THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

MEMBERS: **Ms S Campbell**
Mr G Henderson

BETWEEN:

Mr E Reid

Claimant

AND

London Borough of Lewisham (1)
The Governing Body of Horniman School (2)

Respondents

ON: **18 December 2020 (By CVP Video Conference)**

Appearances:

For the Claimant: Ms S Sleeman, Counsel
For the Respondent: Mr D Panesar, Counsel

RESERVED JUDGMENT ON REMISSION FROM THE EAT

1. The section 15 Equality Act claim succeeds

2. A *Polkey* deduction of 75% is applied to any unfair dismissal compensatory award.

REASONS

1. By an Employment Appeal Tribunal (EAT) judgment sealed on 8 October 2018, the Employment Tribunal (ET) reserved judgment, sent to the parties on 23 May 2017, was remitted in respect of 2 specific matters:

    a. The finding on justification in relation to the section 15 Equality Act 2010 (EqA) claim (the EAT judgment incorrectly refers to section 20)

    b. The *Polkey* deduction in respect of the unfair dismissal claim

2. Whilst there was agreement that, in relation to the first issue, the Tribunal was tasked with reconsidering its decision on the respondent's justification defence, there was disagreement between the parties as to the scope of the remission on Polkey.

    The issues

3. The issues we have to consider are:

    a. Was the claimant's dismissal for capability a proportionate means of achieving a legitimate aim

    b. If not, what remedy should be awarded

    c. Polkey

4. In accordance with the EAT Judgment, no additional evidence was called. We relied on our original findings of facts and the oral and written submissions of the representatives at this hearing, for which we are grateful. The parties prepared a separate bundle for this hearing which comprised of documents from the original bundle as well as documents generated by the appeal. References in square brackets are to pages in that bundle.

    Claimant's Submissions

5. Ms Sleeman submitted that the scope of the remission relating to Polkey was limited to expanding the Tribunal's reasons to ensure that they are *Meek* complaint. Accordingly, it was not open to the Tribunal to revisit its finding on Polkey**.** Reliance is placed on paragraphs 28 and 29 of the EAT judgment [90-91].

6. In relation to justification, the issues relevant to proportionality are likely to be the same matters that are relevant to fairness under section 98(4) Employment Rights Act 1996 (ERA). Section 15 requires a balancing exercise of the employer's needs against the detrimental effect on the claimant and that it is unclear what factors had been taken into account by the Tribunal on the claimant's side. The relevant factors on the claimant's side are his length of service; the disadvantage he would suffer on the labour market because of his age, disability and unqualified teacher status; and the respondent's refusal to consider mediation and failure to obtain an up to date medical report. The Tribunal's *Polkey* finding was not inconsistent with a finding of discrimination under section 15.

Respondent's Submissions

7. Mr Panesar submitted that the Polkey referral was not limited to considering reasons. He too relies on paragraph 28 of the EAT judgment but says this must be read in conjunction with paragraph 23 [88].

8. It was submitted in relation to section 15 that the claimant's dismissal was justified and proportionate even when applying the appropriate balancing exercise. The claimant had been absent from work for 14 months and could not return because of his enduring distrust of the Headmistress and it was unclear that reconciliation steps would be effective. In relation to *Polkey*, the claimant was implacable in his opposition to the Head Teacher and it is unlikely that mediation would have changed that. The claimant would not have wanted to return to work unless the Headmistress was removed and unless his demands in relation to his timetable were met. There was at least a 90% likelihood that the claimant would not have returned to work.

The Law

9. Section 15 EqA provides that

"(1) a person (A) discriminates against a disabled person (b) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim"

Conclusions

10. Having considered the parties' submissions and the authorities referred to, our conclusions are set out below.

11. The respondent's legitimate aim is that which is set out at paragraph 43 of the liability decision, and is unaffected by the remission. [10] We are only concerned with the issue of proportionality.

12. In considering whether or not a measure is proportionate, the Tribunal must consider whether or not there was a less discriminatory way of achieving the respondent's legitimate aim. This is to be considered as at the date of the discriminatory act.

