EMPLOYMENT TRIBUNALS

Claimant: Mr Trebilcook

Respondent: Royal Borough of Greenwich

Heard at: London South via CVP **On: 13 and 14 October 2020**

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: Ms H Platt, Counsel
For the respondent: Mr C Milsom, Counsel

RESERVED JUDGMENT

Decision:

The complaint of unfair dismissal under S. 98 / S. 111 Employment Rights Act 1996 is not well founded and is dismissed.

Reasons

The claim, appearances and documents

1. By a claim form presented on 11 October 2019, the claimant brought a complaint of unfair dismissal.

2. The claimant was represented at the Hearing by Ms H Platt, Counsel. The respondent was represented by Mr C Milsom, Counsel.

3. The Tribunal had an agreed bundle both in electronic and hard copy format. The hard copy was arranged in sections A to G and was within one lever arch file. References herein will be to those tabs. The Tribunal also had 2 chronologies and a (claimant's) list of issues.

4. The Tribunal understood the list of issues to be:

   a) Whether the claimant's dismissal was fair having regard to S.98 (2) and (4) of the Employment Rights Act 1996?

   b) In particular if the claimant's dismissal for ill health was fair or unfair?

   c) Alternatively, was the claimant's dismissal for some other substantial reason fair or unfair?

   d) In particular, in either case, did dismissal fall within the band of reasonable responses?

5. The claimant had prepared a witness statement but at the commencement of the Hearing, he sought to abandon reference to paragraphs up to 23. Ms Platt sought permission to ask a series of supplementary questions which was allowed in so far these related to the issues. This was considered to be fair and just as the claimant's evidence had been prepared by him as a litigant in person. The supplementary questions were late in the day, but the Tribunal considered 30 minutes of supplementary questions proportionate in the circumstances. The respondent was afforded permission to ask supplementary consequential questions. The respondent's prejudice, if any was minimal, the respondent was represented by counsel and a lot of the evidence in this case was in fact well documented.

6. The respondent called three witnesses – Mr Dick Quibell, Vice Chair of Governors for Newhaven Secondary School, Ms Diana Devine, Governor at Eltham Hill Secondary school (Chair of Operations Committee) and Mr Robert Janes, School Governor, Thomas Tallis school.

7. Both parties provided written closing submissions which were also supplemented orally.

8. The Tribunal did not factor into its decision-making inadmissible evidence. Although it appeared that without prejudice privilege had been waived, that did not (and could not apply) to pre-termination negotiations under S. 111A Employment Rights Act 1996 (***Fairthorn Farrell Timms v Bailey UKEAT/0025/16/RN***). This was announced during the hearing and in particular any such communications in D13 and D14 were removed from consideration. The parties were otherwise agreed that the fact of 'settlement' discussions were not exempt.

Relevant findings of fact

9. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during

the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

10. Only relevant findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

11. The claimant was employed as a Seclusion Officer at the Newhaven Pupil Referral Unit until his dismissal with effect from 30 September 2019. The pupil referral unit ('PRU') admit pupils who have been temporality or permanently excluded from main-stream schooling.

12. The claimant stated in his claim form that his employment with the school commenced on 1 October 2013 but it was not disputed that his overall length of service with the respondent was 19 years.

13. The relevant history in this case started with a meeting which took place between the claimant and the head teacher, Mr Patterson on 16 November 2018.

14. The detail and factual resolution of what happened in that meeting was not an issue before the Tribunal upon which a finding was necessary. No witness was questioned on the content of that meeting; this was not a constructive dismissal claim arising from alleged conduct at that meeting.

15. The Tribunal accepted and found as a fact that comments made at that meeting, allegedly about the claimant's performance and/or value, by Mr Patterson had triggered the claimant's subsequent absence from work.

16. The Tribunal was however taken to emails in the bundle whereby Mr Patterson had attempted to meet with or speak with the claimant after this meeting, without success. In addition the claimant had informed Mr Patterson that he was not prepared to meet with him pursuant to legal advice (D5) and union advice (D4) until, in particular, he had received advice from his union for a "satisfying, stress-free outcome".

17. The claimant's union representative from GMB, Mr Oakes was engaged from this time onwards ; he had written an email to Mr Patterson, copying in the claimant and Ms Wilkes (the claimant's line manager) stating that he was prepared to arrange an informal meeting to discuss a way forward (D3).

