EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss L Vaz	**v**	**The Diocese of Westminster Academy Trust t/a The Convent of Jesus and Mary Language College**

Heard at: Watford **On**: 5 to 8 February 2018
12 & 13 March 2018 (in Chambers)

Before: Employment Judge Bedeau
Members: Ms S Hamill, Mr R Leslie

Appearances

For the Claimant: In person
For the Respondent: Mrs B Huggins, Counsel

JUDGMENT

1. The claimant's unfair dismissal claim is not well-founded and is dismissed.

2. The claimant was, at all material times, a disabled person.

3. The claimant's claim of direct disability discrimination is not well-founded and is dismissed.

4. The claimant's claim of discrimination arising in consequence of disability is not well-founded and is dismissed.

5. The claimant's claim of failure to make reasonable adjustments is not well-founded and is dismissed.

6. The provisional remedy hearing listed on 16 July 2018 is hereby vacated.

REASONS

1. By a claim form presented to the tribunal on 20 March 2017, the claimant made claims of unfair dismissal, race and disability discrimination, arising out her employment with the respondent as a Lead Learning Mentor.

2. In the response presented to the tribunal on 13 May 2017, it is averred that the claimant was dismissed for reasons of capability. Allegations of discriminatory treatment being denied.

3. Before Employment Judge Hyams, at the preliminary hearing held on 16 June 2017, the Learned Judge ordered that the claimant should provide further information to the respondent by Friday 21 July 2017 in relation to her unfair dismissal, disability discrimination and direct race discrimination claims. Orders were also given for her to disclose her medical records as the issue of her disability was not conceded by the respondent.

4. There was a further case management held on 6 December 2017 by Employment Judge Wyeth. The claimant, before him, clarified the claims against the respondent as: unfair dismissal; direct discrimination because of race; discrimination arising from disability and failure to make reasonable adjustments. The issues are set out below as agreed between the parties.

The Issues

5. Unfair dismissal claim

    5.1 What was the reason for the dismissal? The respondent asserts that it was a reason related to capability which is a potentially fair reason for section 98(2) Employment Rights Act 1996.

    5.2 If capability was the reason for dismissal, did the respondent follow a fair procedure leading up to that decision?

    5.3 Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

    5.4 Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event and/or to what extent and when?

6. Disability

    6.1 The claimant relies upon a mental impairment of anxiety and depression.

    6.2 Does that impairment have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

    6.3 If so, is that effect long term? In particular, when did it start and:

6.3.1 has the impairment lasted for at least 12 months?

6.3.2 is or was the impairment likely to last at least 12 months or the rest of the claimant's life, if less than 12 months?

6.4 Are any measures being taken to treat or correct the impairment? The claimant has stated that she is not on any medication but has undertaken talking therapies in the past and has referred herself last week to a further talking therapy session/s.

6.5 But for that measure (talking therapy) would the impairment be likely to have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

6.6 The relevant time for assessing whether the claimant had/has a disability (namely, when the discrimination is alleged to have occurred) is from 11 March 2016 to 16 December 2016 (the date of the claimant's dismissal).

7. Section 13: Direct discrimination because of race

7.1 The claimant relies on the fact that she is mixed race, namely Jamaican, Tanzanian, Goan and Swiss.

7.2 The claimant says that her dismissal and the process leading up to it was less favourable treatment because of her race.

7.3 With regard to the dismissal, has the respondent treated the claimant, as alleged, less favourably than it treated or would have treated the comparators? The claimant relies on an actual comparator Ms Laura Normoyle, and a hypothetical comparator.

7.4 If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

7.5 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

8. Section 15: Discrimination arising from disability

8.1 The allegation of unfavourable treatment as "something arising in consequence of the claimant's disability" falling within section 39 Equality Act, is the claimant's dismissal. No comparator is needed.

8.2 Did the respondent dismiss the claimant because of the "something arising" in consequence of the disability?

8.3 Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the following:

8.3.1 As to the business aim or need sought to be achieved, the respondent says that the claimant was the only person performing that role and it could not continue with the level of disruption her absence caused.

8.3.2 As to the reasonable necessity for the treatment, the respondent says that there was no alternative to preventing further absenteeism.

8.3.3 As to proportionality, the respondent relies upon the above and states that dismissal was the appropriate step to take.

8.4 Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability?

9. Reasonable adjustments: section 20 and section 21

9.1 The claimant was not able to identify the precise nature of her reasonable adjustments complaint. She alleged that the respondent failed to make reasonable adjustments, in that, it:

9.1.1 Did not ignore her symptoms of stress and depression;
9.1.2 Did not discuss and/or implement reasonable adjustments during or after formal absence meetings and appeal hearing;
9.1.3 Did not provide mental health training for the senior leadership team;
9.1.4 Did not provide access to the grievance procedure;
9.1.5 Did not deal with the underlying causes of depression and stress;
9.1.6 Did not provide independent mediation for Mrs Freear; and
9.1.7 By not adhering to the stress management policy.

