



EMPLOYMENT TRIBUNALS

Claimant: Mr M Scott

Respondent: Kenton Schools Academy Trust

Heard at: via Cloud Video Platform

On: 19th, 20th, 21st July 2021

Before: Employment Judge Pitt
Ms Wiles
Ms Winship

Representation

Claimant: Mr R Gibson, Solicitor

Respondent: Mr P Sangha of Counsel

RESERVED JUDGMENT

- (i) The claim under Section 15 Equality Act is not well founded and is dismissed
- (ii) The claim under Section 20 Equality Act is not well founded and is dismissed

REASONS

1. This is a claim by Mr Scott, the claimant, whose date of birth is 6th March 1987, in relation to his employment as a teacher with Kenton Schools Academy Trust, the respondent. The claimant was employed between 1st September 2009 and 31st July 2017, when he was dismissed. Having been previously decided by a differently constituted Tribunal, the Shepherd Tribunal, these claims have been remitted by the Employment Appeal Tribunal for reconsideration of the claimant's claims under Section 15 and Section 20 of the Equality Act 2010.
2. The Tribunal had before it a number of documents in a joint bundle which included the pleadings and the Judgment and Reasons of the Shepherd Tribunal, dated 10th August 2018. In addition, we were referred to the Judgment and Reasons of the Employment Appeal Tribunal dated 6th February 2020. We also had various meeting notes in relation to the disciplinary process and a report from Professor Turkington, a Consultant Psychiatrist. We were also provided with a copy of the Teachers Standards Guidance for School Leaders, School Staff And Governing Bodies.
3. We read witness statements and heard evidence from the claimant and Sarah Holmes Carne, The Principal at Kenton School.

The Issues

4. The issues were identified by Employment Judge Aspden at a preliminary hearing held on 4th November 2020 as follows:-
 - a. in respect of the claimant's complaint that his dismissal was an act of discrimination under section 15 of the Equality Act 2010:
 - i. whether the claimant was dismissed because of something arising in consequence of his disability.
 - ii. if so, whether the respondent has shown that the dismissal was a proportionate means of achieving a legitimate aim.
 - b. in respect of the claimant's complaint that the respondent failed to comply with the duty to make reasonable adjustments:
 - i. whether the respondent's provision criterion or practice (PCP) of requiring compliance with its disciplinary procedure and teaching standards put the claimant at a substantial disadvantage in comparison with persons who are not disabled.
 - ii. if so, whether the respondent knew or could reasonably be expected to know that the PCP was likely to put the claimant at a substantial disadvantage in comparison with persons who are not disabled.
 - iii. whether imposing a sanction short of dismissal would have been a reasonable adjustment for the respondent to take to avoid the disadvantage.

The Facts

5. At the original hearing, it was determined that the claimant was a disabled person at the material time. The respondent has not challenged that decision. The claimant's disability is 'anxiety and depression.' The Shepherd Tribunal identified two periods as the material periods; first, June 2016; secondly, the period from December 2016 until his dismissal. Neither party takes issue with these findings. Both parties also relied on the findings of fact from the Shepherd Tribunal contained within paragraph 7 of its Judgment. It is not necessary to rehearse them here in full. For the purpose of this hearing and in determining the claims before us, the relevant facts are set out below.
6. The respondent is a Schools Trust. It has two academies, Kenton School and Studio West. The claimant qualified as a teacher in 1994. In September 2009, he was appointed Head of Modern Languages at the respondent school. Concerns were expressed concerning his performance as early as 2013 during an appraisal. Objectives were agreed upon, and his performance was monitored by Richard Devlin. In September 2014, the claimant was placed on a Support Plan. Although this was an informal process, objectives were set, and there was regular monitoring. In 2015 the claimant wrote to the Principal informing her he wished to stand down as Head of Department. The claimant took on additional teaching duties at Studio West, which allowed him to maintain his income at the same level.
7. Further issues were identified with the claimant's performance in October 2015 concerning his marking of students' books. A support plan was put in place to improve this. The support plan was extended in December 2015 to include controlled assessments.
8. At an appraisal review meeting in January 2016, Mr Devlin informed the claimant that the respondent's capability procedures might be invoked if improvements were not made.