18. The claimant was signed off sick from 29 November 2018 to 21 December 2018 with work-related stress (D8).

19. A further sick certificate dated 19 December 2018 was received signing the claimant off until 21 January 2019 (D15).

20. A stage 1 meeting under the respondent's absence procedure was arranged for 20 December 2018. The claimant did not attend this meeting. The bundle did not contain the email setting the meeting date which was unusual. The email confirming non-attendance and re-arranging the meeting for 14 January 2019 was in the bundle (D23). The claimant disputed he had received notice of this meeting and in the absence of any evidence of the meeting notification (which would have been easy to do) the Tribunal was not satisfied the first (stage 1) meeting had been scheduled for 20 December 2018 or that it had been made known to the claimant.

21. There were 3 stages in the respondent's attendance management procedure (pages E1 to 16). The process differentiated between short term absence and long term absence. Stage 2 would lead to the issuance of an 'employment at risk' notice ('EAR'). This carried a right of appeal. Stage 3 was the dismissal stage which also had a right of appeal.

22. Mr Oakes sought a postponement of the stage 1 meeting scheduled for 14 January 2019 until after the claimant had seen occupational health on 21 January 2019. Mr Patterson declined this request. The Tribunal found that it would have reasonable to delay this meeting by a week or so.

23. A stage 1 review meeting did take place on 14 January 2019. The claimant did not attend but his union representative, Mr Oakes did attend. This was conducted by Mr Patterson, with Samantha Dyer from HR. Mr Patterson expressed his awareness of the claimant's cancer 'scare' and that the claimant had received good news about it. He also expressed his disappointment that the claimant had not taken him up on his offer to meet with him after 16 November 2018. Mr Patterson also referred to the Occupational Health meeting which had been arranged for 21 January 2019. He stated that the stage 1 review could be re-convened thereafter.

24. An Occupational Health ('OH') meeting took place on 21 January 2019. The output from the meeting was set out in a report at pages D51 to D53 of the bundle. It was stated that there was no underlying medical condition but "simply put…[the claimant] becomes anxious about issues relating to the work environment not necessarily the work itself". A phased return was recommended starting with 50% of duties. There was a recommendation for the claimant's line management to have regular 1:1 well being meetings. It was recommended that the claimant agreed to have a meeting at the earliest opportunity and to have some counselling through the EAP (employee assistance programme).

25. A reconvened stage 1 review took place on 4 February. The claimant did not attend. Mr Oakes (GMB) did attend. The outcome letter was at page D57-58.

By this date the claimant had had 39 days absence. Mr Oakes was informed that once the claimant was deemed fit to return by his GP, a return to work plan could be formulated. Mr Oakes had conveyed that the claimant had felt his job might have been in danger following the 16 November 2018 meeting. The letter stated that once Mr Patterson & Ms Wilkes had been able to meet with the claimant, he could be reassured why they had arranged to meet with him that day.

26. The claimant was signed off for three months from 13 February to 12 May 2019. The certificate was at page D59-60 citing work-related stress.

27. A Stage 2 review meeting took place on 18 March 2019. The claimant did not attend. Mr Oakes was in attendance. Mr Patterson was present with Ms Dyer (HR) and a separate minute taker. The minutes were at page D61. It was recorded that by now the claimant's absence was 66 days. Mr Patterson stated that the claimant's continuing absence was having a significant impact and staff were being utilised to cover his position as a Seclusion officer. He also referred to the OH report of 21 January which had stated the recommendation for the claimant to engage with the respondent. Mr Oakes stated that the claimant had had problems at home, that the claimant had sought his own legal advice and that a settlement agreement should be considered. Mr Patterson issued an EAR letter as provided for in the stage 2 procedure (page E8). The outcome letter was at page G5-6. The claimant was advised that a further OH report would be obtained and that the claimant could submit his own medical report too. The claimant was also provided with a stress risk questionnaire so that a risk assessment could be arranged to discuss the 'workplace issues which may be affecting your current condition'. The letter warned the claimant about the impact of his continuing absence if he did not return before 13 May 2019. The claimant was also afforded a right of appeal.

