EMPLOYMENT TRIBUNALS

Claimant: Mr J Sidhu

Respondent: Our Place Schools Ltd

Heard at: Birmingham on 24 and 25 July 2023
And Reserved Decision 26 July 2023

Before: Employment Judge Hindmarch

Appearances
For the claimant: In person
For the respondent: Mr Wheaton – Counsel

RESERVED JUDGMENT

1. The complaint of unfair dismissal is not well founded and is dismissed.

REASONS

2. This claim came before me for an in-person hearing listed for 3 days from 24-26 July 2023. The Claimant is a litigant in person and represented himself. The Respondent was represented by Counsel, Mr Wheaton. The claim was filed on 26 February 2020. It followed an earlier claim submitted (no 1303155/2018) by the Claimant on 19 June 2018 (claim no 1303155/2018) and heard by Employment Judge Woffenden and members in January 2020. That claim was unsuccessful. The Claimant appealed that decision to the EAT and, 2 points of appeal were permitted to proceed. I was told the EAT hearing took place in January 2023 and that the Claimant's appeal did not succeed.

3. The claim before me was the subject of a Public Preliminary Hearing before Employment Judge V Jones on 25 and 26 October 2022. The purpose of that hearing was to consider the Respondent's application to strike out the claim or for a deposit order. In the ET1, the Claimant, in addition to indicating he was bringing a claim of unfair dismissal, had also indicated he was pursuing complaints of race and religious discrimination. Employment Judge V Jones struck out the discrimination claims, but allowed the unfair dismissal claim to proceed. She listed the hearing of the unfair dismissal claim for 24 – 26 July 2023 and made Case Management Orders to ready the parties for the hearing.

4. As to the unfair dismissal claim she noted that the Claimant "makes two arguments on unfairness

    I. The decision to dismiss was made as a strategy to throw (the Claimant) off preparing his Tribunal case (this being a reference to the first claim which was heard in January 2020).
    II. Dismissal could have been avoided if the Respondent had relocated him to another centre with a more diverse workforce. The Claimant said at this hearing that he would have been relocated to the new lakeside centre."

5. By way of Case Management Orders to ready the parties for the hearing before me, Employment Judge V Jones ordered the Claimant 'to write to the Tribunal and Respondent by 16 November 2022 with full particulars of why he believes his dismissal was unfair.' The Claimant did not comply with that Order. Employment Judge V Jones made orders for the preparation of a trial bundle and for the exchange of witness statements to take place by 3 March 2023.

6. On 17 July 2023, a week before this hearing, the Claimant wrote to the Tribunal making an amendment application. In short he wished to add claims of victimisation and disability discrimination to his claim of unfair dismissal. He also asked for a witness order to be made for the attendance of the Respondent's former CEO, Mr French, who had heard his appeal against dismissal. On 18 July 2023, the Respondent's solicitor wrote to the Tribunal objecting to these applications. The papers were referred to Employment Judge Battisby who wrote to the parties on 20 July 2023 informing them that the applications would be dealt with at the commencement of the hearing on 24 July 2023.

7. I dealt first with the Claimant's application for a witness order. I noted that Mr French left the employment of the Respondent on 6 March 2022 and had moved to live abroad in Portugal. I explained to the Claimant that I could not order a witness who lived outside of Great Britain to attend. Rule 32 Schedule 1 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides 'The Tribunal may order any person in Great Britain to attend a hearing to give evidence.' The Claimant argued that Mr French was still a shareholder in the Respondent business and that he believed Mr French had moved abroad simply to avoid giving evidence. He suggested I could order Mr French to give evidence by video link. Mr Wheaton explained that Mr French is 71 years old and had retired abroad.

8. I had read some of the bundle and noted there was a transcript of the appeal hearing and a detailed written outcome so we had evidence of what had taken place and what had been decided.

9. I declined to make a witness order as Mr French does not reside in Great Britain. We had the transcript and the appeal outcome letter, so it was not necessary for Mr French to attend to give relevant evidence.

10. The Claimant then asked if Mr French could give video evidence from Portugal. No permission had been sought from Portugal to and evidence being given from that country. This was day one of a 3-day hearing. I did not agree it was necessary to hear from Mr French, so it was unnecessary to delay further whilst permission was sought.

11. I was then asked to consider the amendment application. The Claimant explained that it was only in June 2023 that he had began to prepare for this hearing. He said he realised that his case turned on the question of whether the Respondent should have found alternative employment for him, rather than dismissing him, and he realised he might have a claim for disability discrimination, a failure to make reasonable adjustments and victimisation. He said the protected act was the bringing of the first claim (in June 2018) and he was later dismissed.

12. The Claimant said he had been diagnosed with other Phobic Anxiety Disorder which was noted in a medical report he obtained in January 2020 after his dismissal. He explained that when he filed this claim in February 2020 he did not have sufficient knowledge and understanding to 'tick the box' for disability discrimination. The Claimant referenced a hearing before Employment Judge Hussain on 6 March 2023 (in claim no 1303755/2022 – his claim against Worcestershire County Council and this Respondent) where Employment Judge Hussain struck out his claims of discrimination based on race or religion, and in which the Judge told him he should have applied for an amendment at an earlier stage. He said he had realised in June 2023 when preparing for this hearing that he needed to get the amendment application in and so he made it in writing on 17 July 2023.

13. I noted that the claim had been filed in February 2020 and it was only in July 2023 that the amendment application had been made and I asked the Claimant about the delay. He told me that on 26 January 2023 he had the aforementioned hearing in the EAT so was busy preparing for that, he also had the hearing before Employment Judge Hussain in March 2023 to prepare for. After that his brother's health had become worse (his brother has kidney cancer and the Claimant had sent in some medical records evidencing this). He told me that in May and June 2023 he was assisting his brother to see a consultant and arrange a CT scan. The Claimant said he only started preparing for this hearing in June and he apologised for making the application so late.

14. Mr Wheaton opposed the application. He referred to the fact Employment Judge V Jones had set out the issues in the remaining unfair dismissal claim at the hearing in October 2022. No mention was made of any disability

discrimination claim at that point. He was of the view the Claimant had recently done some legal research and was trying to morph his unfair dismissal claim into a disability discrimination claim. The condition the Claimant was now seeking to rely on was only diagnosed after the dismissal and the Respondent would not accept at this stage that it amounted to a disability in accordance with the Equality Act 2010.