9. In an Occupational Health Report dated 19th May 2016, it was noted that the claimant reported 'work related and personal stressors leading to his anxiety at the moment.' In particular, he is finding 'the appraisal process stressful, and this appears to be having an effect on his mental and physical health.' The report concluded he was suffering from 'depression and severe symptoms of anxiety.' The claimant was referred to a counselling service.
10. At a further meeting in May 2016, the claimant told Mr Devlin that the teaching commitment at Studio West was impacting his performance. It was agreed that the claimant would cease the commitment at Studio West and also relinquish his Study Room duties. It was also discussed whether the claimant was fit enough to accompany the residential school trip to Barcelona. It was agreed that he would accompany the students and his colleagues on this trip.
11. Improvements were noted in his performance. At the end of July, management of his performance was transferred to Ms Smith, Head of Languages. In paragraph 7:11 of the Shepherd judgment, it is noted 'the claimant said the action plan disappeared as did the threat of formal capability proceedings.'
12. The crux of this case is the actions of the claimant on 25th June 2016 and his subsequent actions later in the year. At this time, a teacher named Ms Conchi, was Head of the Spanish Department and was the claimant's superior within the language department.
13. In relation to those events, the claimant says in his witness statement, 'on 25th June 2016, one student arrived at the school, Conchi took her into her own classroom. Approximately one hour later, she returned to me the student's completed work, all annotated at length and in detail in her own handwriting. She told me to hand them out at the next lesson and have the students copy them up, using her notes. I did so the following Tuesday, 28th June 2016. I then marked the scripts and entered the marks on the departmental tracker system.'
14. He goes on in paragraph 11 'I do accept that my depression and anxiety had adversely impacted upon my performance at school. I was tired and anxious. I was lacking sleep. I lacked motivation. I felt overwhelmed. Ongoing scrutiny of the underperformance process felt intense'. In Paragraph 12, when 'I was handed the script for the students, annotated by Conchi and told to hand them out, I did. I did not feel able to say no to I just felt that if she if that is what she wanted to happen, I would go along with it. She was Head of Spanish she was instructing me what to do. I was at risk of the capability process. I knew it was against exam board regulations. I knew it was wrong. I did not feel able to stand up to her.'
15. The controlled assessments form an important part of the students work required for their GCSE examinations. The claimant told us that he was rationalising what he was doing by telling himself he could just say his manager told him to do it. He said this was the only example of malpractice or misjudgment whilst he was in the work environment.
16. At the commencement of the school term, in September 2016, the Principal instructed all staff to ensure they understood the requirements of course specifications and adhered to them.
17. In November 2016, the issue of controlled assessments being provided to the students came to light due to a walk-through carried out by Ms Smith. Ms Conchi was suspended, and she did not return to work. On 7th December 2016, the claimant went to see Ms Smith to speak to her about the controlled assessments. This Tribunal has not had the benefit of hearing from Ms Smith. There is a

disagreement between her and the claimant as to precisely what was said and whether the claimant openly admitted his part in the events of June at this time. The claimant clearly did inform Mr Devlin on 12th December 2016 about his part in the controlled assessments. He was suspended, and an investigation was undertaken, which ultimately led to the claimant's dismissal.

18. As part of the disciplinary procedure, the claimant obtained a psychiatric report from Professor Turkington dated 24th May 2017. The report concludes that the claimant was disabled at the material time, that is to say, 'at the time when the error is reported to have taken place.' He was suffering from a mix of anxiety and depressive disorder, which was partially treated with citalopram. Further on, the report concludes, 'This gentleman's judgement and decision-making were impaired by his high levels of anxiety and ongoing symptoms of depression at this time.' Finally, the Professor comments, 'The support or adjustment which might have alleviated this disorder would have been an increase in his antidepressant medication or switching to a different medication with structured, evidence-based psychotherapy such as cognitive behavioural therapy.'

