EMPLOYMENT TRIBUNALS

Claimant: Mr A Chucha

Respondent: Calthorpe Teaching Academy

On: 13-16 September 2021

Before: Employment Judge J Jones
Mrs S Outwin
Mr N Howard

Representation
Claimant: Mr Ali (lay representative)
Respondent: Mr M Williams (counsel)

REASONS

JUDGMENT having been sent to the parties on 17 September 2021 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:

Background

1. This is a case brought by the claimant against the respondent for whom he worked as a Teaching Assistant from 22 June 2005 until he was dismissed with effect from the 12 January 2018 due to his prolonged ill health. He presented a claim form to the Tribunal on the 24 April 2018 following a period of ACAS Early Conciliation from the 8 March to 8 April 2018.

2. The claims were the subject of a preliminary hearing to consider case management on 9 July 2018. The claims and issues were summarised in the Order of Employment Judge Battisby (the Battisby Order) following that hearing (in the joint bundle of documents, page 36A onwards).

3. The claims were as follows: -

3.1 Unfair Dismissal (section 98 Employment Rights Act 1996 “ERA”)
3.2 Discrimination arising from Disability (section 15 Equality Act 2010 “EqA)
3.3 Failure to make reasonable adjustments (section 20 & 21 EqA)

3.4 Discrimination by way of harassment (section 26 EqA).

The issues in relation to these various claims were as follows.

4. The respondent admitted dismissing the claimant and asserted that the reason for dismissal was capability, a potentially fair reason in accordance with section 98(1) ERA. The issue in relation to the unfair dismissal claim was therefore whether or not, in all the circumstances of the case, the respondent acted reasonably or unreasonably in treating it as sufficient reason to dismiss the claimant.

5. The parties were agreed that the claimant was dismissed as a result of his long-term sickness absence and that this was something arising from his disability. The issue in relation to the claim under section 15 EqA was therefore whether or not the respondent had shown that dismissal was a proportionate means of achieving a legitimate aim.

6. In relation to the failure to make reasonable adjustments claim, the claimant said that when he returned to work following sickness absence in April 2017, the following adjustments should have been made for him:

(a) Removal of heavy lifting requirement;
(b) He should have been assigned to work with less taxing younger children;
(c) He should have been given more time to recover from his illness;
(d) He should have been offered part-time or alternative working arrangements;
(e) The respondent should have ensured he was able to work near to a toilet that he was permitted to use.

The respondent maintained that those adjustments that had been requested and were reasonable had all been made.

7. The claim of discrimination by way of harassment (section 26 EqA) arose from a meeting between the claimant and the Deputy Head of the Academy, Mr Megashi, on 4 April 2017, during which the claimant said he was harassed because he was invited to resign. He said that Mr Megashi had tried to fabricate a misconduct case against him arising from him being seen using the children's toilets in the school.

8. There was also identified to be an issue about time limits in relation to the failure to make reasonable adjustments claim and the harassment claim. The parties agreed that any complaint about something that had happed before the 9 December 2017 would be potentially out of time. This issue of jurisdiction was to be determined at this hearing together with the merits, pursuant to the Battisby Order. The claimant argued that it would be just and equitable to allow those claims to proceed.

9. At the date of the preliminary hearing described above, the respondent did not admit that the claimant had a disability within the meaning of the EqA. The respondent later conceded this issue, as is recorded in the Order of Employment Judge Broughton dated 29 July 2010 (the Broughton Order), made upon a second postponement of the final hearing. The Broughton Order further clarified that the issues were to be as previously set out in the Battisby Order, but in addition it was

noted “the parties confirmed that the issues included the claimant’s claim that he should have been offered Ill-Health Retirement”.

10. The delay in the hearing of this case is worthy of some explanation. Unfortunately 2 prior attempts to hear the case were thwarted by the Covid-19 pandemic and the claimant’s ongoing ill-health. It has been possible to conduct the hearing on this occasion via video conferencing on the CVP platform and that has been a successful means of managing both those issues.

The evidence

11. The evidence before the Tribunal was in the form of an agreed bundle of documents that ran to 323 pages. Page references in these reasons are references to the pages of that bundle, unless otherwise stated.

12. The witnesses were as follows. The claimant gave evidence in support of his claim and he was supported in doing so by the Tribunal interpreter, Mr Jam, who attended and assisted the Tribunal throughout the hearing. It is worth recording that the Tribunal found that Mr Chucha has a reasonable understanding of English but that it was perfectly reasonable for him to rely upon the assistance of an Urdu interpreter in order to be able to confidently give evidence and understand the evidence and the less everyday language of a Tribunal hearing.

13. The respondent called the following four witnesses: Miss Jo Jackson, HR Manager, Mr Richard Chapman, the former Head Teacher or Principal of the respondent at the time of the events in question, Miss Polowski-Andrews, a Non-Executive Director and Vice Chair of the Academy Board and Mr Munir Megashi, the Safeguarding Lead and Deputy Head Teacher of the respondent.

The facts

14. Having considered all of the evidence the Tribunal made the following findings of fact on a unanimous basis:

14.1 The respondent is a special school for pupils with diverse complex and severe learning difficulties. Pupils are aged between 3 and 19 years of age and at the time of the claimant’s employment there were just under 400 pupils enrolled at the school. There were approximately 400 members of staff.

14.2 The claimant was a teaching assistant. At any given time, he worked within a team of teaching assistants lead by a class teacher. His role was to support the class teacher with all aspects of the teaching, learning, behaviour, welfare and social care needs of the students, including supporting them with going to the toilet and other personal care. The school and the pupils were split into 5 departments – primary, secondary, complex needs, autism and ages 16 to 19.