9.2 No provisions, criteria or practices and substantial disadvantages were identified.

10. Time/limitation issues

10.1 Any act or omission which took place three months less one day prior to the claimant commencing ACAS Early Conciliation is potentially out of time, so that the tribunal may not have jurisdiction.

10.2 To the extent that it may be relevant to any complaint of failure to make reasonable adjustments, yet to be clarified by the claimant, does the claimant prove that there was conduct extending over a period

which is to be treated as done at the end of the period? Is such conduct accordingly in time?

10.3 Was any complaint presented within such other period as the employment tribunal considers just and equitable?

The evidence

11. The tribunal heard evidence from the claimant who called Mr Jayesh Mistry, union representative.

12. On behalf of the respondent evidence was given by Mrs Geraldine Freear, former Head Teacher; Miss Karin Bornman, Assistant Head Teacher; Mr Dermot Haran, Deputy Head Teacher; Ms Danielle Peppiatt, Deputy Head of Inclusion; Mr Danny Finnegan, School Governor and Mr John Skinner, School Governor.

13. In addition to the oral evidence, the parties adduced a joint bundle of documents comprising of 422 pages. The claimant then produced on the first day of the hearing her bundle of documents numbered consecutively from the joint bundle, 423-747. References will be made to the documents as numbered in both bundles.

Findings of fact

14. The respondent is an Academy with over 1000 students employing 120 staff. At the material times the Head Teacher was Mrs Geraldine Freear who line managed Senior Leaders. The Academy is situated at Crownhill Road, Willesden, north west London.

15. It has an Inclusion team that provides welfare and pastoral care to students including sickness monitoring, academic progression, friendships, safeguarding and restorative justice.

16. The claimant commenced employment with the respondent on 5 January 2010 as a Lead Learning Mentor. Her line manager from September 2014, was Mr Walter Moscatelli, Inclusion Manager. He was line managed by Mrs Danielle Peppiatt, Deputy Head of Inclusion. She was part of the Inclusion team.

17. The respondent has a policy on sickness absence. In relation to long term absence, this is triggered by an absence lasting at least four working weeks which would lead to a Formal Absence Review Meeting. The Policy provides the following:

"10. Formal Absence Review Meetings

10.1 At least five working days before a Formal Absence Review Meeting, the Absence Reviewer shall send you an absence report:

10.1.1 Setting out your absence from work indicating the reasons given for the absence;

10.1.2 Setting out any suggestions made by you or the School to make reasonable adjustments to working arrangements that reduce your absence or assist your return to work;

10.1.3 Including copies of self-certificates, Statements of Fitness to Work from our Doctor and all medical reports including those from occupational Health.

10.2 At a Formal Absence Review meeting you will have the opportunity to:

10.2.1 Present any medical evidence in your possession;

10.2.2 Make suggestions about managing your return to work including any phased return to work or change in hours;

10.2.3 Make suggestions of other reasonable adjustments that could be made.

11.Formal responses

11.1 The Absence Reviewer may (in addition to making an Occupational Health referral) undertake the following form of responses:

11.1.1 Reasonable adjustments to working arrangements

These will vary on a case by case basis depending on the medical condition identified.

11.1.2 A first written caution

11.1.2.1 In the context of a persistent intermittent absence this is a caution that if you are absent from work for two or more days in the period of the next six months you will be at risk of a Final Written Caution.

11.1.2.2 In the context of a long-term sickness absence this is a caution that if you are not fully back to work within between 4 to 12 working weeks there will be further Formal Absence Review Meeting. The precise number of working weeks will be set by reference to the available medical evidence.

11.1.3 A final written caution

11.1.3.1 In the context of persistence intermittent absence this is a caution that if you are absent from work at all in the period of the next six months you will be at risk of a dismissal.

11.1.3.2 In the context of long term sickness absence this is a caution that if you are not fully back to work within between 4 to 12 working weeks you will be referred to

the Final Absence Reviewer which could lead to termination of employment. The precise number of working weeks will be set by reference to the available medical evidence.

11.2 The Final Absence Reviewer may (in addition to the responses available to the Absence Reviewer) undertake the following response:

11.2.1 Dismissal with notice

In coming to such a decision in relation to the case of persistent intermittent absence the Final Absence Reviewer will consider:

(a) The total absence and pattern of absence;

(b) The available medical prognosis;

(c) Advice from Occupational Health;

(d) The reasons advanced for the absence;

(e) How long the employee has worked for the school;

(f) Is the job a key job? If so, how long can the school effectively function without that contribution;

(g) What additional demands has the persistent intermittent absence generated for other employees and the school;

(h) Whether other reasonable adjustments have been considered;

(i) Whether other reasonable adjustments have been made and if so whether they were effective.

11.2.2 In coming to such a decision in relation to a case of long-term absence the Final Absence Reviewer will consider:

(a) The available medical prognosis;

(b) Advice from Occupational Health;

(c) Is complete recovery likely and, if so, when?