28. The claimant appealed against the EAR letter. His appeal was at pages G5 -12. At the end of his appeal letter, the claimant stated:

    "*I no longer wish to work with children. I am not intending to simply resign. I am also not wishing to see Martyn again. I am seeking a satisfying settlement… my union representative has given many opportunities for Martyn to offer me a settlement…one that was even uttered flippantly at the initial meeting on 16 November 2018"*

29. A further fit certificate was received from the claimant certifying him as unfit until 31 May 2019 (from 1 May 2019). This was at page D63.

30. A further OH meeting took place on 9 May 2019. The report which followed, dated 14 May 2019 was at page D64-66. The report commented as follows:

    a) Regarding a likely return to work date, it was stated that the claimant's work circumstances do cause symptoms of continuing anxiety which could be aggravated by a return to work.

b) It was noted that the claimant had been sent a stress risk assessment which would usually be helpful though the recent communications between the claimant and the respondent may be inhibiting completion and return.

c) The claimant did not have any underlying disability.

d) When his employment situation was resolved, he could carry out his current role or a job elsewhere.

e) There was no medical reason why the claimant could not engage in formal meetings and communications either in person or through a representative.

f) The claimant had stated to OH his concern about who may be present at a face to face meeting. This was clarified in an addendum to the report stating: " *Mr Trebilcook stated to us in an email dated 15 May 2019 'My GP who has seen me on many occasion, strongly advised that I do not attend a formal Hearing if my headteacher is present."*

g) It was recommended there was a discussion with the claimant to discuss the source of perceived work related stress and a potential barrier to a face to face meeting if unresolved and that there was consideration of "*…adjustments to reduce or eliminate his concern, dependant on what is regarded as feasible and acceptable within the meeting process"*

31. The stage 2/EAR appeal hearing took place on 17 May 2019. This was chaired by Ms Yvonne Geddis (Chair of the Management Committee). Mr Patterson, Mr Oakes Ms Dyer (HR) and Ms Julie Scott (clerk to the panel) were all present. The claimant did not attend. The minutes of this meeting were at page D68-70. The following matters were recorded:

a) The OH report of 14 May 2019 did not apply to this appeal meeting because it was an appeal against the stage 2 / EAR meeting and the information available then.

b) Mr Oakes stated, twice, that the claimant should not be in this position and should have been offered a settlement agreement.

c) Mr Oakes said " *I have protested about this meeting. We would like to abandon this meeting and have a protected conversation…it has been said in all meetings"*

d) Ms Geddis asked why the claimant had not taken out a grievance against Mr Patterson. Mr Oakes replied: "*[he claimant] did no want to cause trouble for the school he wanted a settlement and then out"*

e) Mr Patterson felt the biggest setback had been the advice given to the claimant not to engage with him (as referred to in paragraph 16 above). Mr

Oakes stated he had never given that advice. The Tribunal interpreted this as meaning he did not agree with that advice. Mr Oakes clarified the claimant had been told not to meet with Mr Patterson without the union.

f) Mr Oakes stated: "*sometimes the policy is not always the right way to solve an issue. It could have been dealt with in a different way"*

32. The appeal was rejected. This was recorded in the outcome letter dated 3 June 2019 at pages D 73-74.

33. The claimant provided a further fit certificate certifying his unfitness for work until 27 June 2019 (page D71-72).

34. On 4 June 2019, the claimant was invited to have a stress risk assessment meeting on 12 June 2019. This invitation was sent by Ms Wilkes, the claimant's line manager. She stated she had not received a completed questionnaire so sent a further copy with this letter. The claimant was also reminded of the employee assistance scheme. This was followed up with an email from Sue Callaghan (pages D75-76).

35. A completed questionnaire was sent to Ms Wilkes it appeared with the letter dated 6 June 2019 in response to Ms Wilkes' invitation to a meeting. The claimant declined the invitation (pages D80 & 85) He stated that he could not enter a place and be amongst those "I can no longer possibly trust". He also asserted he had not received travel expenses yet for the previous 2 meetings with OH and also, he would not attend meetings with the SLT without his union representative especially on the school site. He also stated that Ms Wilkes was directly associated with his absence as she had not spoken out at the meeting. The claimant also stated that his union representative (Mr Oakes) was handling the settlement he deserved.