14.3 Prior to the claimant’s ill health, he was employed to work within the complex needs department. The claimant was a valued member of staff and he had been in post for approximately 12 years by the time of his dismissal. There was no history of any issues with regard to the claimant’s

attendance or conduct before the events that led to the termination of his employment.

14.4 The disability that formed the basis of the claim was agreed to be as follows. The claimant has Angina, Ischemic Heart Disease and, by the time of his dismissal, Type 2 Diabetes. He also had some gastro-intestinal problems.

14.5 The principal events began in October 2016. On 10 October 2016 the claimant commenced a period of sick leave. He submitted a sick note a week later (page 44), indicating that he had chest pain which was under investigation. The claimant returned to work on 1 November 2016 when he was said to be fit to do so by his GP, but was to keep emergency medications in the school locker.

14.6 Unfortunately, the claimant fell ill again almost immediately with chest pains and was off work a second time. He was off work almost continuously from this time until April 2017. During this period the claimant developed an additional symptom of abdominal pain (page 48). By December 2016 the claimant had received a diagnosis of angina (page 49).

14.7 During his sickness absence, Miss Jackson kept in touch with the claimant. The bundle included an example of a note of a conversation she had with the claimant on the 2 February 2017 (page 52). At that time the claimant told Miss Jackson that he had a swollen stomach which was very painful, and he was suffering with diarrhea 5 times a day. His doctors had told the claimant they could not do anything about the stomach pain until they had sorted out his heart condition and he was going for a consultation later in February in relation to that. There was a possibility that the claimant might have to have a stent/bypass.

14.8 The claimant did indeed have heart surgery in February 2017. Miss Jackson spoke to him again on 8 March 2017 (page 55). The claimant told her his chest was feeling a lot better after the surgery. The claimant advised that he was now waiting for an appointment in relation to his stomach and there was a suspicion that he had polyps. The claimant reported that he was still struggling with diarrhea and bleeding and told Miss Jackson that he couldn’t control his urine so was struggling to leave the house. The claimant’s mood at that time, however, was said to be reasonably positive.

14.9 This was the state of play when the claimant’s doctor told him on the 3 April 2017(page 56) that he could go back to work on amended duties. The reason for the amended duties and the claimant’s ongoing condition was shown as “abdominal pain” in the GP’s fit note. In order to help the claimant’s return to normal duties, the respondent was asked by the claimant’s GP if he could have an amendment to his duties so as to only perform lighter work.

14.10 Miss Jackson carried out a return to work interview with the claimant on the first morning of his return, 4 April 2017 (page 57). The claimant referred to ongoing abdominal pain but said that he could continue to work if he had no heavy lifting. Miss Jackson arranged for the claimant to transfer from the complex needs team to work in the secondary department. The thinking

behind this move was that the children would require less assistance with their day to day care needs such as going to the toilet in secondary, as the children were older and more independent.

14.11 The Tribunal found that it was the respondent school's practice, set out in an Intimate Care Policy, that children should not be taken to the toilet by a single member of staff but would always have 2 staff members with them. This was for reasons of safeguarding and dignity as well as health and safety.

14.12 Unfortunately, on 4 April 2017 the claimant began to struggle with the urgency of his need to use the toilet. This was a side-effect of the medication he was taking for his chest pain. As a consequence, he used the children's toilet facilities which were near to the classroom in which he was working. The claimant was seen coming out of the children's toilets by a school nurse. In line with the school's Safeguarding Policy, the nurse advised Mr Megashi that she had seen the claimant. Mr Megashi was the Respondent's Safeguarding Lead as well as the Deputy Head.

14.13 Having heard the evidence of Mr Megashi, the Tribunal found him to be a credible witness who was measured in the way he gave his evidence. The Tribunal accepted Mr Megashi's evidence that he had not intended to discipline or remonstrate with the claimant about this incident. Instead, he had decided to remind the claimant that he should not use the children's toilets and to explore with him the reasons why he had. Before Mr Megashi spoke to the claimant he spoke to the other members of staff who had been working in the classroom with the claimant before and after he had been seen using the children's toilets. Having done so, Mr Megashi had satisfied himself that the claimant had only left his workstation for a very short time to use the facilities and then returned to his work in the classroom. As a consequence of this investigation, Mr.Megashi was not concerned that there was a safeguarding issue and had concluded that he needed to offer guidance and remind Mr Chucha of the relevant school policy. It was with this intention that Mr Megashi arranged to speak with Mr Chucha. He intended this to be an informal meeting. The tribunal was provided with no notes of this meeting, but accepted the explanation put forward by Mr Megashi for their absence – namely, that none had been taken because he had intended it to be no more than an informal discussion between just him and the claimant.

14.14 Mr Chucha was very troubled to be invited to speak to Mr Megashi in this way, despite the fact that he had enjoyed a good relationship with him historically. He was feeling vulnerable at this time, having just returned from a very long absence from work and feared the consequences of being asked to speak to a member of staff in authority. The Tribunal found that, in view of the claimant's anxiety, prior to the meeting he asked his Trade Union representative, who also worked at the school, to attend the meeting with him. In light of this, Mr Megashi thought it wise to have the claimant's Head of Department present also. In this way, it therefore became a meeting of 4 people and inevitably more formal than Mr Megashi had intended.