(d) How long the employee has worked for the school;

(e) Is the job a key job? If so, how long can the school effectively function without that contribution;

(f) What additional demands has the absence generated for other employees in the school;

(g) Whether alternative employment or a transfer is available, suitable and acceptable;

(h) Whether ill-health retirement has been explored;

(i) Whether other reasonable adjustments have been considered;

(j) Whether other reasonable adjustments have been made and if so, whether they were effective.

11.3 You may appeal against a written caution by writing to the Clerk to Governors within five working days of being sent the caution.

11.4 You may appeal against a dismissal on notice by writing to Clerk to Governors within ten working days of being sent the notification of termination." (429-437)

18. The Inclusion team is part of the Enhanced Learning Department. They provide support for pupils with emotional and behavioural difficulties. The claimant was part of the school's support staff. In or around January 2013, two members of her team left and were not replaced. She then became responsible for the overall planning and co-ordination of the mentoring department's work; one-to-ones with pupils; the Homework Club; handling safeguarding concerns; managing Anti-bullying Committee and was Restorative Justice Co-ordinator. Restorative justice involves facilitating a resolution of a dispute amongst pupils by the pupils themselves.

19. In September 2013 a new structure was put in place for Inclusion and Enhanced Learning Development. In the new structure the new Inclusion Manager had a joint role of Inclusion Manager/Learning Mentor. As part of her role as anti-bullying committee co-ordinator, the claimant planned, managed and facilitated the whole school initiative for anti-bullying week 18 to 22 November 2013 entitled Random Acts of Kindness. In July 2014 the volunteer mentors were trained and supervised by the claimant.

20. The school has achieved flagship status for the Inclusion Quality Mark as the support it offers to the pupils is exemplary.

21. We find that there was no challenge to the claimant's competence and ability to carry out her duties. The concern was that she would spend time with pupils who were themselves being seen by other members of staff and was, therefore, duplicating the service provided by the school, which resulted in some pupils getting no support.

22. The claimant was absent in 2013 for ten days due to a stomach bug and flu-like symptoms. On 29 January 2014, she was issued with a first caution regarding her sickness absence. She was absent from work due to stress for 18 days from 23 September to 16 October 2014. Following her return, she met with Mrs Geraldine Freear, Head Teacher, on 20 October 2014. Mrs Freear has since retired.

23. The claimant also met with Ms Karin Bornman, Assistant Head Teacher, on 21 October 2014 and was instructed to not engage in extra work such as the running of a Homework Club after school. Instead she was to direct pupils towards the Homework Club run by the Enhanced Learning

Department and the school library. She was also instructed to physically walk the pupils to the alternative venues for the purpose of showing and bringing them to where they should study after school and do their homework. This was to take into account the claimant's concern that the pupils may feel that she was abandoning them as she had a good relationship with them. It was further agreed that the claimant would focus on three key roles which were:

1. Check-in visits to morning registration;

2. One to one meetings;

3. Two small behavioural groups of eight pupils, key stage 3, once a week each.

24. We find that the respondent took these steps to reduce the claimant's work load in order to minimise her stress.

25. The claimant was absent from work due to sickness from 25 May to 15 July 2015, a period of 33 days and returned to work on 16 July 2015, two days before the school's summer holidays. She was written to on 8 July 2015 and invited to attend a Formal Absence Review Meeting on 16 July at 9.00am at the Academy. Prior to the meeting she was seen by Dr James Preston, Consultant Occupational Physician, on 15 July 2015, who prepared an Occupational Health report. The claimant said to Dr Preston that there were many issues which combined to lead her to feel stressed, emotionally drained, tearful, isolated and lacking in energy. The time away from work proved helpful to her and her feelings of wellbeing had improved. The doctor then wrote;

> "However, unless her perceptions are fully understood and can be addressed in some way, there is a chance that, simply returning to work will lead her stress levels to rise once again. As things stand at the moment she remains anxious but I think this is appropriate to her circumstances. It is my feeling that, if a mutually agreeable solution can be found, her wellbeing would rally very quickly and she would be able to return to work without any further medical intervention.
>
> I would therefore suggest that you undertake a stress risk assessment using the HSC Management Standards for stress in the workplace principles. These outline six domains under which stress can be generated. These are as follows: demands, control, role, support, relationships and change. Further information is available on their HSC website and tools are available for an employer, to help undertake stress risk assessments using a template built on these principles. In my view, any stress risk assessment should be undertaken as an exercise separate to any management meetings to deal with implementing sickness absence policy and procedure. This will help with the aim that the meeting being non-confrontational and take place on a peer to peer transactional basis, so there can be an explorative and open discussion about the work situation. This kind of exercise will help you better understand Miss Vaz's perception and allow you to determine where you have agreement and where common ground can be found. Equally if differences are identified these can be communicated and acknowledged. This will be the starting point for thinking about work orientated adjustments and solutions.

