOR THE RESPONDENT: **MR C HOWELLS (COUNSEL)**

JUDGMENT

The unanimous judgment of the Tribunal is: The respondent is ordered to pay the claimant the sum of £696,255.65 in compensation of discrimination as calculated below:

Basic Award	£9,580
Past Loss of Earnings	£94,475.33
Future Financial Loss	£113,554
Pension Loss	£286,424.37
Loss of Stat Rights	£500
Injury to Feelings/PI	£20,000
Total	£514,953.70
Polkey deduction of 20% on compensatory award	(£102,990)
Total	£411,963.70
Interest	£17,789.69
Grossing up for tax	£266,502.26
GRAND TOTAL	**£696,255.65**

REASONS

Preliminaries

1. The claimant was represented by Mr Sugarman the respondent by Mr Howells both of counsel. This judgement should be read in conjunction with the tribunal's judgment of August 2017.

2. The matter was remitted to the tribunal to consider whether a decision to abdicate responsibility for decision making by the Governing Body was discriminatory. In addition, the tribunal is to consider the appropriate remedy for our previous findings of unfair dismissal and discrimination in addition to any findings in the claimant's favour we make on the remitted matter.

3. The tribunal heard oral evidence from the claimant on his own behalf. We were provided with a bundle of documents, running to 169 pages, we were also referred to some documents used in the substantive hearing.

4. The following issues were identified by the parties.

    4.1. The remitted matter:
        4.1.1. Was there a non-discriminatory reason the respondent governors abdicated their role?
            4.1.1.1. On the facts had the burden of proof shifted to the respondent?
            4.1.1.2. If the burden of proof shifted was there an explanation for the respondent abdicating responsibility for making a decision which was in no way whatsoever because of the claimant's sexual orientation.
    4.2. The remedy issues.
        4.2.1. Is it inevitable that the claimant would have been fairly dismissed in any event ***Polkey***?
            4.2.1.1. Would dismissing the claimant conflict with the claimant's Article 8 right to privacy and be unreasonable?
        4.2.2. Did the claimant cause or contribute to his dismissal?
        4.2.3. Did the claimant fail to mitigate his losses?

5. The parties did not require the tribunal to consider and come to conclusions on certain matters and, once the tribunal outlined the principles of its findings on remedy orally the parties agreed the figures set out above.

The Facts

The Remitted Issue

6. A PASM arranged for 28 August 2015 considered the claimant's conduct with A and B. Mr Latham, as chairman of the governing body, was invited to attend this meeting and was told at the meeting that the police had concerns about both A and B's ability to consent to the sexual activity. The decision that followed was that the claimant should be suspended from work. Mr Latham implemented that decision but he was simply following an instruction from the Local Authority officers.

7. A further PASM held on 20 October 2015 recommended that the school consider disciplinary action because "*the allegations were substantiated."* Mr Latham told the claimant that same day that his conduct was to be investigated as a disciplinary matter. Mr Latham arranged with the LEA for an investigation to be carried out. Mr Gordon who carried out the investigation did so in a biased way and produced a flawed report. On 18 March 2016 Mr Latham and Mr Crowley discussed the investigation report. They were advised by HR officers and Mr Gordon was also present. Mr Latham held a personal opinion that the claimant was guilty of gross misconduct, on the basis that there was a child protection issue.

8. The members of the disciplinary panel were Mr O'Dwyer, Mrs M Evans and Mrs K Evans. Mrs Karen Holt, as HR manager, would also be present an adviser to the panel. Mr Gordon presented the management Case acting as if he were a prosecuting advocate. The claimant was accused of behaviour bringing the school into disrepute, conduct incompatible with the role of the head teacher both which seriously undermined the trust and confidence of the school in its head teacher. The disciplinary panel had handed the administrative responsibility to ensure a fair process and relied entirely on the LEA officers to administer a fair process. The disciplinary hearing was held on 17 May 2016. None of the panel were qualified, experienced or had any training in serious disciplinary matters. When it was suggested to him that the panel relied on the LEA officers his response was "*yes, they are the experts*." Mr Hodges and Mrs Holt remained with the panel after evidence and submissions. The panel had no understanding of the reasons given for dismissal by Mr Hodges, the tribunal drew the conclusion that the panel decided upon dismissal but were entirely reliant on the LEA advisers for its reasoning: in short, they saw that the LEA appeared, through Mr Gordon and others, to want a dismissal and acquiesced in that.