19. The claimant was dismissed following an investigation and a disciplinary hearing. The following allegations having been proved against him:-

- i. provided help to students in a controlled assessment by allowing pupils to copy work produced by another teacher; this was not permitted by the exam board.
- ii. failed to follow the instructions of the Principal when she instructed the staff to ensure that they fully understood the requirements of the course specifications and read to them
- iii. failed to follow reasonable management instruction through discussing the disciplinary case against you with colleagues when expressly instructed not to do so
- iv. during these discussions, you made serious allegations against the colleagues in contravention of the school's dignity at work policy
- v. attempted to coerce colleagues into providing false statements
- vi. ultimately your actions breach the mutual trust required between employer and employee.

All the allegations were substantiated, and the claimant was dismissed. The claimant appealed the decision, and this was unsuccessful.

20. The claimant and Ms Conchi were referred to the Teaching Regulation Authority, the TRA, who made a decision on 21st November 2021. It concluded that both teachers had breached the Teaching Standards. It commented their conduct was of a serious nature and fell significantly short of the standards of the profession. The TRA concluded that it was unnecessary to recommend Prohibition from the profession and that publishing the adverse finding was a sufficient penalty.

The Law

21. Section 15 Equality Act 2010, The Act, sets out the provisions concerning discrimination arising from disability as follows:-

- (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.
- (2) subsection (1) does not apply if (A) shows A did not know and could not reasonably have been expected to know (B) had the disability.

22. Section 20 of The Act sets out the duty to make reasonable adjustments for a disabled person. For the purposes of this claim, the relevant requirement is as follows: –

(3) the first requirement is a requirement, where provision, criterion or practice of (A) puts a disabled person at a substantial disadvantage about 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.

23. We have been referred to the following case law:-

i. Pnaiser v NHS England 2016 IRLR170. Here Simler J drew together the case law relating to Section 15 claims and summarised it as follows: –

- (1) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
- (2) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thoughts of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for the impugned treatment in a direct discrimination context, so to there may be more than one reason in a Section 15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment and so amount to an effective reason or cause of it.
- (3) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant.
- (4) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause is "something arising in consequence of B's disability". That expression "arising in consequence of" could describe a range of causal links.....Having regard to the statutory purpose, which appears from the wording of Section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes the unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of a disability.
- (5) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

Homer v Chief Constable of West Yorkshire [2012]UKSC 15. A case involving the application of a PCP in an age discrimination case. It was held, a PCP must be an appropriate means of achieving the legitimate aim and a reasonable necessary means of doing so.

Hardys & Hansom PLC v Lax 2005 EWCA Civ 846. It is for the Tribunal to objectively assess the reasonable needs against the discriminatory effect, which requires the Tribunal to carry out a balancing exercise.

Submissions

24. Both advocates provided the Tribunal with full written submissions. In addition, the advocates addressed us orally.

The Claimant

25. In relation to the Section 15 claim, it was submitted that the 'something arising in consequence' is the claimant's impaired judgement and decision-making. In essence, the claimant's case is, did the claimant's lack of mental resilience and inability to think through the consequence of his actions ultimately lead to his dismissal. Further, the fact that the respondent denied knowing he was disabled shows that the respondent failed to have regard to the consequences of the disability. It was submitted the Tribunal should consider whether a lesser measure would have achieved the same legitimate aim. The Tribunal should consider the following factors when deciding case: the claimant came forward to volunteer his wrongdoing, his previously clean disciplinary record, the claimant was apologetic and remorseful, there was no acknowledgement of the impact of dismissal upon the claimant, there was no assessment of the risk of recurrence, the respondent did not consider the need for the school and the teaching profession more widely to retain skilled teachers. In effect, the respondent failed to carry out a proper reasoned balancing act when deciding to dismiss the claimant. Turning to the Section 20 claim, the question of a reasonable adjustment requires the same considerations.

