EMPLOYMENT TRIBUNALS

Claimant:	**Mrs J Speechley**
Respondent:	**Greenwood Academies Trust**
Heard at:	Tribunals Hearing Centre, 50 Carrington Street, Nottingham, NG1 7FG
On:	28 November 2019
Before:	Employment Judge Adkinson sitting alone
Appearances	
For the claimant:	Mr Thakerar, Counsel
For the respondent:	Mr Bunting, Counsel

JUDGMENT having been sent to the parties on 6 December 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The heart of the issue that I must determine is the interpretation of section 4 clause 9 ("clause 9") of the collective agreement between teachers and educational establishments. This is called "the Burgundy Book". The factual issue is whether a person who suffers an injury which is a reoccurrence or exacerbation of a pre-existing condition is entitled to full pay for 12 months or only 6 months.

Background

2. At all relevant times, Mrs Speechley was an employee of Greenwood Academy Trust ("the trust"). She started her employment in March 2017. However, before she had commenced employment, at some point in the past she had an episode of post-dramatic stress disorder ("PTSD").

3. On 16 October 2018 Mrs Speechley was signed off work because of a reoccurrence of her PTSD. She says that during her employment, there was an incident that reignited the PTSD.

4. Her employment was subject to the terms of the Burgundy Book. Under the terms of the Burgundy Book, she was entitled to, and she received, 6

months of full salary by way of sick pay. This was for the period until 29 March 2019.

5. Her case is that from 29 March 2019 she was entitled under clause 9 to further full sick pay. She says that the fact her illness is a reoccurrence or exacerbation of her previous PTSD is irrelevant.

6. The case of the trust is that clause 9 refers only to injuries that are new and occurred during employment. They say that reoccurrence or exacerbation of pre-existing injuries do not count, even if the exacerbation or reoccurrence happens because of something that occurred during employment.

Procedure

7. Mr Thakerar, a barrister, represented Mrs Speechley. Mr Bunting, a barrister, represented the trust.

8. I have heard evidence from Mrs Speechley herself and evidence from Mr P Kullar on behalf of the trust. Both witnesses were cross-examined and both witnesses have answered questions from the Tribunal where the Tribunal had any.

9. I understand from the parties that are or may be other proceedings between them taking place in the Tribunal system. I know nothing about those proceedings. I have given them no regard whatsoever and express no view on them.

10. It is quite clear from reading Mrs Speechley's witness statement and from the bundle that there are many factual disputes between the parties. In my opinion most of those are not relevant to the issues that I must decide. I express no view on those other factual issues.

11. Therefore, at the trust's request and with Mrs Speechley's agreement, I indicated that cross-examination can be limited to only those facts which are in dispute and which are relevant to the issues that I needed to determine. Cross-examination needed to be enough to enable me to decide the relevant issues, to allow the witness to understand what major parts of their evidence are disputed and allow them sufficient opportunity to comment on those disputed issues. My understanding is that such an approach is consistent with previously decided authorities: see **Browne v Dunn (1893) 6 R. 67 UKHL(S)**, **Howlett v Davies [2018] 1 WLR 948 CA** and ***NHS Trust Development Authority v Saiger [2018] ICR 297 EAT**. This is the approach the parties took.

12. There was an agreed bundle of documents. I have considered those documents to which I have been referred.

13. There has been no suggestion that I cannot consider any evidence that has come to light or been created after Mrs Speechley presented her case to the Tribunal. Both parties therefore agreed that I can consider what Dr C Mutalik, a consultant occupational physician to whom the trust referred Mrs Speechley, said in his report of 21 August 2019.

14. Each barrister had prepared a skeleton argument. Each barrister also made on their client's behalf careful and focused oral submissions. They were very helpful and I am grateful for them. I have taken those into account too.