14.15 At the meeting Mr Megashi asked the claimant open questions to establish whether or not he had used the children's toilets and, if so, why he had done so and whether he had used the girls or the boys. Mr Chucha said he had been struggling with his urgent need to use the toilet because of the medication he was on, and had used the boys' toilet. This information confirmed for Mr Megashi that this was not a safeguarding issue, but he was nevertheless concerned to ensure that there was no repeat. He reminded Mr Chucha of the need to use the staff toilets only in future. As far as Mr Megashi was concerned, this was the end of the matter.

14.16 Mr Chucha was distressed, embarrassed and offended as a result of the discussion. He felt that he was being unreasonably criticised because what had happened was not his fault as he was suffering with the side effects of his medication. He became quite defensive with Mr Megashi. He asked Mr Megashi whether he wanted him at the school at all and he said Mr Megashi should sack him if that was how he felt.

14.17 Mr Megashi was clear in his response that he was not going to sack the claimant. He had no reason to do so and he said so to those present. He explained that the only way Mr Chucha was going to leave would be if he himself resigned. There was no invitation to the claimant to resign nor the expression of a wish on the part of Mr Megashi that the claimant would do so. The Tribunal found that Mr Megashi did not want the claimant to resign - he simply wanted him not to use the children's toilets again. The meeting ended but the claimant remained very disturbed and upset by what had transpired.

14.18 The claimant's health did not improve. He voluntarily chose to stop taking his medication. The Tribunal found that this may well have been because the claimant was seeking to reduce the frequency with which he needed to use the toilet at school, because he knew that he had to go to the staff toilets which were not as close by to where he was working.

14.19 By the 27 April 2017 Mr Chucha's wife was so concerned about him that she approached Miss Jackson and told her that Mr Chucha was not taking his medication. She asked Miss Jackson to have a word with the claimant, which she then did. Miss Jackson advised Mr Chucha that he should be taking his medication and to go and see his doctor. The claimant was accordingly allowed to go home in order to seek medical advice and Miss Jackson wrote to him the same day confirming that (page 58).

14.20 The claimant then submitted a fit note on 2 May 2017 for two months. It said that he was not fit to work due to Ischemic Heart Disease, Angina and Abdominal pain (page 59).

14.21 The claimant had further surgery in relation to his heart in May 2017.

14.22 On 9 June 2017 Miss Jackson wrote to the claimant advising him that he was now on half pay, having been absent from work for most of the time since October 2016. On 13 June 2017 Miss Jackson referred the claimant to Occupational Health, via the referral form at page 63. The claimant's current fit note was due to expire a couple of weeks later, The reason given for the referral was that the claimant had been off sick for a considerable

amount of time, had received medication for heart problems but was still having problems with his stomach. The respondent wanted to know when the claimant would be fit to resume his duties.

14.23 An Occupational Health report was received dated the 21 June 2017 (page 65) which described the claimant's health status as "symptoms of chest pain, blackouts/dizziness, breathlessness, numbness to his left arm and feeling sick which had been going on for several months before a diagnosis of Angina, High Blood Pressure and stomach problems in February 2017". The ongoing symptoms were said to be blackouts, feeling sick, having no appetite and needing to rely on his family for support. There was a pending specialist appointment. The opinion of the Occupational Health Nurse at that time was that the claimant was unlikely to return to work unless his symptoms drastically improved. He would be fit at some point she felt to return to his work as a Teaching Assistant but only when his health conditions were under control.

14.24 The claimant was advised again by his doctor by means of a fit note (page 67) to refrain from work for a further 2-month period because of abdominal pain, Ischemic Heart Disease and Angina. That took his pending sickness absence to the end of the summer holidays in August 2017.

14.25 Miss Jackson convened a Formal Attendance Meeting with the claimant which took place on the 11 July 2017. The procedure that was applicable to the claimant's management and attendance during this time was that which the Tribunal had at page 268 of the bundle. This was put forward by the respondent as the correct procedure although the Tribunal heard that the Head Teacher, Mr Chapman, was not satisfied that it was the correct procedure when he gave his evidence. He advised that, because the school had become a Academy and this policy dated back to its time as a part of the City Council, he wasn't sure it was the right one at all. The Tribunal found that it was the applicable procedure, there having been no variation to the same, however, and in accordance with the submissions of counsel for the respondent.

14.26 At the meeting on 11 July 2017 the claimant was supported by Mr Gary Blakemore, his Trade Union Representative. There was a discussion about the claimant's current state of health. The notes of the meeting (page 71) record that those present considered that ill health retirement might be something that would need to be looked at for the claimant, should he not be able to return to his position by September 2017. Mr Blakemore expressed his view that he personally didn't think the claimant would be eligible for ill health retirement at that stage. The Tribunal found that this was not a particularly surprising observation bearing in mind that Occupational Health at that time were still hopeful that the claimant would be able to control his symptoms and return to work, although they could not say when that might be.

14.27 Following the meeting, Miss Jackson wrote to the claimant and advised him that the plan was for him to return to work if at all possible by September 2017 or very soon thereafter and that was the respondent's expectation. Failing this, the respondent would need to consider a termination of the claimant's employment on capability or ill health grounds. There was

reference in the letter to the need to consider adjustments. The Tribunal found that there was no serious consideration of adjustments after the claimant's sickness absence re-commenced in April 2017 because there never came a time when the claimant could realistically return to work, with or without adjustments. There was an expression of interest in possible reduced hours should the claimant be well enough to come back to work and Miss Jackson said that might well be a possibility and she would discuss it with Mr Megashi. Had that adjustment ever become necessary the Tribunal concluded that Mr Megashi would have considered it reasonably based on his evidence that he had made that adjustment for others. As long as it could work around the needs of the learners, he said that it would not be a problem. However, this issue did not resurface because the claimant was unfortunately unwell enough to return to work from then until the time of his dismissal.