36. In the completed questionnaire the claimant stated "*my union and I are seeking a settlement…I am seeking a settlement to now slip away quietly…to think about Newhaven let alone be at Newhaven causes me tremendous anxiety…I cannot return to a workplace where I don't trust those in power."* (pages D81-84).

37. A stage 3 meeting took place on 21 June 2019. This was chaired by Mr Dick Quibell, Vice Chair of Governors for Newhaven Secondary School. In advance of that meeting, the claimant had written to Mr Quibell (page D95) saying he would not attend if Mr Patterson was present. He said this was pursuant to GP and OH advice. He also stated about Mr Quibell; "*The only remotely positive aspect of this stressful period of my life is having a highly experienced professional as yourself, a champion for whistle blowing on bullying behaviour in Greenwich, having the ability to make a ruling decision on my future and satisfying outcome for all".*

38. In advance of the meeting Mr Quibell received a bundle of papers as set out in paragraph 11 of his witness statement. This was not challenged. The Tribunal accepted his evidence. The minutes were at pages D99-106. The claimant did not attend. Mr Quibell, Mr Patterson, Mr Oakes, Ms Dyer and Mrs Karen Hennessy (clerk) were present. At this meeting the following matters were stated:

a) Mr Patterson was asked how the claimant's absence was being managed. Mr Patterson stated this was through the use of SLT staff. In response to a question if casual staff could be used he replied 'absolutely not' as it was a role which required building up relationships with the students.

b) Mr Quibell referred to the costs as being £40,000 plus on-costs. Under cross examination he said this included the cost of deploying labour to fill for the claimant/the opportunity cost of that as the SLT were on salaries between £70,000 to £80,000,

c) Mr Quibell commented on the presentation of some of the communications which the claimant had sent in – being handwritten notes and also that he had received information from the claimant to his home address.

d) Mr Quibell explored an alternative assignment with Mr Patterson. Mr Patterson commented that one of the OH recommendations was a phased return with other roles which he said he would have done if he was able to engage with him.

e) Mr Oakes stated that the process should be adjusted to permit another member of management to present the case to allow the claimant to be present. Mr Quibell said he had anticipated the request and responded:

"*I have a difficulty with that if [the claimant] is going to return at any stage until the end of this term he will have to work in conjunction with the existing headteacher; you are probably aware that he has given notice and won't be there from September and moreover, would be returning to school where his line manager is still a senior member of staff and will be acting in a more senior role"*

f) There was discussion about whether the claimant had expressed reluctance to work with another member of staff (beyond Mr Patterson and Ms Wilkes). Mr Oakes commented that he had spoken with the claimant in the morning and he had told him "he would engage with any other member of staff". Mr Quibell confirmed in response to Tribunal questioning that he understood this to mean someone other than Mr Patterson or Ms Wilkes. This was accepted. It was consistent with the context of the entry in the notes. Further, that he could not remember the name of the other member of staff).

g) Mr Quibell stated he could not accede to the request and delay the meeting further.

h) Mr Oakes confirmed that the advice he had given to the claimant was to have a meeting with Mr Patterson, with union representation. He said he (the claimant) would never have been told not to engage with management.

i) Mr Oakes disagreed with the opinion of OH that the claimant was fit to do his job and suggested a psychiatrist not a nurse or a doctor should assess him. Mr Quibell 'agreed' with Mr Oakes as he felt the OH conclusion about fitness for work was surprising based on all that he read. He suggested that if the OH assessment was not a fair one it would almost certainly mean the claimant was not fit to work in the PRU.

j) In response Mr Oakes commented "*We have constantly asked for a settlement. I have asked from the beginning for you to consider [the claimant's] long service. That is what I instructed at the beginning."*

k) In response to a question about whether the claimant had sought counselling, Mr Oakes said he was not sure and went on to say "*I don't think he is helping himself"* but went on to state he (the claimant) was in a dark place. He said the claimant needed a dignified exit.

l) In response to a question from Mr Quibell about procedure compliance, Mr Oakes stated "I don't think there is any question that proper proprieties have been observed at all stages, certainly since 16 November 2018".

39. The decision following the stage 3 meeting was conveyed to the claimant by a letter dated 8 July 2019. This was at page D107-108 of the bundle. Mr Quibell's decision was to terminate for capability based on the claimant's ill health. Mr Quibell reviewed the OH reports, the previous EAP decision when the claimant's attendance was flagged as a concern and because of which the claimant was at risk. Mr Quibell did not consider it reasonable to postpone the meeting to reconvene with a different leader presenting the management case. He also felt that the school had made reasonable attempts to engage with the claimant and would have facilitated a phased return. The claimant was given a right of appeal.