15. The trust accepted that, for the purposes of this claim, Mrs Speechley's relevant absences were because of PTSD. The trust has not suggested that Mrs Speechley is not genuinely ill. The trust has not suggested Mrs Speechley is not telling the truth. There is no suggestion that Mrs Speechley does not genuinely believe there is a link between the recurrence or exacerbation of her PTSD and her employment by the trust.

16. I am satisfied that both witnesses have done their best to tell the Tribunal what they believe to be the truth.

Issues

17. In my view, the issues I must determine are:

    17.1. the legal question: what does clause 9 mean?

    17.2. the factual question: once I have worked out what it means, does the Claimant qualify under it for payment of full sick pay?

Findings of fact

18. The Burgundy Book contains the following clauses that are relevant to the case.

19. Section 2 clause 3 says that "approved medical practitioners" means "any registered medical officer nominated or approved by the employer".

20. Section 4 clause 2 says:

    "Provided the appropriate conditions are met, a teacher absent from duty because of illness (which includes injury or other disability) shall be entitled to receive in any one year sick pay…". It then sets out how the pay is worked out which is not in dispute in this case.

21. Section 4 clause 8 sets out the requirements that a teacher must meet in order to be entitled to sick pay. It is agreed that Mrs Speechley meets those requirements so I do not set them out in detail.

22. Clause 9 (so far as relevant) says:

    "9.1 In the case of absence due to accident, injury or assault attested to by an approved medical practitioner to have arisen out of and in the course of the teacher's employment, including attendance for instruction at physical training or other classes organised or approved by the employer or participation in any extracurricular or voluntary activity connected with the school, full pay shall in all cases be allowed, such pay being treated as sick pay for the purposes of paragraphs 3 to 7.5 above. Subject to the production of self-certificates and statements from the date of the accident, injury or assault up to the date of recovery, but not exceeding six calendar months.

    "9.2 After the maximum period of six months' full pay, in the event of the teacher not returning to duty, he/she shall be entitled to normal sick leave and pay under the terms of paragraph 2.1 according his/her to length of service as prescribed by that paragraph."

"…

"9.4 For the purposes of paragraph subparagraph 9.1 absence shall include more than one period of absence arising out of a single accident, injury or assault."

23. The trust accepted that the report from Dr Mutalik of 21 August 2019 is a report that is from an approved medical practitioner for the purposes of the section 2 clause 3 and so for clause 9.

24. The trust conceded that injury in clause 9 includes not just physical injury but also psychiatric injury. If it is of any comfort to the trust, that is an appropriate concession because I would have unhesitatingly come to the same conclusion if I had had to determine the matter.

25. The parties agree how much the trust has paid to Mrs Speechley.

26. The key dates are agreed between the parties.

27. The parties agree that there have been various grievance procedures. The details do not matter in the current case and so I have no considered them further.

28. At some point before her employment began with the trust, Mrs Speechley suffered an episode of PTSD. The details of that do not matter for the purposes of this hearing.

29. When her employment began with the trust, her PTSD was in remission or she at least no longer had it – whichever term is the most apposite I do not know and I believe do not need to resolve.

30. She began employment with the trust on 1 September 2017.

31. On 16 October 2018 she was signed off work by her general practitioner. The general practitioner noted she was very stressed at work and needed a break to deal with those stresses at work. The doctor noted it was not a good environment in which Mrs Speechley could cope with her mood.

32. On 16 November 2018 she was signed off until 14 December 2018 due to stress. On 14 December 2018 she was again signed off due to an acute stress reaction.

33. On 14 January 2019 there was an occupational health assessment which was done by telephone. The occupational health adviser noted that Mrs Speechley had had previous episodes of depression in the past and noted that Mrs Speechley had been diagnosed with PTSD in 2016 by an occupational health doctor around some work issues at that time. She was seen by a psychiatrist at that time for treatment. They also noted that Mrs Speechley reported her depression and stress had been triggered at work. She described feeling unsupported. Though the trust disputes not supporting her, it does not matter if that belief is correct or incorrect for these purposes so I put it to one side.