> In terms of a return to work date, this is best determined once the above process has been initiated. Contact with the school will be necessary to pave the way for a successful return to her normal duties and in my view Miss Vaz is fit for that process to start as soon as possible. This would include attendance for any necessary meetings." (72-73)

26. In light of the Occupational Health report, Mr Haran asked Ms Bornman to conduct a risk assessment. The scheduled risk assessment meeting was due to take place on 17 July 2015, the last day of term before the summer holiday. He emailed the claimant stating that a meeting had been arranged for her to meet with Ms Bornman at 2.00pm that afternoon. The claimant told us in evidence that she sought advice from the Health and Safety Officer of her union and responded to Mr Haran's email stating that she was unable to attend the scheduled meeting as she was still adjusting back to work after a long period of absence due to work related stress and felt that it was important to be prepared. It was both Mr Haran and Ms Bornman's view that they wanted to put everything in place prior to the commencement of the next academic year in September, having regard to the Occupational Health report.

16 July 2015 written outcome

27. On 16 July 2015, a meeting was held attended by Mr Haran and Ms Bornman and the claimant, during which the claimant's absence record was discussed and she was issued with a first written caution. She was warned that if her absence from work was two or more days due to sickness in the following six months, she was at risk of a final written caution. It was also discussed that the respondent intended to conduct a stress risk assessment using HSC Management Standards for Stress in the Workplace Principles. The discussion was followed up with a letter dated 17 July 2015. (74)

28. The claimant did not attend the Stress Risk Assessment meeting with Ms Bornman. She told us during her evidence that it was unreasonable for her to attend the meeting at 2.00pm when Mrs Freear had released the staff for their summer break. This reason was not given to the respondent by her at the time.

29. As a result of her non-attendance, she was sent a letter by Mr Haran dated 24 July 2015, advising her that he had been asked to prepare an investigatory report into her conduct. It being alleged that she had failed to follow school procedures in relation to her return to work and had failed to follow a reasonable instruction, namely to attend a meeting to discuss her return to work adjustments. She was informed that a meeting was scheduled to take place on Monday 7 September 2015 at 3.00pm with Mr Haran and was advised of her right to have a trade union representative present or a work colleague. (75-76)

30. On 17 September 2015, Mr Haran wrote informing her that he had completed his investigation and had prepared an investigation report which he enclosed. He invited her to attend a formal disciplinary meeting on Thursday 1 October at 1.00pm at the Academy, chaired by Mrs G Freear,

Head Teacher. Also present to advise Mrs Freear would be Mr M Pittendreigh, Assistant Director of Education/Diocese of Westminster. Again, the claimant was advised of her right to be accompanied.

31. From Mr Haran's investigation report he concluded that having met with the claimant on Monday 7 September in the company of Mr D'Mello, Site Supervisor and work colleague, and having interviewed Ms Bornman, he concluded in respect of the first allegation that the claimant had failed to follow procedures in that she did not attend her return to work meeting on 16 July. Mr Haran concluded that there had been a misunderstanding and that the claimant genuinely believed that her meeting with him had been in place of her meeting with Mrs Freear. The allegation was, therefore, not fully upheld.

32. In relation to second allegation of failing to follow a reasonable instruction to attend the meeting with Ms Bornman on 17 July, this was upheld by Mr Haran. He concluded that the claimant should have met with Mrs Bornman at 2.00pm as instructed as the meeting was arranged following the Occupational Health report that there should be a stress risk assessment using the HSC Management Standards for Stress in the Workplace Principles. (81-81b)

Disciplinary hearing 5 October 2015

33. A formal disciplinary meeting was held on Monday 5 October 2015. In attendance were Mrs Freear; Mr Pittendreigh; Mr Haran; the claimant; and Mr A Murray, union representative. The meeting only addressed the second allegation. Mr Haran stated that Ms Bornman had informed him that the claimant had left the school on 17 July. The claimant gave her account as to why she was unable to attend the meeting. She referred to having sought advice from the Health and Safety Officer for the union who advised her that she should complete the risk assessment form in the new academic year. She said that she advised Ms Bornman that she was not feeling well and was going to go home. She had completed the stress assessment form during the holidays and she wanted to do it properly. Had she attended the meeting at 2.00pm on 17 July, it would have aggravated her condition.

34. Mr Haran felt that it was important to make a start on the form as the school was entering the summer holidays. He and Mr Murray summarised their case.