14.28 Approaching the end of the summer holidays, on 24 August 2017, the claimant's GP concluded that he was unfit to return to work again and should stay off for a further 2 months. There were no adjustments that could help him back to work that were recommended at that time according to his GP. The reason given for the claimant's ongoing unfitness to work was Abdominal pain, Ischemic heart disease and Angina (page 73). The claimant ran out of the 12 months' sick pay to which he was entitled on 16 September 2017 (page 74). He then received only statutory sick pay.

14.29 This was the lie of the land at the commencement of the new academic term in September 2017. The Tribunal accepted the evidence of the respondent that during the claimant' s sickness absence, his position had been filled by agency staff. Whilst that was a workable solution on a short term basis, it was not a long term solution in the respondent's view. Agency staff came and went and the children could not build up relationships with staff who were frequently changing. It was a reasonable need for the school to have some consistency in the role that the claimant occupied.

14.30 The claimant was referred again to Occupational Health for an updated opinion on 21 September 2017. That led to the report of Dr Stephen Ruffles, a specialist Occupational Health doctor, who reviewed the claimant on 12 October 2017 (pages 86-86). Dr Ruffles' key findings were as follows. The claimant, he said, had a number of medical problems - he had Angina and raised Blood Pressure having had Coronary Heart surgery for those in February and May 2017. He was currently struggling to tolerate some of his prescribed medication. The claimant also had a number of gastro-intestinal problems affecting his upper and lower tract. Dr Ruffles set out what those entailed and the fact that they led to problems with bowel habit and pain and vomiting after eating. He added that the claimant had been experiencing recurrent fainting, occasional loss of consciousness, which could be a consequence of his medication and impaired cardiac function. He said that the claimant's activities of daily living were impaired and that the claimant had sleep disturbance. He was troubled particularly by pain affecting his left arm and leg, needed help with aspects of personal care, including getting dressed and wasn't able to undertake the usual range of household duties. The claimant was at that time taking 10 different medications to control his various conditions. Dr Ruffles' opinion was that the claimant was not fit to attend work and he did not feel that he would

regain any sufficient fitness to enable a return to work for the foreseeable future. The reasons Dr Ruffles gave for that were that the claimant had significant symptoms of Ischemic Heart Disease despite surgery, the severe pain in his left arm and leg and due to the impact of the gastro-intestinal problems. Dr Ruffles said he could not suggest any adjustments or restrictions that would enable the claimant to return to work or keep him in his role. His opinion was unequivocal that the claimant would not be able to carry on as a Teaching Assistant for the foreseeable future.

14.31 Against the backdrop of that clear but sad information, the respondent convened a meeting with the claimant. This was called a Decision Meeting (page 88). The meeting took place on 21 November 2017 at the school. The claimant was again supported by his Trade Union Representative, Mr Blakemore. Miss Jackson and the Head Teacher, Mr Chapman, were present. The Tribunal found that Mr Chapman was to be the decision maker although he relied extremely heavily on the advice of the HR Advisor he was provided with by the schools' solicitors, Browne Jacobson - a Mr Minor. This Advisor was present at the meeting as well as Miss Jackson and a note-taker.

14.32 The advice of Dr Ruffles was considered and early on in the meeting the Claimant's Trade Union representative raised the question of ill-health retirement (page 91). Mr Minor agreed that a conversation around the possibility of ill-health retirement would be beneficial, however he needed to be clear that if the option was applied for but the application was not successful, then the process would move forward and the decision would be taken to dismiss Mr Chucha.

14.33 On the claimant's behalf, at this meeting Mr Blakemore did not query the conclusion of Dr Ruffles, but rather focused on the application for ill-health retirement which now needed to be processed. It was common ground that the claimant had an entitlement to ill health retirement in accordance with the Local Government Pension Scheme (LGPS) of which he was a member, if he qualified in accordance with the statutory criteria.

14.34 The letter which followed the meeting (page 94) was dated 27 November 2017 and was from Mr Chapman. He wrote that, in view of the circumstances and the Occupational Health Report, regrettably he had concluded that the claimant's employment would have to be terminated. However, he said he would delay any final decision pending the claimant's application for ill health retirement under the rules of the LGPS. It was agreed, he said, to refer the matter back to the Occupational Health physician so that he may consider the nature and extent of the medical condition and whether in his opinion the claimant was permanently unable to do his job - the criterion for ill-health retirement.

14.35 A form M1 was obtained and sent to Dr Ruffles (page 95). This was a document in prescribed format for a medical professional to fill in for the purposes of the LGPS. Miss Jackson filled it in with the claimant's details and Dr Ruffles was asked a series of questions, which were in some parts taken from the wording of the pension regulations themselves, relating to the claimant's legal eligibility for ill-health retirement. Dr Ruffles opinion was that the claimant was "suffering from a condition that, more likely than not,

rendered him permanently incapable of discharging efficiently the duties of his employment with his employer because of ill health or infirmity of mind or body". He said that the claimant was not immediately capable of undertaking any gainful employment and was unlikely to be capable of undertaking gainful employment before his normal pension age. The claimant was 59 years of age at the time – nearly 60 - and his normal retirement age, based on his state pension age, was 67. Dr Ruffles certified that in his opinion the claimant was not in part- time service working reduced contractual hours as a result of ill health and he said he certified that in his opinion the claimant satisfied the following criterion

> " As a result of his ill health and infirmity he is unable to continue in his current job and is unlikely to be capable of taking on any other paid work in any capacity otherwise and to an insignificant extent before State Pension age"

The statement was signed by Dr Ruffles who confirmed in doing so that he had given due regard to guidance by the Secretary of State when completing the certificate and that he was registered with the General Medical Council as a specialist in Occupational Health Medicine.