40. Under cross examination, Mr Quibell also explained that his decision was influenced by the absence of a formal grievance by the claimant against Mr Patterson. He explained that the school had a well thought out judicious process. It had been expressly explored at stage 2. Further, his belief that the claimant was actually seeking settlement as a resolution, not to remain employed (in paragraph 27 of his witness statement). He also explained that he felt the claimant's objection to returning to work was wider than just Mr Patterson and Ms Wilkes. There were some general comments in the risk assessment questionnaire which were part of his pack. In connection with the

grievance question, this was expressly asked during the stage 2/EAR appeal which Mr Quibell had considered; thus, the Tribunal accepts they were factors influencing the decision-making process.

41. Mr Quibell also explained in his witness statement that in his mind because there were two consistent OH reports, this resolved any conflict between the views of OH and the claimant's GP. The Tribunal did not accept that this a conscious consideration at the time. There was no cross reference to the policy at the time or any specific discussion at the stage 3 meeting about this. However, the Tribunal did find that the decision reached by Mr Quibell essentially meant he was satisfied that the claimant was and continued to be unfit for work, as referred to at the time which was consistent with the view of the claimant's GP.

42. The claimant appealed against his dismissal. The appeal letter was at pages D109-117. The appeal letter had a lot of history relating to the 16 November 2018 incident. Also, when dealing with the actual outcome letter, the claimant referred to his desire to teach children having gone and his inability to trust Ms Wilkes too. He sought an apology and compensation totalling £735,000. There was also an unconnected reference to photographs of the sexually explicit and lewd woodland areas which could be provided if necessary. The sole ground for appeal however was cited as unreasonable decision in the light of personal information provided by employee.

43. The appeal Hearing took place on 16 September 2019 and was chaired by Ms Diane Devine (Governor at Eltham Hill Secondary School) and Mr Robert Janes (Governor at Thomas Tallis School). The appeal hearing received a statement of case from both parties. The claimant did attend the appeal Hearing. This was the first meeting he had attended. Ms Dyer (HR) and Ms Scott (clerk) were also present. The minutes of the hearing were at pages 123 – 127. At this meeting the following matters were noted:

    a) The claimant stated that the "*main cause of his anxiety has gone but there are still issues"*

    b) The claimant acknowledged that Mr Patterson and his wife (also employed by the school) had gone

    c) Mr Janes asked if the claimant had taken out a grievance. The claimant said he had not out of loyalty to Mr Patterson and the school.

    d) The panel announced it had 3 options – to uphold the appeal, change the outcome, or not uphold it. The claimant was asked hypothetically, when he could go back to school. The claimant replied "*That is a big question. At the school there are still some who are loyal to [Mr Patterson]. It would be difficult to work with my line manager who did not support me."*

e) Following a short adjournment, Mr Oakes suggested that the claimant may be able to return to work from 1 October 2019 (He was currently signed off until 30 September). The claimant then stated "*But there are lots of factors to consider"*

f) Ms Devine put to the claimant that he had been off for almost a year, if there was a phased return in place if he was able to provide a clear commitment that he was able to and wished to return to work. In response the claimant said "*I can't make a decision now".*

g) There followed a discussion regarding Ms Wilkes about whom the claimant maintained "*She is part of the issue, she is still part of the case. She was part of the cause".* In response to whether this could be improved with mediation the claimant responded "*Can't make a decision"*

h) The claimant stated he didn't believe he had any issues with Jon Kelly, the acting headteacher.

44. The appeal was rejected. The outcome letter was at page D128-129. The appeal panel concluded that despite OH advice, a sympathetic approach had been taken towards the claimant's fitness for work. All appropriate procedures had been complied with. The Tribunal accepted the deliberations as set out in the witness statement of Ms Devine particularly in paragraphs 12 to 14 regarding the reluctance of the claimant to wish to or commit to returning to work. Mr Janes had also been influenced by the non-pursuit of a grievance by the claimant (paragraph 10 of his witness statement) and also, like Ms Devine, had not felt the claimant desired to return to work any longer (paragraphs 11 and 13 of his witness statement). Both were influenced in deliberations by the departure of Mr Patterson which should have made the claimant's return to work more forthcoming. The Tribunal noted that Mr Janes evidence was not challenged at all.