34. On 1 March 2019 Mrs Speechley's general practitioner, Dr Louise Baker, wrote a letter which was handed to the trust and which read:

"This is to confirm Mrs Speechley is a patient at our practice and we hold her full medical records. We have been seeing her regularly with ongoing

problems with her mental health secondary to work related issues. Her current work situation has ignited previous [PTSD] issues from the past. I believe the trigger to these problems has been her untenable working situation which would have been avoided if adequate support had been provided for.

"Unfortunately I feel these problems will lead her being unable to return to teaching in the future and she will need to reconsider her career."

35. Mr Kullar conceded in cross-examination that as part of the appeal against the original grievance outcome, the trust had accepted it knew that Mrs Speechley had previously suffered from anxiety at the least. Furthermore, that appeal had gone on to conclude that the trust should have provided additional support to Mrs Speechley at the beginning of the school term because there were particularly challenging pupils in her class. Mr Kullar also conceded it was foreseeable that that an incident would occur that would in turn cause her to suffer a reoccurrence or exacerbation of her PTSD.

36. Mrs Speechley presented her claim to the Tribunal on 5 July 2019 following a period of early conciliation.

37. On 21 August 2019 Dr Mutalik wrote his amended report.

38. His report begins by saying:

"My recommendations are based on my critical evaluation of the following sources of evidence.

"* letters from Dr Ray, Consultant Psychiatrist dated 11 January 2017 and 9 May 2017,

"* health declaration form dated 26 March 2017,

"* letter from Dr Eastwood who is the Claimant's general practitioner dated 10 December 2018,

"* letter from Dr Baker also the Claimant's general practitioner dated 1 March 2019,

"* reports by Ms Gilland, Occupational Therapist dated 14 January, 25 February and 29 April 2019,

"* part B Medical Section of the Pension Form completed by Dr Baker on 8 July 2019,

"* management referral form, 17 July 2019,

"* an e-mail from Ms Spiteri, the Human Resources Officer dated 28 July and

"* today's assessment."

39. It is quite clear therefore that Dr Mutalik had a significant of information before him when reaching his opinions and conclusions and also had the advantage of an examination of Mrs Speechley.

40. In his report he goes on to say:

"I understand that she did not experience further problems until last year and was able to provide regular and effective service in her current job. Her psychological symptoms relapsed in the last year due to her few pursued work-related stresses such as staff shortage, lack of management support, challenging classroom environment, inadequate risk assessment and lack of reasonable adjustments and increase in work demands/pressure. I understand she had raised a grievance on this matter and the employer is aware of the work-related issues. The previous occupational health report refers to a complete breakdown of the relationship between her and the employer."

41. Later in the report, Dr Mutalik wrote:

"In your e-mail you have requested an opinion on whether her sickness absence is due to an accident, injury or assault caused by [Mrs Speechley]'s employment. I understand this question is in relation to your sickness pay policy. I do not have its details but as stated above, based on the available information, her current episode of psychological ill health is caused by the perceived work-related stressors. This view is consistent with the recent report from her general practitioner. She informed me about an event in October 2018 when she was asked to supervise a student with challenging behaviour while the student was outdoor[s] on a movement break and simultaneously […] teach and supervise the classroom. I understand your Health and Safety manager has highlighted a high level of safety risk involved in such scenario. It is likely that this incident caused significant anxiety and the relapse of her psychological illness. She had to consult her GP and after this event and is on sick leave since then."

42. He then writes, further on:

"She experienced two severe episodes of psychological illness caused by work related issues. She had and continues to receive appropriate medical and psychological interventions. Despite treatment she continues to experience significant anxiety and remains incapable of returning to her normal duties."