15. In Selkent Bus Company Ltd (Trading as Stagecoach Selkent)) v Moore (1996) IRLR 66, it was held that a Tribunal, when dealing with an application to amend, should carry out a careful balancing exercise of all circumstances and exercise its discretion in a way that is consistent with the requirements of 'relevance, reason, justice and fairness inherent in all judicial discretions.' In the EAT's view relevant circumstances included 'the nature of the amendment, the applicability of time limits and the timing and manner of the application.'

16. I considered Selkent, and the other relevant authorities namely Vaughan v Modality Partnership UK EAT /0147/20/BA (V) (9 November 2020) and Galilee v Commissioner of Police of the Metropolitan 2018 ICR 634. The key issue is the balance of prejudice, injustice and hardship that would be occasioned if the application were to be granted or refused. I noted that time limits must be taken into account in the balancing exercise, along with other important factors such as whether the claim has merit and whether the Respondent is able to deal with it given memory fade/availability of witnesses.

17. The amendments sought for this claim were to add totally new claims, of disability discrimination. These claims had not been set out in the ET1, nor mentioned at the earlier preliminary hearing. The application had been made only a week before the final hearing, some 3 years and 5 months after the claim was issued. Whilst I accepted the Claimant had been preoccupied in 2023 by his other claims and his brother's ill-health there was no good reason why he had not sought to amend his claim in 2020, 2021, 2022, nor mentioned it at the hearing in October 2022 before Employment Judge V Jones. The claims would be significantly out of time. I accept that there would be some injustice to the Claimant if his application was refused, however, I had to balance that with injustice to the Respondent who had prepared its defence, bundle and witnesses in respect of an unfair dismissal claim only and had incurred the costs of instructing counsel for this final hearing. Mrs Edrop no longer works for the Respondent and had taken unpaid leave to attend this hearing. Had I granted the application, the hearing would have needed to be postponed as discrimination cases require lay members to form a panel.

18. The Claimant still had his unfair dismissal claim as an issue to be determined. The burden of prejudice to the Respondent outweighed the prejudice to the Claimant of not being allowed to bring the disability discrimination claim. I therefore refused the application to amend.

19. The Claimant then handed up a written application asking me to reconsider my decision on the amendment application. The fact he had prepared this, suggested that he anticipated the application being refused. I refused to reconsider my decision. I considered there were no reasonable prospects of my original decision being varied and it was not in the interests of justice to alter it.

20. The Claimant then asked me to adjourn the case to allow him to challenge my decision on the amendment application in the EAT. I refused. The Respondent's witnesses were present, the claim had been issued over 3 years ago, and progress had to be made.

21. The Claimant said he wanted written reasons for my decision to refuse the amendment application. I explained I would give these at the end of the hearing.

22. I was informed by my clerk before the hearing commenced that the Claimant had informed her he had emailed his witness statement to the Tribunal the day before on Sunday evening. He had thus not complied with the order to exchange witness statements by 13 March 2023. I checked with Mr Wheaton that he had received the (very late) witness statement and he confirmed that he had and that we were able to proceed. He asked me to consider rejecting the statement and not allowing the Claimant to rely on it. I decided I would allow the statement in and it was to be taken as the Claimant's evidence-in-chief but that I would disregard any part of it that talked to victimisation or disability discrimination.

23. I had a trial bundle running to 219 pages. I had the Claimant's witness statement and 2 witness statements from the Respondent: Joanne Edrop, former Head of HR for the Respondent and the dismissing officer, and Sean Maguiness, the current CEO.

24. As noted earlier in this Judgment, Employment Judge V Jones had set out the issues to be decided where a Respondent admits dismissal and says this is for the potentially fair reason of capability and I checked these were still relevant with the parties and which were as follows:

> "If the reason was capability, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:
>
> a. The Respondent genuinely believed the Claimant was no longer capable of performing their duties;
> b. The Respondent adequately consulted the Claimant
> c. The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position
> d. Whether the Respondent could reasonably be expected to wait longer before dismissing the Claimant

e. Dismissal was within the range of reasonable responses."

25. Over day one and two we heard the witness evidence and submissions. To avoid the cost of the parties returning to the Tribunal on day three and given the Claimant had indicated he wanted written reasons in relation to this amendment application, we agreed that I would reserve my decision and prepare written reasons on all issues.

Findings of Fact

26. The Respondent is a charity and private limited company. It operates a residential home and day school for children up to the age of 19 who have special education needs. At the time of the Claimant's employment, there was just one building (known as the Orchard) on the site occupied by the Respondent. This was used as a school and a home. The Respondent began to build a new building on the same site; about 100 yards from the original building. It was intending to use this as a centre for adults, but it was not possible to obtain registration for this due to the rural location of the setting. The Respondent then sought to operate the new building (known as Lakeside) as a children's home. Registration was granted for this use in April 2020, on an expedited basis, during the first Covid-19 lockdown period. I was told the capacity of the Lakeside home is 10 children, but there is an agreement from the Department for Education to increase this to 45 children in time, possibly by 2025.

27. The Claimant commenced employment with the Respondent in the role of Weekend Support Worker on 7 August 2017. The Claimant is a qualified teacher and worked weekdays in this role at schools totally unconnected to the Respondent.

28. The Respondent issued the Claimant with a contract of employment which he signed on 7 August 2017 (pages 104 – 110 of the bundle). At clause 19 it provided the following:

> "19. Absence Reporting:
> You are required to notify the Company of your sickness absence. You should do this personally, by telephone, to the Team Coordinator or Manager on site and if before 07:30am a member of the night staff by no later than one hour before your scheduled start time on the first day of absence.
> Further details relating to the Company's absence procedure and rules are set out in the Employee Handbook and sickness and absence policy."

29. Clause 20 provided:

> "You will be entitled to Statutory Sick Pay for any period of absence due to sickness or injury subject to meeting the required qualifying conditions.
> Further rules relating to the notification of and payment in respect of absence because of sickness or injury are set out in the Employee Handbook."