Applicable Law

45. Under S. 98 (2) Employment Rights Act 1996 ('ERA') an employer needs to have a potentially fair reason for dismissal. The employer has the burden of showing the reason. The respondent relies on capability alternatively some other substantial reason underpinned by its belief that by reason of long-term ill health the claimant was unable or unwilling to return to work.

46. Pursuant to S.98 (4) ERA, an employer must act reasonably, having regard to reason shown, to treat that as s sufficient reason for dismissing the employee. This is a neutral burden.

47. In ***Spencer v Paragon Wallpapers 1976 IRLR 373*** the EAT set out the key question in determining the fairness of a dismissal based on absence: whether

the employer can reasonably be expected to wait any longer for the employee to return. This can include consideration of:

a) The nature of the illness

b) The likely length of the absence

c) The need for the employer to have done the work the employee was engaged to do (which should be balanced with the employee's need for time to recover)

'The Spencer Guidance'

48. An employer is also expected to consult and ascertain the true medical position (***East Lindsey District Council v Daubney 1977 ICR 566).***

49. If an employer is culpable in relation to an employee's absence, the employer may still fairly dismiss the employee may be expected to "go the extra mile" ***McAdie v Royal Bank of Scotland 2007 IRLR 895.***

50. In ***BS v Dundee City Council 2014 IRLR 131***, it was stated that an employee's own view of his health whether positive or negative should be taken into account thus, including if he is saying he is unable to return. The relevance of length of service in capability cases was also distinguished from its relevance in conduct cases. It does not have 'automatic' relevance in capability cases involving ill health/absence.

51. The Tribunal must also have regard to the 'range of reasonable responses' test. It has long been established that, under section 98(4), a Tribunal must assess objectively whether dismissal fell within the range of reasonable responses available to the employer. Whether or not the Tribunal would have dismissed the employee if it had been in the employer's shoes is irrelevant: the Tribunal must not "substitute its view" for that of the employer. (***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439)***. The range of reasonable responses test applies not only to the question of whether the sanction of dismissal was permissible, but also to that of whether the employer's procedures leading to dismissal were adequate. (***Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23).***

52. In ***Spencer*** it was stated:

"In the first instance, the decision how to act in circumstances such as the present is that of management. Secondly it is the function of the Tribunal to determine whether the management had satisfied them that in the circumstances (having regard to equity and the substantial merits of the case) they acted reasonably in treating it as a sufficient reason for dismissing the employee. it is not the function of the Tribunal to take the management's decision for it"

Conclusions and analysis

53. The following conclusions and analysis are based on the findings which have been reached above by the Tribunal. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.

54. The Tribunal considered the 'Spencer guidance' to assess the key question posed in that case itself namely could the respondent have reasonably waited any longer for the claimant's return to work.

(a) Nature of the illness

The claimant's reason for his absence was persistently work-related stress. Save for the fit certificates from his GP, the claimant did not rely on any other medical evidence from his GP. The claimant's absence was managed as an absence without an underlying medical condition. This was confirmed by OH. It was an entrenched position the claimant had with management. In ***Herry v Dudley Metroploitan Council 2016 EAT /0100/16/LA*** a case which also relied on ***J v DLA Piper 2010 ICR 1052*** which were cases about the question of disability the EAT stated:

"*Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An Employment Tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an Employment Tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an Employment Tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the Employment Tribunal to assess"*

Whilst the case before the Tribunal was not about deciding whether or not the claimant had a qualifying disability, the above passage does provide an insight into the nature of the claimant's illness and absence. This was a case much closer to a resistance to return to work. Mr Quibell was in fact questioned about the reasonable adjustments section of the policy on page E4. Mr Quibell said he did consider 'adjustments' could be made consistent with ameliorating the claimant's mental health. The Tribunal concluded there was no specific disregard of this section of the policy. It was not the claimant's assertion he was, at the material time, a disabled person.

At the dismissal stage (stage 3), the respondent had accepted the claimant's unfitness for work as asserted by his GP in preference to the OH view on fitness to return on a phased basis. The claimant's own views *via* Mr Oakes were also factored in. In the Tribunal's conclusion, that was a sufficient answer, in the circumstances, to the challenge to the non-seeking of an adjudicating medical opinion. It was not necessary.