9. After the end of the claimant's employment the claimant was entitled to attend the school buildings in another capacity unrelated to the school. The chairman of school governors Mr Latham prevented him attending in that capacity excluding him from the building for child protection matters.

The Remedy Issues

10. The claimant had been involved in education for the majority of his working life, first as a teaching assistant progressing to become a class teacher and later on becoming a deputy head teacher in 2009. The claimant was a primary headteacher at the point of dismissal. His career shows the claimant to be an individual who was dedicated to working in the education sector and someone who was not only ambitious but effectively so. The claimant was therefore a well-qualified and experienced school manager with extensive teaching experience.

11. The claimant began making job applications in September of 2016. This job search was initially for temporary teaching and permanent headteacher roles and, also, included applying for roles connected with education but outside of teaching children. This approach was taken because the

claimant, at this early stage, was seeking to return to teaching as a headteacher but was looking to fill time working in other roles because of his financial situation.

12. In respect of headteacher vacancies the claimant was confined to applying when posts became advertised, which would be less frequently than posts for teachers. Further there are specific times of year when teaching and senior teaching posts are advertised and, additionally, when positions can be taken up. The claimant experienced a great deal of difficulty in finding employment in Neath Port Talbot and Swansea areas. He considers this is because the respondent has deliberately undermined him. We have not heard sufficiently cogent evidence to draw that conclusion but there are foundations for suspicion. Whether through the grapevine or otherwise, the claimant was not interviewed for posts where he might have expected to be given an interview. In one case in Swansea the type of reference that the LEA gave for the claimant was considered to be lacking information by the school had applied to. This problem extended to schools outside the area we have mentioned. On that basis there were limitations affecting the claimant's ability to find work in the geographical areas where he was originally seeking work (within normal travelling distance of his home); that this was surprising given the claimant's abilities and qualifications.

13. The claimant also became quite unwell at points during the period between his dismissal and the tribunal hearing. During these periods he was unable to seek work. The respondent has conceded that at least part of this illness was caused by the discrimination we have found as the respondent and claimant have agreed that there should be a global figure to represent personal injury and injury to feelings.

14. The claimant put his name forward for supply teaching and sought to work with an agency. He applied for 5 headships between February 2018 and 24 May 2018. On 1 September 2018 the claimant began working as a primary teacher in Merthyr, he has remained working there on a series of temporary contracts. In our judgment the school has seen the value of the claimant's teaching and are seeking to retain him as a teacher.

The Law

15. As this is a claim where both discrimination involving dismissal and unfair dismissal claims have been upheld the tribunal has a choice as to the appropriate method of calculating damages, however it cannot award for any particular loss under both statutes; in short nothing can be awarded which would amount to double recovery. In ***D'Souza v London Borough of Lambeth [1997] IRLR 677*** it was held that where there is discrimination amounting to an unfair dismissal the principles for discrimination compensation should be followed to ensure the employee is fully compensated.

16. The tribunal is required to consider whether it is just and equitable to make any award. If it decides to make an award it must be evaluated using general principles applied in tort cases. That means that the particular act

must have caused the loss in question and, as best as money can do this, the claimant is to be put in the same position as he would have been but for the unlawful conduct. The question is one of pure causation and if the loss flows naturally from the unlawful act it does not matter that the consequences are not foreseeable ***Essa v Laing Ltd [2004] IRLR 313*** the perpetrator will be liable for the consequences. The principle of taking your victim as you find them is also applicable.