35. Mrs Freear then concluded by saying that a letter would be sent to the claimant within five working days. (84-85)

36. In her letter dated 12 October 2015, she decided against imposing a formal sanction and offered the claimant management advice. She then wrote;

> "I believe it was entirely reasonable that Ms Bornman wanted to see you on the last day of term, within directed time, in order to initiate a conversation about the stresses you feel at work. She was anxious that that process should at least commence before the start of the holiday, believing that this would be in your interests and those of the school. If you

> felt unable to take part in this meeting, I would advise you that it would have been more appropriate for you to have seen Mr Haran or Ms Bornman before leaving school and offer a suitable apology for your inability to attend. The apology was not forthcoming even at our meeting.
>
> Of paramount importance is the need to urgently review your practices in order that you are better able to manage your workload effectively. This must involve a review of your workload, and include adherence to instructions about tasks you should take on and those which are not appropriate. It may also include a move of your working base to be nearer to your line manager and the Inclusion Department. Again, this will be with the intention of monitoring and regularising your workload.
>
> You should urgently meet with Ms Bornman and your line manager so that these discussions can be completed. I will be asking for a report on the outcomes of those discussions." (86-87)

37. On 23 October 2015, the claimant sent by email her completed stress risk assessment to Ms Bornman. (77-80, 88)

38. We find that the claimant and Ms Bornman had completed the stress risk assessment process to a satisfactory conclusion and that the claimant was effusive in her praise of Ms Bornman and the support she gave her. One of the outcomes of the support planning through the risk assessment, was the clear definition of the claimant's role. Ms Bornman and the claimant agreed that the claimant would focus only on three areas: one-to-one mentoring with a limit of the claimant's case load to be checked regularly through the respondent's computer log; small group and check-ins.

39. It was, however, clear that the claimant was still engaged in restorative justice work which was the role of the Pastoral Support Managers. She was written to on 5 February 2016 by Ms Bornman about two girls who the claimant gave support to. They did not appear on the respondent's intervention log and one of them, the claimant stated, had engaged in a restorative justice session. The claimant was invited to discuss with Ms Bornman a way of developing opportunities for girls who wanted to drop-in to see her. Ms Bornman suggested that it could be done during the lunchtimes, but had to be carefully monitored and recorded. She reminded the claimant of the three aspects of her role, already referred to above. (98)

<u>Mrs Freear's alleged "scowling" at the claimant on 2 March 2016</u>

40. The claimant alleged that on Wednesday 2 March 2016, National Citizenship Service spoke at year 11 assembly at 8.40am. She had a session at 9.00am. During the session Mrs Freear looked at her through her office window and walked on. Moments later, she returned and stood at the window "scowling", visibly angry, but did not enter her room or contact her. Mrs Freear's issue, the claimant alleged, was that she, Mrs Freear, was not informed that NCS were coming in. It was not the claimant's responsibility and the claimant had discussed NCS coming in during a weekly Inclusion meeting in the autumn term. This was followed up by Miss Claudia Paisley, Head of year 11, having to explain the position to Mrs

Freear. Her response was conveyed to the claimant by Miss Paisley and Ms Bornman.

41. The claimant was absent from work from Friday 4 March to 10 March, a period of five working days. She alleged that her absence was due to the incident on 2 March 2016 when Mrs Freear "scowled" at her.

42. She returned to work on Friday 11 March and had a return to work meeting with Mr Haran. She explained to him that the reason for her absence was work related stress triggered by Mrs Freear's behaviour towards her. It was not what Mrs Freear had said, but how it was delivered that was the trigger. She stated there was lack of clarity from senior management regarding her role. She named Mrs Peppiatt and Mrs Freear. She gave Mr Haran a copy of her health issues and work concerns. Mr Haran asked her whether she would like to meet with Mrs Freear and Ms Bornman. She replied that a restorative format mediation with an independent person would be the preferred course of action. Mr Haran agreed to have a look at her proposal and would give it some thought and said that he would talk to Mrs Freear the following week.

43. Mr Haran had arranged a meeting with Mrs Peppiatt on 18 March 2016, the new Manager of Inclusion, to further review the claimant's role. He also communicated the content of the meeting with the claimant to Mrs Freear as part of his responsibility as Deputy Head.

44. Mrs Freear was quite upset at being accused of being the trigger for the claimant's work-related stress as the claimant's pattern of absence began in September 2014 before the alleged 2 March incident. She denied scowling at the claimant and believed that it was a reference to the claimant having allowed a pupil into a part of the building the pupil was neither invited nor permitted to be in.

45. Following Mrs Freear's conversation with Mr Haran, she emailed the claimant copying Mr Haran on 16 March 2016 at 09.56 and wrote;

> "Louise
> I have received the report and I am concerned by what you are saying. You allege that I am the reason you have been off work and claim that I'm 'angry' with you.
>
> I find your claims complete fabrication and suggest you make an appointment to see me or take out a grievance. This needs to be done as a matter of urgency as I find your claims completely unfounded and certainly not grounds for your failure to attend work." (101)

46. The reason why Mrs Freear sent the email, she told us in evidence, was that she "thought it was appropriate at the time not to let a member of staff say I caused her absence. I felt very strongly about it at the time." In her witness statement she stated that she made no reference to the claimant's condition being a complete fabrication, but said that the claimant's allegation was the fabrication and that she was angry with her because of it.