30. The Respondent also has an Employee Handbook which has a section on 'Absence' (pages 113 – 116 of the bundle). It states under the hearing 'Your Responsibilities':

> "Breach of absence procedures
> Breach of any of the absence reporting procedures detailed below, including those relating to the notification of absence or provision of a medical certificate, may result in disciplinary action. Any periods of absence that are unauthorised may be treated as gross misconduct and could lead to your dismissal without notice from the Company."

31. There is also a section entitled 'Medical Report' which provides:

> "It may be necessary for the Company to obtain a medical report during the course of your employment in order to gather further information about your medical condition, its probable effect on your future attendance at work, your ability to do your job and whether there are any reasonable adjustments to be made, if appropriate.
>
> Although you have the statutory right to withhold your consent to the Company to approach your GP or consultant for a medical report, if you do choose to withhold your consent to our application, the Company may need to assess your state of health and its impact on your continued employment without the benefit of professional medical advice."

32. There is also a section entitled 'long-term absence' which provides:

> "Welfare Meetings
> During a period of long-term absence, you are required to attend any scheduled welfare meetings with the Company. The purpose of these meetings is to discuss your current state of health, how long you expect to be absent from work and what steps, if any, the Company can take to facilitate your return to work.
>
> If you are medically incapable of attending your place of work, a representative of the Company will come out to visit you. If the time

scheduled for the meeting is not suitable, you should contact the Company immediately so that an alternative time can be agreed. You are also required to respond to any correspondence from the Company and any requests for information about your health.

Medical Certification
You should continue to provide medical certificates, completed by your medical practitioners even if you have exhausted your entitlement to sick pay.

Failure to Co-Operate
The Company will always be sensitive to your physical and mental wellbeing during periods of long-term absence. However, where there is a failure, without good reason, to co-operate with the Company in relation to attending meetings, communicating effectively, attending occupational-health assessments and providing necessary information, this may be treated as misconduct and the Company may take disciplinary action.

Termination of Employment
The Company is committed to supporting you during your absence and assisting your return to work. However, a prolonged period of absence cannot be sustained indefinitely, and the Company may need to review your continued employment periodically. Before any decision is made in relation to termination of your employment on the grounds of capability, the Company will consult fully with you and may obtain up-to-date medical evidence."

33. The Claimant said in evidence that he had not seen the Employee Handbook and he did not have access to his contract of employment. Even if he is correct at various stages of his absence, as set out below, the Respondent referred him to the Employee Handbook and absence procedures, and on occasion quoted directly from the policy. On 7 January 2019, Joanne Edrop emailed the Claimant and attached a section from the policy regarding Long Term Absence. There is no evidence that at any time the Claimant asked for copies of the contract or the Handbook or any section thereof.

34. On 5 October 2017, the Respondent suspended the Claimant on full pay following a safeguarding allegation made by one of his co-workers, a white female by the initials GM (a copy of the suspension letter is at page 122 of the bundle). After the investigation, the Respondent determined that no disciplinary action was to be taken against the Claimant and he was notified on 21 December 2017 that the suspension was lifted. During the period of suspension from his role with the Respondent, the Claimant was also unable to work in his weekday teaching role. After the suspension was lifted, it appears he returned to his weekday role, but he did not return to work for the Respondent.

35. On 18 December 2017, the Claimant raised a grievance concerning allegations of discrimination that were largely aired in claim no 1303155/2018. When the suspension was lifted the Respondent asked the Claimant to return to work on 30 December 2017 and did so by email to him on 21 December 2017 (page 123 – 124 of the bundle).

36. The Respondent emailed the Claimant again on 29 December 2017 to inform him of the arrangements for his expected return to work the following day (page 124). The Claimant did not return.

37. In the bundle at page 125 was an email from the Claimant's trade union representative to him dated 3 January 2018 referring to a meeting with the Respondent 'on Friday' and advising him 'You…need to give them some sort of explanation as to why you have not returned to work'. It appears this was a reference to the grievance meeting on 5 January 2018.

38. At page 126 is a typewritten record of a 'return to work meeting' in which the Respondent asks the Claimant if he will be returning to work 'this weekend' and he replies that he will not return to a 'toxic hostile work environment' that has 'caused him to be injured emotionally, physically, mentally, for me to return to work I have to recover and I don't know how long that's going to take, in order for me to return here, that environment has to change. So, return to work is related to grievance. It interlinked. I have to recover fully.' It appears the Respondent paid the Claimant his accrued holiday pay in January 2018 effectively allowing him to be 'on holiday' and to receive some pay. The January payslip (page 211) records this.

39. A grievance meeting was arranged for 5 January 2018. The grievance outcome letter was sent to the Claimant on 19 January 2018. The grievances were not upheld. In the outcome letter it was noted "Our Place endeavours to be a supportive employer and we would welcome a positive return to work" and support and training to facilitate this was offered (page 127 -130).

40. The Claimant remained absent from work and appealed the grievance outcome, on 30 January 2018. The appeal hearing took place on 15 February 2018 and the decision maker was Lena Graham, Director.

41. The grievance appeal outcome letter is dated 5 March 2018 (pages 132 – 135). The letter records the following:

> "…we have been clear that we wish to support you in a successful return to the workplace, we have agreed for you to take unpaid leave as you have not been comfortable returning to the workplace until the conclusion of your grievance."

42. It appears that having exhausted his holiday leave/pay in January 2018, that the Claimant was on unpaid leave in February and March 2018 by way of agreement with the Respondent. The letter also records:

> "You specifically said during your appeal meeting that appointing you to an executive role at Our Place would resolve the problems that you feel you have experienced whilst working for us. We do not feel that appointing you to an executive role would be an appropriate response to the issues that you have raised… although we have not upheld your concerns we have always maintained that we would like to work with you for a successful return to your role as Weekend Support Worker.
>
> The internal grievance process is now concluded. There is no further right of appeal. As we have said previously, we would like to support you to return to your role. We understand from your grievance appeal that you were not sure if you wanted to return. Should you not wish to return please advise Holly… so she can make the necessary arrangements regarding your employment. Should you wish to return we would, as previously suggested, advise that you return to shadow initially for two weeks, we would then review with you if you felt comfortable to return to the full role. **Please can you let us know by 22 March 2018 at 4pm whether you intend to return to work as a Weekend Support Worker at Our Place or not? If you are returning we would expect you to commence a shadow shift on 31 March 2018.**
> We then went on to discuss what you felt would be an appropriate outcome to your grievance appeal. You stated that you wanted your wage to be continued to be paid whilst you are off, an executive decision-making role within Our Place and the toxic hostile working environment to be addressed."