17. The claimant must prove loss; the respondent must establish a failure to mitigate loss. In ***Wilding v British Telecom PLC [2002] EWCA Civ 349*** Potter LJ said that five elements were to be considered in respect of the reasonableness of mitigation:

> *It was the duty of Mr Wilding to act in mitigation of his loss as a reasonable man unaffected by the hope of compensation from BT as his former employer; (ii) the onus was on BT as the wrongdoer to show that Mr Wilding had failed in his duty to mitigate his loss by unreasonably refusing the offer of re-employment; (iii) the test of unreasonableness is an objective one based on the totality of the evidence; (iv) in applying that test, the circumstances in which the offer was made and refused, the attitude of BT, the way in which Mr Wilding had been treated and all the surrounding circumstances should be taken into account; and (v) the court or tribunal deciding the issue must not be too stringent in its expectations of the injured party. I would add under (iv) that the circumstances to be taken into account included the state of mind of Mr Wilding.*

18. In ***Scope v. Thornett [2007] IRLR 155 the Court of Appeal*** reminds the tribunal of its need to engage in a certain amount of speculation in the appropriate circumstances (albeit in that case dealing with unfair dismissal and not discrimination) in the words of Pill LJ at paragraph 34

> *"The employment tribunal's task, when deciding what compensation is just and equitable for future loss of earnings will almost inevitably involve a consideration of uncertainties. There may be cases in which evidence to the contrary is so sparse that a tribunal should approach the question on the basis that loss of earnings in the employment would have continued indefinitely but, where there is evidence that it may not have been so, that evidence must be taken into account."*

And at paragraph 36

> *"The EAT appear to regard the presence of a need to speculate as disqualifying an employment tribunal from carrying out its statutory duty to assess what is just and equitable by way of compensatory award. Any assessment of a future loss, including*

> *one that the employment will continue indefinitely, is by way of prediction and inevitably involves a speculative element. Judges and tribunals are very familiar with making predictions based on the evidence they have heard. The tribunal's statutory duty may involve making such predictions and tribunals cannot be expected, or even allowed, to opt out of that duty because their task is a difficult one and may involve speculation."*

19. In ***Chagger v Abbey National and Hopkins [2009] EWCA Civ 1202*** the Court of Appeal upheld the EAT's decision that an employment tribunal should assess the likelihood that an employee would have been dismissed even if there had been no discrimination and to then assess any consequential reduction in compensation necessary, this in effect follows the ***Polkey*** approach in unfair dismissal.

20. The claimant raised Article 8 rights of privacy in dealing with the question of a likelihood of a fair dismissal in these circumstances. The tribunal accepted the following elements of the argument (the interpretation of the law not being significantly challenged by the respondent): that the tribunal should consider the interpretation of statute taking account of rights under the ECHR; that an individual's private sex life falls under the provisions of Article 8 ECHR; that an individual's publicity of a sexual activity did not, necessarily, mean that the rights were not engaged.

21. Article 8 ECHR provides:

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

Analysis

22. Dealing first with the remitted issue: the tribunal conclude that there was an explanation for the decision of the governing body to abdicate responsibility for its decision making to LEA officers which was, in no way whatsoever, because of the claimant's sexual orientation.
    - 22.1. Mr Latham was not experienced or trained in dealing with meetings involving child protection matters.
    - 22.2. In respect of Mr Latham's decision to suspend the claimant following the first PASM the claimant accepted in cross examination at the liability hearing that it was appropriate to suspend at that stage.
        - 22.2.1. Mr Latham attended a meeting with a number of professionals in different fields who recommended this.

22.2.2. In our judgment the nature of the claimant's sexuality did not arise as part of Mr Latham's approach, the sole question was the age and potential vulnerability of the two youths.

22.2.3. On this basis there would have been no difference of treatment of a comparator. If a male or female headteacher had sexual relations with two 17 year olds, of a different gender, where there was a concern over potential vulnerability, and Mr Latham had been advised to suspend we conclude that Mr Latham would have acted by suspending that comparator.