The respondent

26. With regard to the Section 15 claim, the respondent invites the Tribunal to conclude that the claimant's decision making was not impaired; if it was impaired, it was not as a consequence of his anxiety or depression; if it was impaired, it was due to stress or the claimant's workload. If the Tribunal concludes it was, the respondent relies on the proportionality defence. The legitimate aim is to uphold teaching standards. Mr Sangha reminds us it is our objective assessment that is relevant, and therefore we can disregard the TRA panel outcome. Turning to the Section 20 claim, the PCP is the respondent requiring the claimant to comply with the teaching standards and the respondent's disciplinary policy. In particular, the respondent does not have a PCP of dismissing employees for failure to adhere to the Teaching standards or its disciplinary policy.

Discussion And Conclusions

27. The Section 15 claim. It is not disputed that dismissal may amount to unfavourable treatment.

28. The claimant was dismissed as a result of the misconduct set out above. The principal reason for the dismissal was the claimant's action on 25th June and the controlled assessments. However, he was also dismissed for failing to follow the instruction given by the Principal at the commencement of the following term and for discussing his disciplinary case with his colleagues.
29. It is irrelevant that the respondent did not intend to act in a discriminatory way. The Tribunal accepts that the respondent was reacting to what it perceived as a serious breach of the teaching standards, which it could not ignore.
30. In determining whether the reason or cause was something arising in consequence of the claimant's disability, the Tribunal considered the report of Professor Turkington. This is clear that as of 25th June 2016, the claimant's judgment and decision making were impaired because of his anxiety and depression. Professor Turkington was not asked to comment on the claimant's other actions for which he was disciplined. As far as these matters go, whilst the claimant was still disabled, no evidence was before the Tribunal from which we could conclude that the claimant's judgement continued to be impaired. The Tribunal noted that the respondent had no input into this report. However, it did not seek either at the disciplinary proceedings or before either of the Employment Tribunals to adduce evidence to rebut Professor Turkington's conclusions.
31. The Tribunal took as its starting point the medical evidence that the claimant's judgement was impaired in June 2016. Whilst the respondent points to the fact there were no other errors of judgement, the events of 25th June were unique. The claimant was instructed to distribute the script by a senior teacher. His evidence was that he felt he could not refuse. He lacked the resilience to refuse. There is no evidence before us that there was any other situation similar to this. Whilst the trip to Barcelona may have been stressful, there is no evidence that the claimant was in a position similar to 25th June. The Tribunal concluded that the claimant acted in the way he did because his judgement was impaired and the impairment was because of his disability.
32. The claimant was dismissed for misconduct. There were five disciplinary allegations proved against him. The evidence before us was that handing the script to the pupils was the most serious allegation and may, of itself, result in the claimant's dismissal. Even if the claimant's judgement was not impaired from September 2016, when the other allegations arose, the claimant was at risk of dismissal in any event. The effective cause of the dismissal was the claimant's misconduct in June 2016. As the claimant committed the misconduct because of his impaired judgment, the dismissal arose 'because of something in consequence of the claimant's disability.'
33. The respondent relies on the legitimate aim of upholding teaching standards, in particular, the standards of:-
 - a. Teachers act with honesty and integrity;
 - b. A Teacher is expected to demonstrate consistently high standards of personal and professional conduct;
 - c. A teacher is required to maintain heightened high standards of ethics and behaviour, within and outside school;
 - d. A teacher is expected to set high expectations which inspire, motivate and challenge pupils;
 - e. A teacher is expected to demonstrate consistently positive attitudes, values and behaviour which are expected of pupils;
 - f. Teachers must have an understanding of, and always act within, the statutory framework which sets out their professional duties and responsibilities.