43. Whilst the grievance appeal was not upheld the outcome letter concluded "we will hold refresher training sessions around communication and interactions at work and are happy to facilitate you in a return to work, should you decide this is what you would like to do."

44. The grievance appeal was the final stage of the internal appeal process. The decision was sent to the Claimant by email on 15 March 2018. The Claimant sent an email to the Respondent on 21 March 2018 to say he was awaiting documents from Worcestershire City Council and would, on receipt, contact the Respondent to schedule a meeting concerning a safeguarding allegation and grievances. He further stated, "the Toxic, hostile discriminatory work environment needs to be addressed as I also have to make a full recovery in order for me to return back to work." The Respondent replied on 21 March 2019 and stated "As the grievance process is now concluded and we have been unable to substantiate your claims regarding a toxic, hostile discriminatory working environment we would now expect you to return to your role… as such,

you have been scheduled for work on Saturday 31 March and the measures to support your return to work as outlined in your grievance outcome will be implemented. If you are unable to return to work for any reason you are obligated to report your absence in line with our absence reporting policy contained within the Employee Handbook" (pages 136- 137).

45. The Claimant did not return to work. Nor did he follow any absence reporting procedures.

46. On 27 April 2018, the Claimant submitted another grievance on behalf of a child. He was not authorised by the child's parents to do so. At the same time he informed the Respondent that the earliest he could see his GP was 2 May 2018.

47. Having heard nothing from the Claimant, by way of explanation for his continued absence on, 7 August 2019 Lena Graham at the Respondent, emailed the Claimant inviting him to a meeting on 14 August 2018 to discuss his absence. The Claimant replied on 10 August 2018 attaching fit notes. The first fit note is dated 8 June 2018 and covers the period 5 May 2018 – 5 August 2018 (page 212). The second is dated 10 August 2018 and covers the period 6 August 2018 – 6 October 2018 (page 213). Both notes record that the Claimant is 'not fit for work' by reason of 'stress related problem/obesity.'

48. Lena Graham replied to the Claimant stating "I want to discuss personally with you, your absence from work… if my purposed (sic) date of 14th August is not suitable for you to attend, please provide me with 2 alternative dates and times that are more convenient for you, by Friday 17 August 2018. I am happy to facilitate this meeting off the site if that is more suitable for you" (pages 142 – 143).

49. The Claimant replied on 16 August 2018 ignoring the request to meet and instead saying that he had received notification from the Tribunal of a preliminary hearing on 21 January 2019 and that "over the next several weeks, I will be in the process of gathering documents/evidence" (page 141).

50. On 4 September 2018, Lena Graham again emailed the Claimant asking him to attend a welfare meeting on 12 September 2018 (page 141). The Claimant did not attend.

51. On 5 October 2018, Lena Graham sent a letter to the Claimant stating that he had not accepted any invitation to meet with her to discuss the grievance he submitted on 27 April 2018, so she had gone ahead and conducted an investigation and determined no further action was required (page 144).

52. On 5 October 2018, Lena Graham sent the Claimant a further letter. She pointed out that he had failed to attend the welfare meetings on 14 August and 12 September 2018 and stated "We are committed to supporting you during

your absence and assisting your return to work. However, a prolonged period of absence cannot be sustained indefinitely. I do therefore require you to consent to us obtaining medical information from your doctors to support us in determining whether we can continue to offer you employment." She enclosed a health questionnaire and a consent form to obtain medical records and asked the Claimant to return them 'no later than 15 October 2018.' To facilitate this, she enclosed a prepaid envelope (page 145).

53. The Claimant did not respond, and his fit note expired on 6 October 2018.

54. In July 2018, Ms Edrop began working for the Respondent in the role of HR Manager. In evidence, she said she familiarised herself with the Claimant's personal file and was aware he was bringing Tribunal proceedings against the Respondent.

55. On 30 November 2018, Ms Edrop wrote to the Claimant. She explained that his fit note had expired, that he had failed to attend welfare meetings, that he had failed to report his absence in accordance with company procedures and that his absence was classed as unauthorised and this 'could be subject to disciplinary action.' She asked the Claimant to contact her by Friday 7 December 2018 to explain. The letter concluded "If you fail to contact me or provide a suitable explanation and this current, unauthorised absence continues, I will have no alternative but to consider it a disciplinary matter of a potential gross misconduct nature. I would like to confirm that any periods of continued absence must be supported by a Doctor's medical certificate" (page 146).

56. It appears that the Claimant did not make contact with Ms Edrop. On 11 December 2018, she wrote to him again. This time she invited him to a disciplinary hearing to discuss his continued unauthorised absence and warned him 'the company now consider this a potential gross misconduct offence and as such, one of the outcomes following the disciplinary hearing could be summary dismissal' (page 147). The hearing was scheduled for 18 December 2018.

57. It appears the Claimant then sent in further fit notes on 16 December 2018. One was for the period 3 October 2018 – 2 December 2018 for stress related problems and one was for the period 3 December 2018 to 3 February 2019 also for stress related problems (pages 214 and 215).

58. The fit note dated 5 December 2018 referred to the fact the Claimant 'may be fit for work taking account of…a phased return to work.'

59. On receipt of these fit notes Ms Edrop wrote again to the Claimant on 17 December 2018. She stated "I can confirm that we will not longer be proceeding with your planned disciplinary hearing. However, it is disappointing that you

failed to provide the up-to-date fit notes without reasonable delay." She invited him to a meeting on 28 December 2018 'to discuss your ongoing absence from work.' She explained "the aim of this meeting is to gain an understanding of your medical condition in order for us to further consider any reasonable adjustments and/or measures that would facilitate your return to work and any other ways that I can support you. I do also require you to consent to us obtaining medical information from your doctors to support us in determining what phased return may be appropriate" (page 148).