14.36 This certificate/report from Dr Ruffles went to Mr Chapman but was not copied to the claimant. Indeed, the Tribunal found that the claimant never saw that report until disclosure took place in these proceedings in November 2018.

14.37 Having read the report, Mr Chapman told us that he took advice. Having received due warning about legal professional privilege, Mr Chapman confirmed that he wished to share the advice he had received because he relied upon it. He said that the advice he received from 2 places was that he should reject the application for ill-health retirement, because in doing so he would save the Academy from having to pay the strain i.e. the additional cost to the LGPS of granting a pension to the claimant at age 59 that he would otherwise have received at 67. The enhanced contributions during the missing 7 years would have fallen to the paid for by the Academy had Mr Chapman approved the claimant's application. Mr Chapman was, therefore, advised to reject the application and rely on the fact that the claimant could and would then appeal the decision. Mr Chapman then believed the appeal would go to the LGPS itself and, if they overturned Mr Chapman's decision, then they – not the respondent - would have pick up the financial strain. Mr Chapman's remarkably candid evidence to the Tribunal was that "I decided based on cost – yes. The Academy couldn't afford it".

14.38 Mr Chapman subsequently added to his evidence that he also took account of the fact that the claimant was saying that he could have worked in the Nursery. The Tribunal found, however, that this was not part of the decision that he took to reject the application for ill-health retirement on 12 January 2018 because this suggestion only came in the claimant's appeal against dismissal, which was dated later - 5 February 2018 (page 108-10).

14.39 Accordingly, the Tribunal found that on 12 January 2018 when the decision to dismiss the claimant was taken and notified to him, the Tribunal found,

based on the evidence of Mr Chapman, that the decision that had been taken to reject his application for ill health retirement notwithstanding the medical evidence, had been based purely on cost considerations.

14.40 Notwithstanding that this was Mr Chapman's true reason for dismissal, he wrote a letter to the claimant (p98-99) which said otherwise. In the letter he said that he was going to terminate the claimant's employment by reason of incapability. Mr Chapman notified the Claimant separately in the final paragraph of the letter on page 98 that he had determined and rejected the claimant's application for ill health retirement with the following words:

> "Separately with regards to your entitlement to Ill Health Retirement Benefit the rules of the Local Government Pension Scheme are that to qualify for benefits the Academy must be satisfied that you will be permanently unable to do your job until normal pension age based on the advice of an Independent Occupational Health Physician. I have reviewed that advice and have to inform you that I am not satisfied you are permanently unable to do your job until normal pension age and for this reason I am unable to grant you Ill Health Retirement Benefits ".

14.41 The Tribunal found that it wasn't true that Mr Chapman had reviewed the Occupational Health Physician's advice and come to the conclusion that the claimant did not qualify for ill-health retirement. Indeed, Mr Chapman told the Tribunal he had not disagreed with the OH report. Mr Chapman did not come to the conclusion that the claimant was not permanently unable to do his job - he simply hadn't considered it. The only issue Mr Chapman had considered was the issue he believed he had been told to consider – namely that of the potential cost to the respondent.

14.42 When the claimant was dismissed on 12 January 2018 the Tribunal found therefore that his application for ill-health retirement had not been considered on its merits and in accordance with the rules of the Pension Scheme.

14.43 Paragraph 16 of the respondent's Managing Attendance Procedure (page 281) has a section on Ill Health Retirement. Paragraph 16.1 of that section states that

> "fairness requires a school or Academy to consider an employee's eligibility for Ill Health Retirement before consideration is given to dismissing an employee for lack of capability due to ill health."

Mr Chapman did not take into account that provision or seek further advice in relation to it. On his own evidence, he didn't look at the procedure and didn't believe that it was applicable because the school was now an Academy.

14.44 The claimant appealed against both the decision to dismiss him and the decision to reject his application for ill-health retirement on 15 January 2018 (page 100). The claimant had regularly been assisted in dealing with paperwork by his daughter who, from the correspondence she produced for him, was clearly a highly intelligent and articulate woman. In the appeal

letter the claimant added two pieces of information – first, that he had additionally now been diagnosed as diabetic and also had depression and secondly, that he had been hospitalised in the previous week with angina. He made the point in the final paragraph of the letter that the 2 decisions that had been taken were inconsistent. He said that Mr Chapman had not explained his reasons for not supporting ill-health retirement with the medical evidence he possessed and he asked

> "Please refer to the specific medical evidence you used in your decision making and the relevant paperwork you referred to in The Local Government Pension Scheme to explain your reasons for dismissal and reasons for not granting Ill Health Retirement Benefits".

The Tribunal found that the claimant never received a response to that request.

14.45 Miss Jackson acknowledged the appeal on 25 January 2018 (p101) and sent a letter indicating that the 2 issues would now be divorced – i.e. the dismissal from employment and the failure to grant ill-health retirement. She convened an appeal against dismissal hearing, which was to be chaired by Miss Preskoski-Andrews and another member of the respondent's Board, on 1 February 2018. Miss Jackson said that the purpose of that meeting was to give the claimant an opportunity to appeal against the decision to dismiss and she added

> "we appreciate that you will also wish to have the opportunity to challenge the Academy's decision not to award you ill health retirement benefits under the Local Government Pension Scheme. We will arrange a separate meeting for you to discuss your complaint in this regard and will write to you under separate cover with the details".