22.2.4. In our judgment the burden of proof did not shift at this stage, the sole reason for Mr Latham's approach was that he accepted professional advice that this was a potential child protection issue.

22.3. Following the second PASM Mr Latham was again following professional advice that there should be a disciplinary investigation. The circumstances were that vulnerability of the individuals was no longer in question, however the issue being raised was the judgment of the claimant in having sexual relations with children. Once again, we conclude that Mr Latham would have treated the comparator in just the same way by commencing disciplinary proceedings. Mr Latham, simply put did not have the experience or confidence to go against the advice.

22.4. Mr Latham and his colleague read the report of Mr Gordon before making the decision to commence disciplinary proceedings.

22.4.1. The LEA advisors did not advise them of weaknesses in the methodology underpinning Mr Gordon's report as it related to procedure. Neither did the advisors draw attention to the presentation of opinion within the report as pointing to potential bias.

22.4.2. The material within the report appeared to be raising child protection issues. Those issues were presented on an age not a sexual orientation basis within the report.

22.4.3. Mr Latham's opinion of the claimant having been guilty of gross misconduct was based on this material.

22.4.4. Once again, we conclude that had a report been presented which provided a one-sided view of a comparator and where that was not drawn to the attention of the decision makers then there would be no difference in treatment.

22.5. The governing body's decision makers were inexperienced and untrained in disciplinary decision making.

22.6. Those individuals considered that the LEA officers were experts; the officers included professionals with expertise in education matters and law.

22.7. The decision to be reached involved the potential dismissal of a headteacher who had sexual relations with children.

22.8. In addition, the headteacher had engaged a representative who was making complex legal arguments based on Welsh Government procedures, bias and other evidential matters.

22.9. The decision makers did not feel competent to address matters and wanted to rely on the "experts". Had the presentation of the case against a comparator been carried out in a similar fashion we are of

the view that the decision makers would equally have abdicated responsibility to those who they saw as having the expertise and qualifications to make the relevant decisions.

23. We move now to deal with the remedy matters.

24. The dismissal was based on the claimant's conduct in having sexual relations with two seventeen-year olds. At seventeen, as a matter of law, these individuals are children. The actual charges related to the potential for adverse reputational impact on the school. Set against that there was nothing unlawful in the claimant's conduct and the events took place at the claimant's home. This, therefore, is a clear case involving Article 8 rights. However, such rights are not absolute but subject to qualification. In our judgment this is an occasion where the qualification of the right means that it would be possible for a fair dismissal to have taken place.
    24.1. The qualification in Article 8(2) refers to interference being "*necessary in a democratic society*" for the protection of "*morals*".
    24.2. In those circumstances we have to have some thought as to what morals are protected in our society.
        24.2.1. It is our judgment that, consistent with public attitudes and the approach of the state towards laws it has enacted, one aspect of morals is the protection of children.
        24.2.2. This aspect is, in the circumstances of this case, summed up as teachers should not have sexual relationships with children of any age. This reflects the idea of power relationships and vulnerability making such relationships generally inappropriate.
        24.2.3. We cannot simply conclude that, because a majority of the population would hold this view, it is sufficient for this to amount to being necessary. In order to show necessity there must be a social need related to the aim of protecting morals.
        24.2.4. That there is a pressing social need to protect children from exploitation does not require argument, to fail to do so would be likely to endanger the human rights of children themselves.
        24.2.5. Is there a necessity on the facts of this case?
            24.2.5.1. Headteachers have authority over children.
            24.2.5.2. If headteachers have sexual relationships with children it cannot be seen, without exploration of evidence, whether that authority is misused.
            24.2.5.3. It is necessary therefore to restrict the occasions when such sexual relationships arise so that confidence that headteachers will not exploit that authority can be maintained.
    24.3. Therefore, we consider that it is possible to conclude that in the circumstances of this case the claimant could have been disciplined for his admitted conduct within the qualification in Article 8(2).
    24.4. However, a fair process would require the respondent to consider whether the claimant was aware that the individuals were 17 years of age. Further it would have to consider what the real risk of the issues becoming public were and therefore what the real potential for reputational damage was.
    24.5. In our judgment, given the number of procedural failings we have identified, it is extremely difficult to quantify what the prospects of