60. On 27 December 2018, the Claimant sent an email to Joanne Edrop. He acknowledged receipt of her letter of 17 December 2018 and stated "my understanding is that you must be a new employee at Our Place schools. My medical concerns relate to racial discrimination that I have suffered whilst working at Our Place schools. If you check with director Lena Graham she can provide you with all the details pertaining to my case, e.g., grievance, appeal, employment tribunal. The phased return on my fit note refers to returning to teaching not Our place schools. My full time job is as a science teacher and my part-time job is at Our place schools as a weekend support worker. My GP is aware of all the facts relating to my medical condition in relation to racial discrimination at Our place schools."

61. In evidence, the Claimant told me he had been on sick leave since May 2018 and was unable to work in either his weekday or weekend roles. By October 2018, he had returned to his weekday role as a teacher but was unable through sickness to return to his weekend role with the Respondent.

62. On 7 January 2019, Joanne Edrop emailed the Claimant. She drew his attention to the Employee Handbook and attached the relevant page referencing procedures involving Long Term Absence. She stated the Handbook "outlines our requirements for you to attend welfare meetings, it is a reasonable request for us to ask that you attend welfare meetings whilst on long term absence so that we can facilitate in your return to work, particularly as your GP has stated in your fit note dated 5th December you may now be fit for work taking into account a phased return to work, this fit note does not specify that you are only also to undertake contain types of work." Again, she invited him to attend a welfare meeting this time on Monday 14 January 2019 – she offered a location to the Respondent's premises should the Claimant prefer this (page 151).

63. On 9 January 2019, the Claimant replied stating he had an appointment with his GP on 30 January and would send an 'amended fit note.' As to the request to meet he stated "Please check my records – I have had numerous meetings in the past (grievance/appeal) pertaining to my medical condition which has been caused by the racial discrimination whilst working at our place school. These meetings have not helped me. I am now having to go to employment tribunal to seek justice" (page 153).

64. On 4 March 2019, Joanne Edrop sent a further letter to the Claimant. The previous fit note had expired on 3 February 2019, and she was concerned about his further apparently unauthorised absence. She warned him he could face disciplinary action and asked him to contact her by Friday 8 March with an explanation (page 154).

65. On 10 March 2019, the Claimant sent in a further fit note. This one was dated 20 February 2019 such that there was an unexplained absence from 3 February (when the previous fit note expired) to this one which ran from 20 February 2019 to 20 April 2019. The reason for the absence was said to be 'stress related problems' and again, the GP had indicated 'you may be fit for work taking account of… a phased return for work.'

66. On 12 March 2019, Joanne Edrop wrote again to the Claimant acknowledging receipt of the fit note and again, inviting him to attend a welfare meeting on 15th March and again, offering to source a location other than the Respondent's premises if that was the Claimant's preference. The Claimant did not respond and did not attend.

67. On 23 July 2019, Joanne Edrop wrote again to the Claimant. She had not received a fit note since the one sent in March 2019 which had expired on 20 April, some 3 months earlier. She invited the Claimant to attend a meeting 'to discuss your ongoing absence' and suggested this take place on 1 August 2019 at a coffee shop. She sent the Claimant a consent form 'to enable me to obtain a medical report from your GP' (pages 156 – 158).

68. The Claimant did not respond and did not attend the meeting. On 5 August 2019, Joanne Edrop wrote to him again. She informed him that she had scheduled a further meeting on 29 August 2019 at the coffee shop. She warned him this unauthorised absence could be subject to disciplinary action and quoted directly from the Respondent's Absence Policy (pages 159 – 160).

69. On 14 August 2019, the Claimant emailed Joanne Edrop acknowledging her letter and sending her further fit notes (page 161). He did not agree to meet or complete the consent form to obtain a medical report form. The fit notes were dated 5 June 2019 covering the period 5 June 2019 – 5 August 2019 for 'stress related problem – anxiety at work' and 9 August 2019 to 9 October 2019 for 'stress related problems.' Both fit notes stated the Claimant was 'not fit for work' and did not propose a phased return. Again, there appeared to be periods not covered by the fit notes, a gap from 20 April 2019 – 5 June 2019 and from 5 August 2019 – 9 August 2019 (pages 217 – 219).

70. On 29 August 2019, the day of the proposed meeting, Joanne Edrop replied to the Claimant and said, "I look forward to seeing you later this morning at our welfare meeting" (page 161). The Claimant did not reply and did not attend the meeting.

71. On 3 September 2019, Joanne Edrop wrote again to the Claimant. She expressed her concern at the Claimant's failure to attend the meetings offered and failure to allow the Respondent to obtain a medial report. She stated "as previously explained to you I can only take account of the information available to me when considering your continued employment with the Company. The information I have considered is your medical certificates. I have given significant consideration to the information available to me and I believe it is now appropriate that we discuss your continuing employment." She invited him to a formal meeting on 17 September 2019 where "you will have a final chance to put forward any update on this situation at this meeting. You will also be able to put forward any further suggestions for the company or further representations you may wish to make prior to any final decision on your ongoing employment being made. An outcome of this meeting could be your termination of employment due to capability" (page 162). The Claimant did not respond and did not attend the meeting.

72. On 24 September 2019, there was a Case Management Hearing before myself in the Claimant's first claim against the Respondent that had been issued on 19 June 2018 and with case number 1303155/18. That hearing had been listed by Employment Judge Wynn Evans in February 2019 and the purpose was to review progress and compliance with case management orders (given a Final Hearing was to take place in January 2020).

73. I noted that the Claimant had not yet provided his documents to the Respondent and so the orders made by Employment Judge Wynn Evans as to disclosure, for a trial bundle and for the exchange of witness statements had not been complied with. I made a Unless Order in respect of the Claimant needing to disclose his documents by 8 October 2019 at 4pm. If he complied, I made further case management orders to ensure the parties were 'trial ready' by January 2020. The Claimant complied with the Unless Order. I mention this Case Management Hearing and the Unless Order at this stage in my Judgment as the Claimant argues it had relevance to the Respondent's later decision to dismiss him, a matter I shall return to later.