34. Insofar as it is suggested that this is not a legitimate aim for the purposes of these proceedings, the Tribunal rejects such a claim. The standards of conduct required to be followed for any profession must constitute a legitimate aim for the Equality Act.
35. In considering the issue of proportionality, the Tribunal has considered the TRA decision. However, the TRA is faced with a different task to this Tribunal. Its duty is to consider how best to maintain public confidence in the teaching profession whilst this Tribunal has to balance the needs of the legitimate aim against the discriminatory impact on the claimant.
36. The primary discriminatory effect on the claimant following his dismissal was financial and the Tribunal acknowledges this is a serious consequence for him. Since his dismissal, he has been unable to secure a permanent position as a teacher. There has been no evidence adduced of any impact or further impact upon the claimant's mental health.
37. Mr Gibson has referred us to several matters which the respondent failed to consider as set out above. These are matters of personal mitigation; it is not relevant whether the Principal carried out a meaningful balancing exercise. It is for the Tribunal to assess, objectively, if the dismissal was a proportionate response to the proven misconduct.
38. In considering this aspect of the case, the Tribunal must balance the legitimate aim against the discriminatory impact upon the claimant. The matters addressed below do not focus on the discriminatory impact but rather are mitigation and akin to reasons why the claimant should not have been dismissed in an unfair dismissal case. We have, however, addressed each in turn in carrying out our balancing exercise.
39. Was this the first offence and a one-off? The Tribunal does not accept that this is a one-off. The claimant knew at the time that this was wrong but felt that he was unable to withstand the orders from a superior. However, following the decision to distribute the papers, the claimant, without any pressure, then marked the papers, knowing full well that the students had copied a teacher's work. He then entered the marks onto a tracker. There were a series of events during which time he could have alerted another person to his superior's wrongdoing.
40. It goes further than that. Having had a break from work during the summer vacation, the staff is reminded by the Principal upon their return of their obligations to the examination boards. The claimant did nothing, and he has never tried to justify why he did nothing at that time.
41. The wrongdoing only came to light as a result of a senior team member discovering it by chance during a walkthrough of the classroom.
42. Whilst the claimant has expressed his remorse, such remorse as shown would have more strength if the claimant had come forward earlier. The claimant's part in this incident did not come to light fully until 12th December. The Tribunal does not accept that the claimant told Ms Smith when he first met with her. The Tribunal concluded that the claimant would have been immediately suspended had he owned up to his part in this, and he was not. The conclusion that the Tribunal came to was that his involvement and the extent of his involvement only came to light during the conversation with Mr Devlin, following which he was suspended.

43. As to the issue of the respondent acknowledging the impact of dismissal upon the claimant. There is no evidence that the respondent considered this, but it is a matter for the Tribunal to weigh in the balance and is referred to further below
44. Whilst there was no assessment of the risk of recurrence of the misconduct on 25th June, there was evidence before the Tribunal and the respondent that the claimant did act in a way inconsistent with the teaching standards regarding his behaviour towards his colleagues. There was, therefore, a risk the claimant would breach the standards, albeit in a different way, again.
45. Whilst the TRA must consider the need to keep for the school and the teaching profession more widely to retain skilled teachers. The Tribunal concluded this was not a matter for the respondent but a matter falling to be dealt with by the TRA.
46. Turning to the balancing exercise this Tribunal must carry out. First, was dismissal an appropriate sanction? This was a serious case of misconduct, and, as found by the Shepherd Tribunal, dismissal fell within the range of reasonable responses for an unfair dismissal claim. Dismissal sends a message to other teachers, particularly those in the respondent's employ, that this type of behaviour falls below the standards expected of a teacher. The sanction of dismissal achieves the legitimate aim and is appropriate.
47. Was the sanction of dismissal reasonably necessary to achieve the legitimate aim in this case? The Tribunal considered whether the legitimate aim could be achieved by the imposition of a Final Written Warning. The Tribunal considered that the imposition of a lesser sanction than dismissal would not necessarily deter others from such behaviour. The behaviour is tantamount to 'cheating' and a school needs to reinforce the concept to both students and teachers that it is unacceptable. The claimant's behaviour is in breach of the Teaching Standards of acting with honesty and integrity. To impose a lesser sanction may be seen to condone it.
48. The Tribunal considered the impact the misconduct had upon the school. The pupils had to undertake a period of study in order to re-take the controlled assessments. This was a burden not only upon the pupils but also the school. The Tribunal also considered the impact the claimant's actions may have upon pupils regarding the respect, authority and integrity of the claimant and other teachers. Would a Final Written Warning reinforce this standard or undermine it. The Tribunal concluded that a penalty short of dismissal would undermine the Teaching Standards. Further, the respondent must ensure that there is no repetition of such behaviour.
49. The Tribunal concluded that dismissal was a proportionate means of achieving the legitimate aim. In particular, the Tribunal concluded that a sanction less than dismissal would not achieve the stated aim. The dismissal was a proportionate response to the claimant's misconduct.