43. I accept Dr Mutalik's conclusions and opinions. There is no reason to doubt them. They seem inherently credible and are written after considering a wide range of sources of information. His opinions taken with the evidence of her general practitioner Dr Baker, the evidence of Mr Kullar and Mrs Speechley's own evidence, lead me to conclude that for the purposes of this case Mrs Speechley had suffered a reoccurrence or exacerbation of her PTSD because of an incident in the workplace, and that the incident occurred in the course of her employment. I make no finding of whether that was caused or contributed to by the trust's negligence or breach of duty because that is not relevant to the case before me.

44. In my opinion, it makes no difference if it is a reoccurrence or an exacerbation. Therefore, I do not believe I must resolve that issue.

Law

45. The **Employment Rights Act 1996 section 13** prohibits an employer from deducting monies from wages unless authorised by contract (there are other permitted reasons for deduction not relevant here).

46. **Section 27** of that act defines wages to include sick pay.

47. A Tribunal is entitled to interpret the contract of employment in order to deduce if a worker is properly entitled to wages claimed: **Aggarwal v Cardiff University [2018] EWCA Civ 2084 CA**.

48. When it does so, the Tribunal applies the same approach as the civil courts: **Greg May Carpet Fitters v Dream [1990] ICR 1883 EAT**.

49. In **Investors Compensation Scheme Ltd v West Bromwich Building Society (No1) [1998] 1 WLR 896 UKHL**, Lord Hoffmann said that contracts should be interpreted not according to the subjective view of either party but in keeping with the meaning conveyed to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time they contracted with each other.

50. In **L Schuler AG v Workmen Sales Ltd [1970] AC 234 UKHL**, Lord Reid said that the fact the particular construction produces an unreasonable result must be a relevant consideration. The more unreasonable the result then the more unlikely it is the parties can have intended it. If they did intend it, the more necessary it is that the words make that intention clear.

51. In **Arnold v Britton [2015] AC 1619 UKSC** Lord Neuberger summarised the law and said that the meaning of the words has to be assessed in light of the natural and ordinary meaning of the clause, any other relevant provisions of the contract, the overall purposes of the clause and of the contract generally and in the circumstances known or assumed by the parties at the time they contracted with each other.

52. Lord Neuberger cited 7 factors at paragraph [17] onwards that a court should consider, 6 of which are relevant for this case:

> "17. The reliance placed in some cases on commercial common sense and surrounding circumstances … should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.
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> "18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. … However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. …
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> "19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked

out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language….

"20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed…."

"21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties….

"22. Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention…."

Conclusions

53. I now set out my conclusions on the case.

54. The meaning of the word "injury" is sufficiently wide to include an exacerbation of a previously existing condition or the reoccurrence of a previously existing injury. Therefore, the reoccurrence of Mrs Speechley's PTSD is sufficient to fall within "injury" and so falls in the first sentence of clause 9.1. I do not accept the proposition that injury requires a narrow construction to mean it covers only new injuries that are not reoccurrences or exacerbations of previous injuries.

55. My reasons are as follows:

    55.1. The natural meaning of the word "injury" lends itself to cover the exacerbation or reoccurrence of something that existed previously. It is a clear and natural use of the word to talk about an injury that itself happens to be a reoccurrence or exacerbation of a previously existing injury.

    55.2. The parties at the time they contracted must have been aware of how the general law approached the issue of injuries caused by a tortious act. The law itself considers that reoccurrence or exacerbation of previous existing injuries is sufficient (subject to proof of the other necessary tortious elements) to justify an award of compensation or damages and to be described as an injury. It seems to me that it would be illogical that the word injury would be construed more narrowly when used this contract. If a narrower meaning were meant, I would expect the draftsmen to have said so.

    55.3. The clear purpose of the clause is to ensure that those who are injured at work have any financial hardship they may otherwise suffer abated to less than it otherwise might be. The trust's

proposed interpretation undermines that purpose by introducing what would appear to be an arbitrary restriction.