74. On 21 October 2019, Joanne Edrop wrote again to the Claimant. She pointed out his last fit note had expired on 9 October 2019, and he had not supplied a further one. She pointed out he was again in breach of the Respondent's absence reporting procedures. She invited him to a further formal meeting on 30 October 2019 at the coffee shop. She gave him the right to be accompanied. She stated "Unfortunately, you have chosen not to attend the meetings I have arranged to discuss your ill-health and any support I can offer you in returning to work. Additionally, you have decided not to allow me to obtain a qualified medical opinion on your current ill-health or ability to return to work. As previously explained to you I can only take account of the information available to me when considering your continued employment with the Company. The

information I have considered is your continued period of absence and your failure to follow absence reporting procedures." She warned him "an outcome of this meeting could be your termination of employment due to your capability" (pages 163 – 164).

75. The Claimant did not respond and did not attend the meeting. On 30 October 2019, Joanne Edrop wrote to him again proposing a further meeting on 5 November 2019 at the coffee shop. The letter was in very similar terms to that of 21 October 2019 (page 166).

76. On 4 November 2019, Joanne Edrop emailed the Claimant stating, "I trust that you will be attending the meeting tomorrow and look forward to seeing you then" (page 167). The Claimant did not reply and did not attend the meeting.

77. On 7 November 2019, Joanne Edrop wrote to the Claimant inviting him to a further formal meeting on 12 November 2019. The letter was in similar terms to those sent on 21 October and 4 November but added "If you fail to attend this meeting, then a decision will be made in your absence based on the information currently available to me, and I must stress that the potential outcome of meeting could be your termination of employment due to capability" (page 168).

78. The Claimant did not attend the meeting and it went ahead in his absence. The Claimant's evidence at the hearing before me was that he was unable to meet with both Lena Graham and Joanne Edrop because he was not comfortable with meeting women, given it was a woman who had made the allegation in October 2017 which had led to his suspension. He said meeting them would put him in a vulnerable position. The Claimant did not offer this explanation to either Lena Graham or Joanne Edrop at any time when they were asking to meet with him. Joanne Edrop considered matters and made the decision to dismiss the Claimant on grounds of capability. On 20 November 2019, she wrote to him explaining her decision. In this outcome letter she stated: -

> "Having carefully considered all the relevant information concerning your absence and a likely return to work that is available to me, in particular:
>
> - You have been absent due to sickness since January 2018 with stress/anxiety/obesity, however you have failed to follow the absence reporting procedure repeatedly and therefore our knowledge of your absence is significantly limited.
> - We have written to you on the following occasions 30/11/2018, 04/03/2019, 13/03/2019, 27/07/2019, 05/08/2019, 30/10,2019 reminding you of the absence reporting procedures and requesting an update to your continued period of absence and in particular the need for you to supply up to date fit notes.
> - We have also invited you to attend welfare meetings on the following dates 14/08/2018, 12/09/2018, 28/12/2018, 14/01/2019,

14/03/2019, 01/08/2019 and 29/08/2019. All of which you failed to attend or engage in dialogue with the organisation.

- You have also been given on a number of occasions the option of a written process which is a reasonable alternative to meeting face to face, including being issued with a consent form for a medical report and a health questionnaire, however you have failed to return any of these.

I have formed the view that your return is not foreseeable within a reasonable period, and it is no longer feasible to support your continued absence from work. My reasons for this are:

- Based on the organisations reasonable attempts to engage with you and your failure to cooperate I do not believe you would ever return to Our Place.
- We cannot sustain covering your role on a temporary basis.

It is therefore with regret that I write to inform you that I have made the decision to terminate your employment with the organisation as of today Wednesday 20th of November" (pages 169 – 170).

79. The Claimant was paid in lieu of notice and offered the right to appeal the decision to dismiss.

80. On 2 December 2019 the Claimant sent a letter of appeal. He also sent a further fit note dated 15 November 2019 for the period 10 October 2019 to 12 December 2019 for 'stress related problems at work' This noted he was not fit for work (page 219).

81. The appeal letter gave six grounds of appeal. The Claimant referenced the events leading to his suspension from work in October 2017 and the allegations of discrimination in claim 1303155/18. He said he had not been able to provide the latest fit note in a timely manner "because it was taking longer than usual to book a GP appointment" and that "I have stated many times and I will state again that I am open to getting a **Medical Expert Evaluation**." He said he "will not attend any welfare meetings where further malicious allegations can be made against me." The Claimant said he would only have his appeal heard by the Respondent's then CEO, Mr French. He suggested his dismissal had come at a time which might "jeopardise my ability to receive a fair hearing" and that "this termination is unlawful and has been engineered to effect the employment tribunal legal proceedings" in claim no 1303155/18 (pages 173 – 174).

82. The appeal hearing was arranged for 17 December 2019. Mr French was the decision maker and was accompanied by Kelly Flynn, HR Adviser for the Respondent. The Claimant attended with his trade union representative. A transcript of the recorded hearing was in the bundle at pages 178 – 192.

83. The Claimant produced a written statement of appeal points at the hearing, page 177. He repeated many of the matters raised in his grievances and stated at point 7, "Due to the aforementioned reasons (the matters leading to his suspension) I am no longer able to work in toxic hostile work environments because of future malicious allegations."

84. At point 11, he stated, "The school has not made it possible to make adjustments to the workplace and help me. Instead the toxic hostile discriminatory environments manifest itself and continues." At the appeal hearing, the Claimant said the reason he had not attended welfare meetings was "each time the welfare meetings have been tried to set up is by Lena. And Lena is involved in the employment tribunal. And for her to chair a welfare meeting, this is not fair. It's biased."

85. At the appeal hearing the Claimant requested an expert medical examination. The Claimant asked about whether some of the employees that he had issues with were still employed. Mr French confirmed that of the 9 names mentioned, 4 were still in the employment of the Respondent. the following exchange was recorded: -

> "*Mr French* – So, in the normal course of events, whatever normal may be, an appeal looks to overturn the decision for dismissal.
> *Claimant* – Okay
> *Mr French* – Yeah, but in the particular event what (the Claimant) has clearly stated is, that he doesn't want that decision overturned because he doesn't want to return to work. So if that's the case…
> *Trade Union Representative* – Have you stated that you don't want to return to work?
> *Mr French* – It says here (shows email) because of the hostile environment, I'm unable to return to this environment.
> *Trade Union Representative* – Unable to, it doesn't say he doesn't want to."