dismissal were had a fair procedure been adopted. However, as there was admitted conduct and we have concluded that such conduct could be the subject of discipline we consider that there was at least a 20% prospect of the claimant being dismissed fairly and without discrimination and, in those circumstances, we consider that any award should be reduced to that extent. In approaching this matter, we have considered what might be described as the ***Polkey*** question along with the issue of contributory fault in coming to our conclusion.

25. The respondent provided no evidence as to the availability or otherwise of suitable employment for the claimant to apply for during the period from 2016 up to 2018. We consider that the claimant was applying for roles during that period when he was well enough to do so. The respondent asked us to consider that, it having demonstrated that there were four headteacher vacancies in a twelve month period in 2018/19 within Neath Port Talbot, we should extrapolate that to view the number of vacancies the claimant may have applied for in the previous years. We did not consider that such an exercise was possible and certainly did not consider that on the balance of probabilities we could conclude that there were a significant number of vacancies the claimant could have applied for and did not. There was simply insufficient evidence for us to take such a statistical leap in the dark.

26. We have to consider whether the claimant has mitigated his loss. In our judgment the respondent has failed to prove that the claimant did not mitigate loss. The respondent provided documentary evidence of a number of vacancies. Those vacancies were in Neath Port Talbot and therefore subject to the LEA who were contesting this tribunal's judgment on appeal. Those vacancies were also relatively recent. We did not consider that the argument that the claimant had failed to apply for these recent roles meant that the claimant had failed to mitigate loss. Given the difficulties that the claimant had experienced in obtaining references, the ongoing litigation and the need to build experience after a significant gap in employment in school he was reasonable in continuing in the role at Merthyr.

27. The duty of the claimant to act in mitigation of his loss as a reasonable man unaffected by the hope of compensation from his former employer is, in our judgment met. The onus on the governing body to demonstrate that the claimant had failed in his duty was not made out. The claimant had showed that he had made, and persisted in making, applications. He had broadened his search beyond headteacher roles and even beyond schools. He had continued to make these efforts save for periods when he was too ill to do so. The respondent had not demonstrated that the claimant was unreasonable in not seeking roles in Neath Port Talbot and Swansea after his earlier experiences. The claimant was not unreasonable on an objective view when he sought to settle in Merthyr in a teaching role, although the role was temporary. A period of consolidation was an objectively sensible approach to take after such a long period of unemployment.

28. For past loss the tribunal considered that the claimant should be compensated for all losses to date less the sums earned and benefits received.
29. The tribunal concluded that the claimant's dedication to teaching and his ambition would return. We came to the conclusion that given his existing experience he would be likely to return eventually to a headteacher role and that he would do so more quickly than he did previously because of his experience. Doing the best that we can we view that this would take up to ten years. We do not consider that there is a significant prospect that the claimant would become unemployed although the current role is temporary that has been extended on a number of contracts. This reflects how well the claimant is thought of and points to a continuation of employment or a very favourable reference at the least. We concluded that he would progress through leadership roles to reach the position of headteacher. On that basis an average of teaching and head teacher salary and benefits would best reflect the appropriate multiplicand. We indicated that the Ogden tables should be used to obtain the appropriate multiplier.

30. The parties then calculated the correct figures based on those principles along with those that they had already agreed. On that basis we conclude that the respondent should pay to the claimant the agreed sum of £696,255.65 based on our findings.

Judgment posted to the parties on

……9 November 2019…….

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For Secretary of the Tribunals

EMPLOYMENT JUDGE W BEARD

Dated: 8 November 2019

31.