By the time of the appeal hearing, it appeared to the Tribunal that the reason for the claimant's dismissal was because of his refusal or resistance to return to work, despite the offer of mediation with Ms Wilkes and Mr Patterson's departure. Whether this should be labelled as capability or some other substantial reason is immaterial. It was the case, in the respondent's view that it was no longer able or prepared, in the circumstances, to wait any further for the claimant's return owing to the absence to date and no reasonable prospect of a return because of ill health or unwillingness/reluctance or both.

(b) <u>The likely length of the absence</u>

It was asserted that the claimant had been off for 306 calendar days by the time of his dismissal. This was not disputed. The prognosis of the claimant's absence was either uncertain or not stated. By the appeal stage, Mr. Patterson had left the school. This was known to the claimant. The respondent discussed with the claimant the prospect of mediation with his line manager Ms. Wilkes. It was obvious that the respondent's view about removing Mr. Patterson from attendance at any of the meeting stages had been declined. It was expressly declined by Mr. Quibell at stage 3. It had not been raised up until then – the claimant's reasons not to meet with Mr. Patterson in D4 and D5 were not about Mr. Patterson, similarly in advance of the stage 1 meeting (D27). Nothing was said at the stage 2 meeting about this specifically by Mr. Oakes (page 61). There was no grievance against Mr. Patterson. This had been asked by Ms. Geddis at the stage 2 appeal meeting. Mr. Quibell explained he was not prepared to deal with the claimant's letter of 17 June 2019 outside the forum of the stage 3 meeting (page D95). It was open to the respondent to proceed on the basis that Mr. Patterson ought not to be removed from being present at the meetings. These were not one to one meetings; they were meetings in the presence of, from stage 2 appeal onwards, another senior person with his union present. The claimant's union representative was in fact present at all meetings. The claimant had said about Mr. Quibell that he thought of him as a "highly experienced professional…a champion for whistle blowing on bullying behaviour in Greenwich". Mr. Quibell's view about the OH recommendation was that it did not endorse/support the exclusion of Mr. Patterson. It was recording what the claimant had said his GP had told him. The respondent did not have that email or any supporting letter from his GP. Moreover and crucially, Mr Oakes, distanced himself from any advice/recommendation that the claimant should not engage with Mr. Patterson. That was advice which the claimant had received from elsewhere which, Mr. Patterson believed to be the root cause of the problems since.

The claimant made reference in evidence to other teachers who could have been involved on the management side – Jon Kelly, (Deputy Head), Tracey Phillips (Head of English) and Tanya Peach (assistant Headteacher) but neither he or Mr. Oakes ever raised this possibility at the time. Jon Kelly was referenced at the very end just before the appeal hearing concluded.

(c) The need to have the work covered

It was not contested that the claimant's role in the PRU as a seclusion officer was a role that needed to be covered. It was not a role which for example, following an employee's long term absence was dispensed with, which can happen in some cases. It was being covered by the SLT. This was not challenged by the claimant. Mr. Patterson said at the stage 3 meeting it could "absolutely not" be covered by casual staff, as the person in role specifically needed to build relationships. This was not challenged by the claimant or at the time by Mr. Oakes. Whilst it had been unclear, the Tribunal concluded that Mr. Quibell's 'cost estimate' was the totality of cost – including the claimant's salary and the opportunity cost of the deployed salary of the SLT. Balanced against the length of absence to date and the uncertainty of the future prognosis, there was nothing unreasonable about the respondent's reliance on this factor. The Tribunal also noted the difficulties, from a resource perspective, of arranging the panels for the hearings.

55. Having regard to all the circumstances

(a) Having regard to all the circumstances in the case and looking at the case holistically, the Tribunal was left with an inescapable conclusion that the claimant's intention from 16 November 2018 onwards was never to return to work and to seek a settlement as the *only* solution. The entirety of his efforts and those of his union were geared towards achieving this exclusively. That manifestly affected and clouded the claimant's entire judgment and decision making in this case and acted as an obstacle. The meetings were littered with references to the claimant wanting one resolution only: a settlement. That he did not achieve this, the Tribunal concludes, impacted on his lack of cooperation and desire to return to work. This caused the respondent to have no choice but to work through the stages ultimately leading to the claimant's dismissal. In evidence, there was an ambiguous attempt by the claimant to separate *his* position on this from that of his union representative. This was rejected for lacking any credibility having regard to the contemporaneous history.