And later: -

> "*Mr French* – So what is required is the bottom line for me. What does (the Claimant) want?
> *Claimant* – Mr French, we're going to sit here, and we're going to go round in circles.
> *Mr French* – No.
> *Claimant* – You've already answered this point.
> *Mr French* – I've answered it?
> *Claimant* – Yes, you said, all these people, Kuba, Merlin, Lena, Holly etc you are not going to take any action on them? So, the case is closed.
> ……

> *Mr French* – Okay so, then let be very clear. What you're actually asking for is for (the Respondent) to dismiss that list of people. Is that what you're asking for?
> *Trade Union Representative* – You haven't said that?
> *Claimant* – I haven't said that. I'm asking for, not a hostile working environment, now you are the person in charge."

86. Following the hearing, Mr French sent an email to Joanne Edrop on 20 December 2019 outlining some 'key aspects' of the appeal hearing. He stated the following, "I found that (the Claimant's) failure to attend welfare meetings and/or undergo a medical examination, the principal influence of a decision by Our Place to decide that he is unfit to continue his duties at Our Place, is upheld by the facts identified at the meeting. On that basis, I believe that (the Claimant's) dismissal should stand. I do believe, however, that Our Place should take (the Claimant) at his (current) word and fund a medical examination. I have made clear to (the Claimant) that Our Place will be led by experts as to who should be appointed to undertake that examination, however, I have confirmed that the examination will be at Our Place's cost and that we will do all we can to try to achieve an appointment before the planned date of the Tribunal", this being a reference to the hearing in claim no 1303155/18 listed to begin in January 2020 (pages 193 – 194).

87. On 19 December 2019, Mr French had written to the Claimant asking him to sign a consent form to allow the Respondent to approach his GP for a medical report (page 195).

88. On 9 January 2020, Kelly Flynn emailed the Claimant chasing the consent form and attaching another copy. She stated "I would like to make you aware that should we not receive the signed consent form by Monday 20 January then the appeal decision will be made based upon the information available and without a medical report" (pages 196 – 199).

89. On 12 January 2020, the Claimant emailed Kelly Flynn to say he had commissioned his own 'Medical Expert Evaluation' and he anticipated the report would be available before the hearing later that month in claim no 1303155/18. A copy of that report was at pages 45 – 67. The author was Dr Venkat Chetan Reddy Majjiga who stated that he was a Consultant Psychiatrist and that he had assessed the Claimant on 10 January 2020. The date of the report is 13 January 2020. The doctor stated he was 'not in receipt of the Claimant's GP records and treatment records.' He concluded that the Claimant's 'presentation is in keeping with a diagnosis of Other Phobic Anxiety Disorder.' He stated "(the Claimant) presents with the cardinal symptoms that can be associated with a Phobic Anxiety Disorder which is predominantly related to his fears and anxieties of the White British community… based on the available history and facts it is my opinion that trauma has disadvantaged

him in the likes of his personal life and career prospects as he is limited‘ as to where he can seek work preferring majority black/Asian communities.”

90. On 6 February 2020, Mr French wrote to the Claimant with his decision in relation to the appeal against dismissal. He did not uphold the appeal. He recorded that he had considered the Psychiatrist’s report and informed from this that ‘a return to work, either now or in the future is not-feasible given that a large number of personnel employed by Our Place Schools are White British.’

91. During his questioning of Joanne Edrop, on the afternoon of 24 July 2023, the Claimant asked her about the number of employees at the Respondent and their ethnicity. She explained that she had left the employment of the Respondent in April 2022 and could not recall. On the morning of the second day of the hearing, the Claimant produced new documents which were demographics on ‘Age, Ethnicity, Religion and Well-being’ for the areas of Sandwell, Worcester and the West Midlands. He proceeded to put questions to Sean McGuiness about these documents. Mr McGuiness said the Respondent currently had 37 staff and about 8-9 of these were from a BAME background. The Claimant put to him that there were a higher percentage of Sikhs in Sandwell than Worcester and McGuiness agreed that the documents produced by the Claimant seemed to demonstrate this. Whilst I allowed this questioning, I queried the relevance of it given I was not dealing with any complaint of race or religious discrimination.

92. In the course of his evidence, the Claimant suggested another potential reason why his dismissal was unfair, in addition to the 2 reasons he had given to Employment Judge V Jones and as set out in paragraph 4 above, namely that the Respondent should have considered placing him on medical suspension on full pay until the Lakeside building was open and functional and then offered him a role at that building.

Submissions

93. I heard oral submissions from both parties which I now summarise.

94. Mr Wheaton submitted that the Respondent had ‘bent over backwards’ to accommodate the Claimant before making the decision to dismiss. He referenced the numerous occasions the Respondent had written to the Claimant requesting fit notes, and when these were not provided, informing him of consequences of unauthorised absence which could be dismissal. The Respondent had written to the Claimant many times offering welfare meetings and asking him to comply with requests to obtain a medical report. The Claimant had failed to engage, sending only 2 emails to Joanne Edrop. The Respondent could not be expected to wait indefinitely for the Claimant to return to work, it had a business to run and needed to staff its enterprise.

95. As to the allegation that the dismissal was deliberately timed to interfere with the Claimant's preparation for the January 2020 hearing, Mr Wheaton said this could not be correct. The Respondent could have dismissed the Claimant earlier.

96. On the issue as to whether the Claimant could have been re-located to another centre this was never raised with the Respondent, either at dismissal or appeal stage. The Respondent's position was that the Claimant had only latched onto this as a potential argument, on learning at the hearing before Employment Judge V Jones that the Lakeside building was operational in April 2020. The Respondent could not have known at the dismissal and appeal stage that registration was going to be approved in April 2020 due to Covid-19. The Lakeside building is only 100 yards from the Orchard building. The Claimant did not want to work with some of his former colleagues and the Respondent could not ensure they would not come into contact with one another.

97. On the newly raised issue of a medical suspension, this was not something raised by the Claimant at the time of his dismissal or appeal. In Mr Wheaton's submission, this was something the Claimant was raising now with the knowledge of the opening of the Lakeside building.