The Tribunal found that no such meeting was ever convened.

14.46 The appeal meeting went ahead but the claimant did not attend, choosing instead to submit his arguments in writing which he did on 5 February 2018 (pages 108 -109). Importantly, in that letter the claimant again reiterated his request for a copy of the medical evidence (paragraph 8 on page 109). He said

> "I've not received or been called upon by any doctor to provide any further medical evidence, I believe it is unfair that the Medical Report which Mr Chapman depended on when not granting me ill health retirement has not been shared with me. This also hinders my appeal on this point because I cannot advance a challenge because the medical information has not been shared with me. Can you please let me have a copy of the final Medical Report?"

There was, the Tribunal found, no response to that letter or request and no disclosure of Dr Ruffles report on ill-health retirement to the claimant.

14.47 The claimant indicated in his letter of appeal that he believed he had been dismissed unfairly because if the school couldn't grant him ill-health retirement, then he should be reinstated. His indication at paragraph 7 of

his letter was that, if an alternative role had been considered, and he gave as an example working with younger or nursery children which might have been less challenging, he could have come back to work.

14.48 The appeal panel dealt with the appeal on the basis they were asked to – i.e. purely as an appeal against dismissal for capability without any consideration of the ill-health retirement issue. They gave their outcome on 27 February 2018. The Appeal was dismissed on the basis that the medical evidence, particularly from Dr Ruffles, had been extremely clear in indicating that Mr Chucha was extremely unwell and wouldn't be fit enough to return to work for the foreseeable future.

14.49 Two letters were then drafted by Miss Jackson (pages 116-117). The first stated that, further to the letter dated 12 January 2018 (the letter of dismissal), the decision had been taken to decline the claimant's application for ill-health retirement under the LGPS and that, because the claimant had indicated that he believed it to be unfair, he could evoke stage 1 of the West Midland Pension Fund internal dispute resolution procedure. It was indicated that the claimant's letter of appeal dated 15 January 2018 was going to be treated as his appeal to that body. The draft letter went on to say that Mr Chapman would be carrying out this review on Tuesday 13 March 2018 at 1.30 p.m. and that the claimant could attend to make representations if he wished to do so.

14.50 The copy of this letter that the Tribunal had in the bundle at page 116 was a copy of the draft. It was not signed and it was not on Calthorpe Academy letterhead like the other letters which were produced by the respondent in evidence. The evidence of Miss Jackson was that she had found this copy letter on the hard drive of her computer and all she could say to the Tribunal about whether or not it had been sent was that she "would have sent it."

14.51 The Tribunal heard evidence from the claimant that he had not received this letter (paragraph 22 of his witness statement). This evidence was not challenged in cross-examination by the respondent's counsel. Furthermore, the Tribunal found that at this point in the narrative, the claimant was in a situation of some desperation. He was in zero pay, he had been dismissed, he had not been granted ill-health retirement and he had not been granted access to the evidence of the doctor whose opinion it was said supported that decision. Taking account of these factors and the fact that the claimant was in receipt of the able assistance of his daughter, the Tribunal found on the balance of probabilities that the claimant did not receive this letter because it was not in fact sent, remaining in draft. If the claimant had received a letter indicating that he could appeal against the refusal of his application for ill health retirement benefits, then the Tribunal concluded he would have been very likely to have followed it up. At or about this time, the claimant notified his prospective tribunal claims to ACAS.

14.52 The second letter drafted by Miss Jackson (p117) stated that Mr Chapman had now reviewed the decision not to grant ill health retirement. It said that Mr Chapman had undertaken that review considering the evidence that was available and declined the application again. The claimant was referred to the possibility of an appeal to the Pension Fund directly but no further information in relation to how to go about that was provided. The Tribunal

found that Mr Chapman did not consult the rules of the Internal Dispute Resolution Procedure in carrying out this exercise, nor did he apply his mind to the potential of a conflict of interest in reviewing his own decision. This was a tick box exercise in his mind, to implement the advice on cost he had already received.

The Law

15. The applicable law in relation to unfair dismissal is to be found in section 98 Employment Rights Act 1996 (ERA) which states as follows:

98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do..

…

(3) In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

16. In order to act reasonably in an ill-health capability case, an employer is expected to fully investigate the nature of an employee’s impairment and obtain credible and up-to-date medical evidence about the prognosis. The key issue will often be whether or not the employee will be fit to return to his or her job in a sustained way and if so, when. Employers do not have to wait indefinitely for an employee to be well enough to return to work, but much will turn on the evidence in the particular case and the type of job in question. There is a balancing exercise to be carried out between the needs of the employee and that of the employer. Full discussion and consultation with an employee before a decision to dismiss is made will usually be required.

17. There are a number of decisions of the Employment Appeal Tribunal which deal with the interplay between ill-health/capability dismissals and ill health retirement. Neither party referred to this case law in its submissions to the Tribunal. At the Tribunal’s request, the clerk therefore wrote to the parties once the Tribunal had adjourned to make its decision with the following invitation:

"The Tribunal considers that the following cases may be of relevance to their deliberations in this case:

First West Yorkshire t/a First Leeds v Haigh [2008] IRLR 182, EAT
Matinpour v Rotherham MBC EAT 0537/12
James v LB Brent EAT 3303476/15
Burton v E North E Homes EAT 1810624/09

The parties are not required to comment on these cases but, as these were not cited by the parties, the Tribunal wishes to give them the opportunity to do so. If either party has any further submissions based upon this caselaw, they are requested to submit them in writing to the Tribunal by 1pm today. An email will be acceptable. Please address it to [ ].