Section 20

50. The PCPs relied upon by the claimant is requiring compliance with the respondent's disciplinary procedure and the Teaching Standards. As noted by the respondent, this is an imprecise phrasing of a PCP. The requirement to comply

with the Teaching Standards is set by the Department of Education. They are the yardstick upon which the profession is judged. The respondent is not able to alter the requirement to comply with them. The respondent can only adjust how it views a breach of the standards in terms of disciplinary outcomes during a person's employment.

51. It is not clear from the evidence of the claimant the nature of the disadvantage complying with the PCP has upon the claimant himself. We noted during his employment and the disciplinary process the respondent did make adjustments, such as holding a disciplinary meeting away from the school. However, having concluded that the claimant's impaired judgement because of his disability was one of the reasons for his dismissal, the Tribunal considered if the claimant's disability put him at a substantial disadvantage compared to persons without his disability in complying with the PCP.
52. There was no evidence before us that the disciplinary procedure itself put the claimant at a disadvantage. On the basis that the adjustment sought is that the claimant should have been issued with a Final Written Warning, it appears it is the outcome the claimant is challenging. Whilst acknowledging the claimant was dismissed, there was no PCP that an employee who acted in the way the claimant did would be dismissed. It was simply an option.
53. Does the respondent have a PCP that a teacher who breaches the Teaching Standards is dismissed? As already stated, there was no such PCP. Dismissal for breach of the Teaching Standards was simply one option available to the respondent.
54. However, if there was such a PCP, did it place the claimant at a substantial disadvantage? Having concluded that the claimant's impaired judgment because of his disability was one of the reasons for his dismissal, the Tribunal considered if the claimant's disability, of anxiety and depression, put him at a substantial disadvantage compared to persons without his disability in complying with the PCP. Other than the matters raised during the support plan, which appear to be more administrative issues and the events of June 2016, the claimant was a good teacher. There were no incidents of breach of the Teaching Standards save for the matter which led to his dismissal. It was not his disability that led to his dismissal but his impaired judgment. The Tribunal is not satisfied that the claimant was put at a substantial disadvantage compared with a non-disabled person.
55. Although the respondent knew or should reasonably be expected to know of the claimant's disability at the time of the dismissal, the Tribunal is not satisfied that it knew that the disability put the claimant at a substantial disadvantage in complying with the PCP.
56. In any event, having considered the factors set out in relation to the Section 15 claim, the Tribunal concluded it was not a reasonable adjustment to impose a Final written warning.
57. The claimant was not subjected to a detriment, namely his dismissal, arising from discrimination. The respondent did not fail in its duty to make reasonable adjustments.

Employment Judge AE Pitt.

Date 7th December 2021