13. Further, the Tribunal must carry out a balancing exercise of the business needs of the employer and the severity of the impact of the unfavourable treatment on the employee.

14. As indicated at paragraph 14 of our original findings, 5 OH reports over the period of the claimant's absence attributed his continued absence to unresolved workplace issues [6-7]. The last of these prior to dismissal was the report dated 4 June 2015. The respondent's notes of the ill health capability hearing on 16 November 2015, record the claimant stating the following:

"*I am feeling a lot better. I went to look at another school and it made me realise how much I missed teaching. I am dying to get back to school. Jul (*Headteacher*) and I need to sit down and talk. We never had a big argument. There is no real history apart from the grievance. I love Horniman. I am pleased with what you have said about the music. It would be nice to sit down and talk and work it. I am ready to come back and work. I love the school. That is how I am feeling*". [227]

15. Further on in the notes it records the claimant stating "*My doctor said the anxiety and depression will go once the problems at school are gone. We need to sit down and work it out".* [227]

16. As is apparent from paragraph 61 of our original judgment, the respondent had been aware for some time that the claimant was interested in some form of reconciliation and had not ruled this out. [13] Their position was that the claimant should instigate this and not them. Given that the claimant was facing dismissal, we found that approach to be unreasonable.

17. At paragraph 45 of our original judgment, we have set out the impact of the claimant's continued absence on the respondent. [10]. The impact of dismissal on the claimant needs to be weighed in the balance and the factor that are relevant are those identified at paragraph 20 of Ms Sleeman's submissions, namely, the loss of a job which the claimant had held for 20+ years; the fact that as an unqualified music teacher, he would have difficulty competing with qualified teachers in the job market; his age (60 at the time of dismissal) and his disability, would, notwithstanding laws on discrimination, have put him at a disadvantage in his search for alternative work compared to younger, non-disabled candidates.

18. In our view, some form of mediation should have been attempted before a decision was taken whether to confirm or withdraw the dismissal. (We use this terminology as the claimant was already under notice of dismissal). At best, this could have avoided the need to dismiss at all. At worst, it would have resulted in a short delay and such delay was unlikely to increase, to any significant extent, the impact that was already being caused to the respondent by the claimant's absence. On the other hand, the effect on the claimant of not taking this step was the end of his teaching career, at least with the school. In our view, this tips the balance in favour of the claimant's needs outweighing those of the respondent.

19. In the circumstances, we find that it was not proportionate for the respondent to dismiss the claimant when it did. The section 15 claim succeeds.

Polkey

20. On our reading of paragraphs 23, 28 and 29 of the EAT judgment, it appears that there are 2 basis for the Polkey remission, firstly that it is not Meek compliant and secondly and separately, that there is an error of law in our reference to a "*no more than 50% chance*" which goes beyond the Meek issue. We therefore agree with Mr Panesar that the referral is not limited to giving reason for our decision but to look at it afresh.

21. The 3 members of this panel have considerable experience in dealing with mediation, in one form or another. As such, we know that even the most intractable of disputes can be resolved with the assistance of an able and impartial mediator, in a conciliatory environment; with goodwill on both sides. The claimant was clear that he wanted some form of reconciliation meeting. The views expressed in the psychiatric report, referred to at paragraph 71 of the original judgment came almost a year to the day after the claimant's dismissal and were no doubt affected and influenced by the dismissal. They do not, in our view, diminish the genuineness of the claimant desire for some mediation, as expressed at both the dismissal and appeal stages of the process.

22. That said, the factors set out at paragraphs 68 to 70 of our original judgment still hold true [14] and it is our view that the chances of a successful mediation would not have been high.

23. Having re-visited our original Polkey finding, we put the chances that the claimant would have been dismissed fairly at 75%.

24. However, if we are wrong about our interpretation of the scope of the EAT remittance on Polkey, we rely on the matters at paragraph 21 and 22 above for our original 50% deduction.

Remedy

25. The matter will be listed for a remedy hearing on a date to be advised.

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Employment Judge Balogun
Date: 23 March 2021