47. The following day, 17 March 2016, the claimant commenced a period of sickness absence and did not return to work.

48. Mr Haran wrote to her on 23 March 2016 inviting her to an Absence Review Meeting on 14 April at 2.30pm. He stated that she had not met the standards required in the first written caution issued to her on 16 July 2015. He reminded her of her right to be accompanied. He then wrote:

> "If you consider yourself to be a person with a disability and there are reasonable adjustments you believe I can make to accommodate your disability in relation to the operation of the sickness absence procedure, please let me know as soon as possible." (101a)

49. The meeting was rescheduled to take place on 21 April 2016 as her union representative was not available. The claimant attended in the company of Mr Jayesh Mistry, her representative. Notes were taken at the meeting. The claimant's doctor certificate stated that she was unfit for work from 13 April to 16 May 2016. She said that she had worked hard with Ms Bornman in producing the stress risk assessment and was anxious to return to work, but wanted to be fit to be able to do so. She wanted clarity in relation to her work with the key stage 4 girls. She said that she was spending some of her time with her mother and father and was due to restart counselling sessions. Mr Haran said in evidence that the claimant was too upset and stressed to return to work which was caused by Mrs Freear. The claimant confirmed that she would be submitting a grievance. (108)

50. The claimant's grievance dated 20 April 2016, comprised of allegations principally against Mrs Freear and her behaviour. The claimant made specific reference to the incident on 2 March 2016 and asserted that because of Mrs Freear's behaviour, she suffered from sleepless nights and was constantly feeling nauseous and anxious. She challenged Mr Haran's letter dated 23 March 2016, in which he stated that she had not met the standards required following a caution on 16 July 2015 inviting her to the meeting on 14 April. She expressed confusion because she did not receive a first written caution on 16 July. On that occasion she received no written outcome and proceeded to comply with the recommendations by Occupational Health with the assistance of her line manager Ms Bornman. There was a hearing held on 5 October 2015, when no further action was taken save for receiving management advice from Mrs Freear. She further claimed that she was protected under the Equality Act 2010. (103-107)

51. In his letter dated 5 May 2016, Mr Finnegan, Chair of Governors, wrote to the claimant confirming that he had received her grievance, but only pages 1, 5 and 9 and the supporting documents. He asked her to provide him with a full copy of her grievance and upon receipt, he would arrange a resolution meeting. (109)

52. Dr Preston prepared a further Occupational Health report dated 13 May 2016, in which he wrote that the claimant was suffering for work related anxiety and stress. In reply to the question "3. What steps the employee and the

employer can take to facilitate improvement in attendance or full return to work?", Dr Preston replied;

> "Miss Vaz did become quite distraught during my consultation with her as she discussed the work situation. It is clear that it is an emotional subject for her and therefore any engagement will need to be conducted in such a way that takes this into account. I therefore suggest that you seek ways to take matters forward as sensitively and supportively as you can. It is in the interests of those concerned to work towards a resolution."

53. He had no specific recommendations in relation to adjustments. He stated that the claimant was in regular contact with her general practitioner and as regards treatment options, she had been referred to the local psychological services for support. She had been assessed and was scheduled for treatment to start soon. He hoped that it would help support her stress and anxiety symptoms. (110-112)

54. On 13 June 2016, Mrs A D Trapp, School Business Manager, wrote to the claimant informing her that her entitlement to full pay during sickness had come to an end and that from 19 June 2016 she would be on half pay. This was in accordance with the NJC's terms and conditions. (113)

55. Mr Finnegan wrote to the claimant on 15 June 2016, stating that he had not received a copy of the completed grievance document. Consequently, he was unable to consider her grievance and invited her to submit the complete document within the next five working days or no further action would be taken. (115)

56. It would appear that the claimant wrote to the respondent on 20 June 2016 in which she stated that because of her state of health she was unable to pursue her grievance. The letter was acknowledged by Mr Finnegan in his reply to her on 28 June 2016, in which he expressed the hope that her condition would improve in time and would be prepared to consider her grievance when she was fit and able to continue with it. (116)

57. Dr Preston submitted a further Occupational Health report dated 19 July 2016. In answer to the question whether the claimant was fit for work, he replied;

> "As I discussed in my report dated 13 May 2016, there is a work related situation that is creating anxiety and a sense of foreboding for Miss Vaz in contemplating a return to work in advance of some form of process to pave the way for a return. Therefore, although her absence is couched in medical terms (stress and related symptoms), it is better to use a construct such as 'readiness to return' rather than 'fitness' to return. That readiness to return will be when she has the necessary confidence in returning without engendering the symptoms of anxiety and foreboding that she currently describes. The only way to achieve this will be through some form of non-medical process that I have suggested to you previously. My understanding is that there has been no engagement with Miss Vaz since I last wrote to you on 13 May 2016, therefore it is difficult for me to expand further on a situation that is in stasis. Although Miss Vaz has now received some input from psychological services, this has not changed her thoughts and feelings with regards to work. Therefore, the advice in my report dated 13 May 2016 still applies."