98. I allowed the Claimant over an hour to make his submissions. He asked me to draw an adverse inference about Mr French's non-attendance as a witness. He said Mr French had left the country to avoid attending as a witness and to avoid the EAT making a finding of discrimination against an entity of which he had been CEO.

99. The Claimant challenged Joanne Edrop's credibility saying she had alarmed him and made him nervous when she turned up at his EAT hearing with Lena Graham. He said that she was 'confused, misinterpreting things and giving misinformation.' He said Joanne Edrop's practice had been to write to him chasing fit notes, he would send them, and she would thank him. He expected that practice to continue but when the Unless Order made by me on 24 September 2019 was complied with, Mrs Edrop moved to terminate his employment so that he would be preoccupied with a grievance or appeal rather than the up-and-coming hearing in January 2020. He argued she should have given him a final written warning to alert him that he was on a 'last warning.' He argued she should have 'reached out' to him and asked him if he would be interested in working at the Lakeside building and put him in there with a pupil and a BAME colleague.

100. The Claimant also argued in submissions, although he did not put this to the Respondent's witnesses, that he could have been offered a job working remotely, perhaps as a research assistant or an ambassador for the Respondent.

101. I allowed Mr Wheaton to reply on this point. He said there was no evidence such a role existed and that the Claimant's role with the Respondent could not be done remotely; it involved personal care.

The Law

102. Section 98 Employment Rights Act 1996 provides

> "(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) for the dismissal, and
> (b) that it is a reason falling with subsection (2)
>
> (2) A reason falls within this subsection if it –
>
> (a) relates to the capability … of the employee for performing work of a kind which he was employed by the employer to do so
>
> (3) In subsection 2(a) –
>
> "capability", in relation to an employee, means his capability assessed by reference to… health or any other physical or mental quality.
>
> (4)[Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

103. In long-term absence cases a Tribunal is usually looking to see that an employer has ascertained the up-to-date medical position, has consulted with the employee and has considered the availability of alternative employment. The Tribunal will consider how long can an employer be expected to keep a role open.

Conclusions

104. There is little dispute on the factual matrix in this case as the Respondent's attempts to consult with the Claimant during his absence are well

documented in the correspondence set out in the findings of fact. The Claimant's suspension was lifted on 21 December 2017. The Respondent was clearly expecting him to return to work at this point. In fact, he never returned to work and was absent (sometimes supported by fit notes, sometimes not) until he was dismissed on 20 November 2019, almost 2 years later. At the time of dismissal, the Respondent had been unable to engage with the Claimant as to the prognosis for a return to work. He had not complied with requests for meetings and had not agreed to requests for a medical report.

105. The Respondent had warned the Claimant if he failed to attend the meetings at which his continued employment would be considered, it could only take account of the information it had. That information was that the Claimant remained unwell and seemingly had no intention of returning to work. In those circumstances the dismissal was a fair outcome.

106. Turning to the specific allegations of unfairness made by the Claimant.

a. The decision to dismiss was made as a strategy to throw the Claimant off preparing his Tribunal case.

107. I was not persuaded by this. It can be seen from the correspondence that the Respondent had warned the Claimant about possible dismissal on various occasions in 2018 and 2019 on account of him not following the sickness absence procedures and not supplying fit notes. On 3 September 2019, before the hearing took place on 24 September 2019 where the Unless Order was made, Mrs Edrop wrote to the Claimant asking him to meet on 17 September 2019 and warning him one outcome of that meeting could be dismissal. He failed to attend. He must have known by the time of the hearing on 24 September 2019 that the Respondent was contemplating dismissal.

108. It is the case I made an Unless Order on 24 September 2019 and the Claimant complied with this. The Claimant's case appears to be that the Respondent was expecting him not to comply with the Unless Order, such that claim no 1303155/2018 listed for hearing in January 2020 would be struck out.

109. He contends it was only when he complied with the Unless Order, and the Respondent realised the January 2020 would be going ahead, that the Respondent moved to dismiss him to hamper his trial preparation. This argument is flawed. Firstly, the Respondent was clearly contemplating dismissal prior to the making of the Unless Order. Secondly, the Claimant complied with the Unless Order by the date specified 8 October 2019. Another almost 2 weeks passed before Mrs Edrop again invited the Claimant to another meeting scheduled for 30 October 2019. Again, the Claimant did not attend, and a further meeting was proposed for 5 November 2019 and again, the Claimant did not attend. The final invitation to meet was dated 7 November 2019, for a meeting on 12 November 2019. It is clear the Respondent was

giving the Claimant opportunities to meet. It was not rushing to dismissal to thwart his preparations for trial.

b. Dismissal could have been avoided if the Respondent had relocated the Claimant to another centre with a more diverse workforce. The Claimant identified this as being the new Lakeside centre.

110. At the date of dismissal and appeal the Lakeside centre was not open. It only opened on an expedited basis in April 2020 because of Covid-19. The Respondent could not have known this opening was going to occur as a result of a National Pandemic at the time of dismissal or appeal. The Claimant had made it clear he would not work at the only open location (Orchard) at the relevant time, due to his perception of colleagues who remained in employment and the toxic atmosphere. Even had Lakeside been open it was close in location to Orchard and the Claimant would have come into contact with people he did not want to work with. This simply was not an option.

c. The issue of medical suspension.

111. This seemed to occur to the Claimant during the hearing, no doubt as a result of being taken to the Respondent's policy which referenced medical suspension. It was not something he had mentioned at the Preliminary Hearing before Employment Judge V Jones. The Claimant was on long term sick, there was no reason for the Respondent to medically suspend him. As I have already noted as at the dates of dismissal and appeal the Respondent was unaware of when Lakeside might open. It would not have been reasonable for the Respondent to medically suspend the Claimant on full pay and await the opening of a centre when it had no guarantee of any specific date.

112. Finally, the matter of remote working. Again, this was not raised before Employment Judge V Jones, and it was not put to the Respondent's witnesses. There is no evidence that the Claimant was fit to work in any capacity at the time of dismissal, and there is no evidence that the Respondent, a fairly small enterprise, had any vacancies for remote workers.

113. For the reasons above, the claim of unfair dismissal fails.

Employment Judge Hindmarch

08 August 2023