(b) Any further medical opinion would have been irrelevant. Mr. Patterson had left and the claimant had no desire to rebuild a relationship with his manager, Ms. Wilkes who had only been 'tarnished' by her presence at the meeting. The respondent could do no more to aid the claimant's return. Re-deployment was not actively considered by the respondent but the Tribunal concluded this was not unreasonable or inappropriate in a case where there was no reasonable barrier prevailing, in the respondent's view, preventing the claimant returning to work to perform *his role*. Mr. Quibell's evidence

was that the claimant's 'net' was wider than Mr. Patterson and Ms. Wilkes. There was some mileage in that as the claimant had also made reference to not wishing to work with children (anymore) (in his appeal against the EAR letter) and his comments in his risk assessment also referred to the Newhaven 'site'. He had also referred to loyalty of 'other' staff to Mr. Patterson at the appeal hearing and had repeated in his appeal letter against dismissal, his desire to teach children had gone. The Tribunal noted that the respondent did not consider redeployment to another site (school). This had never been raised by the claimant or Mr. Oakes. Whilst the duty to explore this rests on the respondent it is still a relevant factor that this was not something the claimant had sought at any point. The claimant stated in evidence that his relationship with Ms. Wilkes was such that he trusted her, she trusted him, she had a cool head and could have repaired anything. This was nothing like his description of, or attitude towards, her at the time in the minutes of the meetings. If he was true in evidence it beggared belief why he would not respond to the offer to mediate with a view to returning to work to perform his role. The Tribunal concluded that his position in evidence was not an accurate description of how he felt at the time.

(c) The respondent applied the 3 stages of the attendance management procedure on the basis of the claimant not having an underlying impairment (based on the OH reports). Even though at dismissal stage the claimant's unfitness for work was accepted based on his GP fit certificates, there was nothing irregular with the respondent's application of the procedure based on no underlying medical condition. This appeared to be based on the underlying dispute with management and Mr. Patterson in particular. The procedural stages were applied. Save as addressed herein, the Tribunal noted that there had been no procedural criticism at the time by the claimant or Mr. Oakes. The Tribunal has already addressed above its view on the alleged conflict of medical evidence (paragraph 53 (a)). In all the circumstances, nothing turned on that or, in relation to the seeking of a further opinion, especially in the light of the comments expressed at the appeal hearing by the claimant and the circumstances of Mr. Patterson no longer being employed known by then. The Tribunal also concluded that it was open to the respondent not to have undertaken a home visit. There was no such recommendation by OH. The key barrier to engagement in the claimant's belief was Mr. Patterson's participation in the process. The last H report was dated 14 May 2019 and the stage 3 dismissal meeting took place on 21 June 2019. That was not a delay of more than 6 weeks even though the decision was not made until 8 July 2019. The Tribunal noted, in any event, that the report should not *normally* be more than 6 weeks old. In addition, in accordance with the findings and conclusions above, by the time of the appeal hearing the respondent considered the claimant's return to work to be about unwillingness/reluctance or ill health or both.

(d) The Tribunal had regard to the ***McAdie*** case. Having regard to the Tribunal's findings and conclusions above, this was not a case where the respondent was 'culpable' in bringing about the claimant's incapability. The claimant had not raised a grievance against Mr. Patterson. Thus no findings were or could have been made about that. It was not possible to taint the Headteacher of a school based on an assertion or allegation of wrongdoing.

This was not a case in which the respondent was expected to go the extra mile.

(e) The Tribunal cannot interfere with the respondent's decision not to consider redeployment in circumstances where it was satisfied that the respondent had done enough reasonably to enable the claimant to return to work to do *his job.*

(f) The decision to dismiss the claimant was both substantively and procedurally within the range of reasonable responses. The respondent was entitled to conclude it could no longer reasonably be expected to wait any longer for the claimant's return. The claimant was offered a way back, a lifeline at the appeal hearing which he did not take, leaving the respondent entitled to reach the conclusion it did.

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Employment Judge Khalil

28 October 2020