58. He confirmed that the claimant was fit to attend a management discussion at work, but cautioned that the respondent would need to proceed in a sensitive and supportive fashion as she would become easily upset when discussing work related matters. (118-119)

Invitation to a Formal Absence Review meeting on 14 September 2016

59. A letter dated 7 September 2016, was sent on behalf of Mr Haran, to the claimant inviting her to a Formal Absence Review meeting scheduled to take place on Wednesday 14 September at 3.30pm. It stated that the reason for the meeting was because she had been off work due to illness since 17 March and there had been no improvement. It further stated that she had been issued with a first written warning in July 2015. Attached to the letter was an absence report sent in compliance with the respondent's Sickness Absence Policy and Procedure. The claimant was informed in the letter that the meeting was an opportunity for her to present any medical evidence; make suggestions about managing her return to work including any phased return or change in hours; and make suggestions for reasonable adjustments. (120)

60. Mr Mistry emailed Mr Haran on 12 September 2016 requesting that the meeting be held at a different venue as the claimant had become upset and had broken down during an earlier meeting held at the school. That request was acceded to and the meeting was held at Newman College, a nearby school. (121)

61. Present at the meeting on 14 September 2016 were the claimant, Mr Mistry, Mr Haran and Mr Pittendreigh. From the notes of the meeting Mr Haran explained that it was convened as a stage 1 absence meeting following the length of time the claimant had been off work. The claimant and Mr Mistry expressed concern that no contact had been made with her while she was on sick leave. Mr Haran explained that it was because she had lodged a grievance, but as only some of the pages were received, a grievance meeting had taken longer than it should. The claimant then stated that she had decided not to continue with her grievance. Mr Haran stated that no contact would be made while the grievance was in process. This was supported by Mr Pittendreigh. She and Mr Mistry again repeated that it was wrong that no contact had been made while she was on sick leave. The meeting had to be adjourned as the claimant had become very emotional.

62. When she and Mr Mistry returned they went through their version of events, namely the disciplinary process; Mrs Freear's behaviour; the claimant's return to work; the meeting with Mr Haran; the email from Mrs Freear; the absence of support with the claimant's workload; lack of clarity over her workload and the fact that the grievance was submitted in whole with all the pages.

63. Mr Pittendreigh then explained that "as boss it was up to Mrs Freear how she spoke to people." He also said that it was Mr Haran's responsibility to pass

information on to Mrs Freear which he did after the claimant's return to work in April.

64. Mr Haran made the point that a lot of support had been given to the claimant with her workload and that Ms Bornman had worked hard with her to ensure that her workload was both manageable and clear.

65. Mr Pittendreigh then asked the claimant and her representative what outcome they wanted. The reply was a mediated meeting with Mrs Freear. His response was to decline the proposal by saying that the Head Teacher did not have to have a mediated meeting just because someone disagreed with her and does not like what was said. At that point the claimant became very emotional necessitating an adjournment. (122)

66. It was apparent to this tribunal that the claimant was very emotional throughout the meeting as Mr Haran, in his evidence said that she "found the meeting very upsetting, sobbed and was unable to speak. It was clear that Louise was not in a fit state to return to work."

First written warning 27 September 2016

67. Mr Haran wrote to the claimant on 27 September 2016 giving the outcome of the meeting that he was giving her a first written warning. He then wrote;

> "If you are not fully back to work within four weeks then you will be subject to a further Formal Absence Review meeting which may result in a final written warning."

68. He informed her that she had the right to appeal his decision and should she wish to do so must notify the Clerk to Governors within five working days of the date of his letter. (123)

Claimant's appeal letter dated 1 October 2016

69. In her letter dated 1 October 2016, the claimant appealed against the decision. She stated that she had been suffering from depression and anxiety since October 2014 and gave a chronology of events from her return to work on 11 March 2016. She again referred to Mrs Freear's treatment of her on 4 February 2016, when she was told that she was not to see year 11 students; the incident on 2 March and events which followed; Mr Pittendreigh's statement that Mrs Freear could say whatever she wanted as she was her boss; that the Occupational Health reports were not discussed and no adjustments suggested despite the respondent being made aware that she was suffering from depression and anxiety since October 2014; and that Mr Haran was accountable for allowing Mr Freear to behave in the various ways towards her. She asserted that she was protected under the Equality Act 2010 and that reasonable adjustments should have been considered to enable her to have equal access to the respondent's services; support with large projects; increased frequency of supervision, counselling, support to prioritise her work; to allow her to focus on a specific piece of work; provide a job coach; provide a buddy or mentor; to provide mediation if there were difficulties between colleagues; and to provide non-judgmental

and proactive support to those who experience mental health issues. Further, that the respondent should ensure that all line managers have information and training about managing mental health in the workplace. She asked that the respondent to explain why it failed to make reasonable adjustments in the first place. She then gave Mr Mistry as her point of contact. (124-129)