55.4. I am fortified in that conclusion by the clause's inclusion of the additional words "accident or assault". By identifying them as equal options in the list and without qualification, the grammatical structure of the clause shows these are independent gateways from "injury" itself. An assault itself could clearly cause the reoccurrence or exacerbation of a previous existing condition. The natural and ordinary meaning of those words do not point to any limit that the trust suggests applied to the word "injury". So, if the resultant effect of an assault was a reoccurrence or exacerbation of a previous condition, it would still fall within clause 9. Likewise, the same must apply to an accident. If there is an accident in the workplace that causes the exacerbation or reoccurrence of some pre-existing condition, whether one also calls it an injury or not, it does not seem to me that the clause provides that that should be excluded. There is no logical or obvious reason why mere "injury" itself should be treated differently and more restrictively. If that were meant to be the case I would expect the clause to say so in clear terms.

55.5. I believe that the trust's interpretation would lead to an unreasonable result. Suppose an employee had had an injury at work that had caused PTSD, and that the employee had never had PTSD before. The impact on the employee would be the same as if the employee had suffered an injury that led to a reoccurrence or an exacerbation of previous PTSD. However, if the trust is correct the former is better off than the latter. There is no reason for that difference in treatment. The wording does not clearly indicate that arbitrary result is what the draftsmen intended.

55.6. The trust's approach would also lead to factually complex enquiries. If an employee for example develops PTSD and had had PTSD previously, the trust's approach would require an enquiry to determine if the PTSD was a reoccurrence, exacerbation or new and independent occurrence. The complexity seems to me to be unreasonable and cannot have been intended because the Burgundy Book (at least the parts to which I have been referred) provides no mechanism to determine such issues. The simple words used in the clause do not support the idea that the parties intended this type of factually complex enquiry.

56. The trust suggested that if I interpret it the way the Claimant proposes that it might result in a floodgate type situation because pretty much any employee would be entitled to extended sick pay.

57. I disagree with that. There are criteria which controls the entitlement to sick pay. It is found in the words "arise out of and in the course of" the teacher's employment.

58. In my judgment those words “arise out of” require some sort of nexus between the injury, assault or accident and the teacher’s employment.

59. The words “in the course of” add an additional condition which requires the injury, assault or accident to have occurred during the employment.

60. Finally, the word “and” means that both those criteria must be satisfied.

61. I accept it is arguable “arise out of and in the course of” may in fact be only one criterion. However even if that is right, it does not undermine the argument here that there is a criterion that otherwise controls open-ended access to sick pay.

62. Although the trust’s evidence suggested it believed that the condition required that the trust was responsible for the accident, injury or assault in order to be liable under clause 9, it did not pursue that argument in submissions.

63. In my view that concession was rightly made. Clause 9 contains no requirement that the trust be responsible for (i.e. the cause of) the injury . If that had been the intention of the draftsmen, the clause would clearly have said so. It is easy to visualise how a teacher might suffer an injury that arises from and in the course of their employment for which the employer is not responsible: an injury on a school coach trip caused by the negligent driving of an independent third party, for example. Such an interpretation would require implying words that are not there and not necessary to make the clause work. Such an interpretation would also add an unreasonable layer of complexity requiring enquiries into who caused the injury, accident or assault. The lack of wording suggests strongly this unreasonable outcome was not the intention of the relevant parties when the contract was entered into.

64. Therefore, if the Claimant’s PTSD has reoccurred or been exacerbated and it has arisen out and in the course of her employment at the trust she is entitled to the further 6 months full sick pay.

65. Did her PTSD arise out of her employment and has arisen during her employment? Based on my findings of fact the answer must be yes. It is the only reasonable conclusion one can draw from the medical evidence and the trust’s own evidence about what occurred in the workplace.

66. It therefore follows that Mrs Speechley falls within clause 9. Therefore, she is entitled to an extra 6 months of full pay.

67. The claim therefore succeeds.

Employment Judge Adkinson

Date: 22 January 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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