The decisions should be available on the Employment Appeal Tribunal (EAT) website or via Google or other internet search engine. Mr Williams is respectfully requested to guide Mr Ali to find copies of the decisions should he need assistance in doing so."

18. Counsel for the respondent made further submissions in writing in response to this communication, which the Tribunal considered.

19. The Tribunal considered these authorities in full. A basic description of them only is set out here. The ***Haigh*** decision was a case in which a bus driver was found to have been unfairly dismissed because his employer had not taken reasonable steps to consider ill health retirement before deciding to dismiss him. The context was one in which the employee had a contractual right to ill health retirement. The Tribunal found that the point about considering ill health retirement in a capability case is that it is an *alternative to dismissal*. If ill health retirement is granted, there is no dismissal because there is a termination of employment by mutual agreement. The Employment Appeal Tribunal upheld the decision of the Employment Tribunal.

20. There was then a subsequent decision in ***Matinpool*** in the Employment Appeal Tribunal. In that case it was held to the contrary that it had still been fair to go ahead and dismiss the employee without considering first whether or not he qualified for ill health retirement. The difference in that case was that the entire case for Mr Matinpool was put forward on the basis he would have been fit to return within 2 months, had he not been dismissed. It was not accepted that Mr Matinpool wasn't fit to return and therefore the idea that he would in fact qualify for ill health retirement would have been inconsistent with the arguments being submitted at the time of his dismissal.

21. ***James*** and ***Burton*** were again decisions that went either way on this issue. They do not introduce any new legal principles to those outlined above. From a consideration of all these authorities, it became clear to the Tribunal that the facts are of considerable importance when considering the issue of whether or not an employer dismisses fairly in a capability case in which there is a possibility at least that an individual might qualify for ill health retirement.

22. In relation to the discrimination claims, the Tribunal considered the applicable law as set out in the Equality Act 2010 as follows:

15 Discrimination arising from disability

(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.

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

21 Failure to comply with duty

(1) A failure to comply with the first …. requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…..

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are…

- disability;

123 Time limits

1) …proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

23. When a tribunal is faced with considering the second limb of the test in section 123(1), namely, whether or not to exercise its discretion and permit a claim to continue out of time on the grounds that it would be just and equitable to do so, it is the claimant who bears the burden of proof - *Robertson v Bexley Community Centre* [2003] IRLR 434*, CA.*

24. It is helpful to consider the following matters in carrying out the factor balancing exercise necessary in considering the exercise of discretion in relation to time limits: the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the respondent has cooperated with any requests for information, the promptness with which the claimant acted once he knew of the facts giving rise to the claim; and the steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action, although this list should not be applied slavishly (*Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA, Civ 27).

25. Applying this law to the facts that the Tribunal found, the Tribunal came to the following conclusions, taking each claim in turn, and again on a unanimous basis.

Conclusions

Unfair dismissal

26. The Tribunal concluded that the reason for dismissal was capability. The

decision to dismiss took effect on 12 January 2018. The Tribunal assessed whether the decision to dismiss was within a range of reasonable responses being careful not to substitute its own decision for that of the respondent. The Tribunal came to the unanimous conclusion that it was not reasonable to dismiss the claimant in circumstances where he was contractually entitled to benefit from ill-health retirement if he qualified, he was asserting that he did qualify and had applied for ill health retirement, a qualified medical professional had opined that the claimant did qualify for this benefit (although the claimant was unaware of that because he was not given access to the report) and his application had not been considered in accordance with the rules of the Pension Scheme but rather against a different criterion imposed by Mr Chapman, namely affordability to the respondent.

27. Furthermore, the decision to dismiss was taken in breach of the respondent's own procedure which said (at paragraph 16.1) that fairness required the respondent to consider an employee's eligibility for ill-health retirement before consideration is given to dismissing him for lack of capability. The Tribunal rejected the initial submission of Mr Williams that Mr Chapman had "considered" ill-health retirement because he had gone through a process where he decided against awarding it on cost grounds. Mr Williams had to accept on reflection that "consideration" in this provision must mean consideration in a reasonable way and in accordance with the applicable criteria.

28. On 12 January 2018 when Mr Chucha was dismissed there had been no genuine consideration to whether or not he was eligible for ill health retirement. Mr Chapman hoped to push that decision off to the LGPS via the appeal process. No legitimate unbiassed decision-maker had looked at the question of whether or not the claimant was permanently incapable of doing his job.

29. In stark contrast to the facts in ***Matinpool***, all the evidence in Mr Chucha's case pointed towards him being potentially a text book case of eligibility for ill health retirement. The Tribunal cannot say what decision the pension scheme would have taken had it considered the matter on appeal. What was clear was that Mr Chapman's decision was perverse and not based on the applicable criteria.

30. When considering the fairness or otherwise of the dismissal, one of the factors that the Tribunal considered was whether alternatives to dismissal had been reasonably considered and/or pursued. An alternative to dismissal is ill health retirement and therefore to dismiss when that had not been reasonably considered was not in the Tribunal's judgment fair.

31. The Tribunal also considered that the respondent did not provide a fair appeal process. No criticism is to be levied at the Appeal Panel because they were told to deal with the Appeal as a pure capability case and not to look at ill health retirement. Had they been advised that these two issues were inextricably linked they may well have concluded, as the Tribunal did, that it was not reasonable to proceed with an appeal without disclosing to the claimant the very medical evidence which had been obtained in support of his application for ill health retirement. Further, it was not fair in the Tribunal's judgment to deal with the claimant's appeal against dismissal before he had an opportunity to appeal against the rejection of his ill health retirement application. The review of Mr Chapman's decision should not have gone to Mr Chapman because he dealt with the original decision. This was not a case of reviewing a decision in light of new evidence or

information - it was an obvious procedural flaw for Mr Chapman to consider an appeal against his own decision.

Harassment

32. This claim related to the discrete issue of Mr Megashi's alleged comments to the claimant at the meeting on 4 April 2017.

33. As explained in the Order of Employment Judge Battisby, events occurring before 9 December 2017 were on their face out of time, applying the time limit in section 123 Equality Act 2010. This was one such event.

34. It was not suggested by the claimant that there was any course of discriminatory conduct on the part of Mr Megashi of which this incident formed a part. The incident was said to be a one off act of alleged harassment. The tribunal heard no evidence as to why it was not possible for the claimant to bring a claim about that issue within the time prescribed by parliament in the Equality Act. The Tribunal noted that the claimant was represented by his Trade Union at both the meeting on 4 April 2017 and again in the meeting on 11 July 2017 when the issue was raised again. The Tribunal heard evidence about what was said at the meeting on 4 April 2017 over 4½ years after it occurred, when there were no notes of the meeting. There was even a difference of opinion between the parties as to who was actually present at the meeting – the claimant being adamant that his Head of Department was not there (evidence that the Tribunal rejected). The claimant did not have a clear recollection of that meeting, so much time having passed since it occurred. In the tribunal's judgement it would not be just equitable to extend time for that claim to proceed. It is very much out of time, memories had faded and the delay had been largely unexplained.

35. If the Tribunal had concluded otherwise on the time point, from the evidence that was available at the tribunal, it would have concluded that what took place at the meeting was not harassment within the meaning of section 26 Equality Act 2010. Mr Megashi did not use words that were indicative of an attempt to get the claimant to resign nor did he try to fabricate a misconduct case against him. He reminded him not to use the children's toilets. This did not have the purpose or effect, judged reasonably, of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. It may have been a sensitive subject to discuss but it was done so politely and respectfully and it was significant that the Trade Union representative with the claimant at the meeting did not object at all to the way in which he was spoken to by Mr Megashi.

Failure to make reasonable adjustments

36. The failure to make reasonable adjustments claims were also on their face out of time because the failure in question took place before 27 April 2017 when the claimant commenced his second period of sickness absence. There was never an opportunity for the claimant to require or benefit from reasonable adjustments thereafter because unfortunately, as was common ground, he was not fit to return to work, with or without adjustments, at any time thereafter.

37. This aspect of the claim was therefore 8 months out of time. The claimant had a Trade Union Representative to support him at this time and once again the Tribunal heard no evidence as to the reason why a claim had not been brought

within time, or why it would be just and equitable to extend time in relation to those claims, by reference to the factors set out above in paragraph 25 or otherwise. The Tribunal was accordingly not satisfied that it was an appropriate case in which to exercise its discretion to allow the claims to proceed out of time.

38. If the Tribunal had reached a different conclusion on the time point, in any event, the claim for failure to make reasonable adjustments would have failed. The five adjustments that were said to have been required were all due, it was said by the claimant, in the short time when he returned to work in April 2017. At that time, the respondent did remove the requirement of heavy lifting as far as possible by assigning the claimant to work with a group of older, more physically able students. The suggestion that the claimant should have been assigned to work with less taxing younger children was not an adjustment which in the tribunal's judgment would have removed or reduced the impact of his disability on him. The evidence the tribunal heard was that the younger classes were in fact more, not less, physically taxing. Thirdly, the claimant says he should have been given more time to recover from his illness. This adjustment, if required, was made. He remained in employment for a further 9 months after this need was said to have arisen on authorised sickness absence, with no requirement to attend work. The offer of part-time or alternative working arrangements was canvassed at the meetings during the claimant's sickness absence but the duty to make that adjustment did not arise in the tribunal's judgment because the claimant was never fit enough to return to work, according to his GP. Finally, the claimant says he should have been permitted to work near a toilet he was permitted to use. No such request was made in April 2017 and in any event, the tribunal has heard no evidence from the claimant about what he says should have been provided and where. The terms of the respondent's Intimate Care and Safeguarding policies were not challenged.

Discrimination arising out of disability

39. The tribunal found that the claimant's long term sickness arose because of his disability. The claimant was dismissed because of that long term sickness absence. This much was not in dispute.

40. The respondent said that it had a legitimate aim in the implementation of an absentee policy that was nationally agreed. The Tribunal accepted that it was a legitimate aim to provide the children with consistency in the Teaching Assistants it provided, and that the implementation of the absentee policy went towards achieving that general aim. What was not clear to the Tribunal was how it could be said that dismissal was a proportionate means of achieving that legitimate aim when ill health retirement might well have been a way of achieving that aim without a dismissal. The effect on the claimant of a dismissal was very significant. Indeed, the tribunal was told that he may have been denied potential access to the valuable contractual benefit of ill health retirement, as a consequence. Whilst the Tribunal is aware of the general financial constraints facing many educational establishments in the UK, it heard no evidence about the cost to the respondent of granting ill health retirement to the Claimant in January 2018, and Mr Chapman did not indicate that this had ever been calculated.

41. The Equality Act makes it clear that it is for the employer to show that the action in question was a proportionate means of achieving a legitimate aim. This respondent failed to do so on the evidence before the Tribunal and its defence was thus not made out.

42. Accordingly, the claims of unfair dismissal and discrimination arising out of disability succeed but the claims of harassment because of disability and failure to make reasonable adjustments fail and are dismissed.

Employment Judge J Jones
10 November 2021