70. The appeal against the first written warning was held on 4 November 2016. In attendance were Mr Pittendreigh; Mr Haran; Mrs J Collins, Governor; the claimant; Mr Mistry and Mrs S Halal-Singh, note taker. The meeting was, however, adjourned as Mr Mistry raised concerns about the impartiality of Mr Pittendreigh who was there apparently to advise both Mr Haran and Mrs Collins. He also objected to the impartiality of the note taker. (132)

Appeal hearing on 18 November 2016

71. The appeal was heard on 18 November 2016. Mr Adam Leith, Solicitor, was present to advise Mrs Collins. Mrs Halal-Singh was not present. Detailed notes were taken at the meeting. The claimant and Mr Mistry expanded on the grounds of appeal. She was questioned by Mr Haran and by Mr Pittendreigh. Mr Haran then presented the respondent's case and was questioned by Mr Mistry. Both Mr Haran and the claimant gave their closing statements. At the end of their submissions, Mrs Collins asked the claimant whether she felt she had a fair hearing. The claimant replied by saying that she had been dealing with stress since 2014 and there was a lot to cover. She was, however, grateful for the opportunity to discuss her case and be listened to. The session then closed. (135-141)

Appeal outcome dated 25 November 2016

72. Mrs Collins wrote to the claimant on 25 November 2016 giving her outcome. She was satisfied that overall the process followed by the school was fair. The claimant had been supported prior to her period of sick leave. The school was cautious about contacting her after she had lodged her grievance and that Mr Haran sought and considered Occupational Health advice. Mrs Collins then wrote;

> "I acknowledge that the discussion at the Formal Absence Review Meeting on 14 September was not as full as it could have been. However, at that point you had been absent from work for almost six months. Ordinarily a Formal Absence Review Meeting would be triggered after four weeks of continuous absence. I have considered the Sickness Absence Policy, which states that it is intended to balance the welfare of employees with the requirement of the Academy to deliver an effective education to its pupils. On balance, I consider that the school was justified in giving you a first written caution.
>
> I therefore reject your appeal, which means that the first written caution will stand.
>
> There is no appeal against this decision." (142)

73. In Mr Danny Finnegan's letter dated 28 November 2016, he invited the claimant to a Final Absence Review Meeting scheduled to take place on 12 December at 5.00pm. He wrote the following:

> "Invitation to Absence Review Meeting with Final Absence Reviewer.
>
> I note that your appeal against your final written caution on 27 September 2016 has not been upheld.
>
> Accordingly, you are invited to a further Formal Absence Review Meeting on Monday 12 December at 5.00pm…. the Final Absence Reviewer for the purpose of the school's Sickness Absence Policy and Procedure is Mr Danny Finnegan.
>
> Please note that, in addition to the formal responses of (i) making reasonable adjustments to your working arrangements, (ii) issuing a final written caution, the Final Absence Reviewer may, at this stage of the process, terminate your employment in accordance with the provisions of your contract of employment."

74. The claimant was advised of her right to be accompanied at the meeting and to inform Mr Finnegan, Governor, of any reasonable adjustments to be made if she considered that she was suffering from a disability. (143)

75. Mrs A D Trapp, School Business Manager, wrote to the claimant on 1 December 2016, to inform her that her entitlement to half pay during sickness absence, was due to come to an end on 19 December 2016 when her pay would be reduced to nil. (144)

Final Review meeting 12 December 2016

76. In attendance at the Final Absence Review Meeting were Mr Finnegan; Mr Andrew Potts, Advisor to Mr Finnegan; Mr Haran; Ms Mary Ryan, Solicitor Advisor to the Academy; Mr Mistry; and the claimant. Detailed notes were taken. Initially Mr Mistry expressed some concerns about the true purpose and process of the meeting. He was not aware that one possible outcome might be the claimant's dismissal as he believed that the meeting was to review the claimant's absence, hear evidence and make a decision on how to proceed. Both Mr Potts and Mr Finnegan noted Mr Mistry's concerns but stated that the meeting would go ahead under the proposed structure. Mr Mistry's application for an adjournment was not granted. He, later agreed that Mr Finnegan would make a decision based on the discussions and, on that basis, he, Mr Mistry, was happy to proceed.

77. Mr Haran then presented his case setting out the supports given to the claimant and the restriction imposed on her work covering the three areas already referred to. He outlined her sickness absence history and the content of the Occupational Health reports. He stated there had been a long period of time during which the students had been without the services of a full-time mentor. Some of the girls faced real needs and challenges. The claimant absence had an impact on the school community as she was dealing with the most vulnerable and challenging students and they were not getting the support they needed. There was a loss of expertise and her

absence increased the workload of other staff. Several meetings had been arranged and there was a breakdown of professional trust and confidence. The college had considered carefully the need to take into account both the welfare of its employees and the requirements of the Academy to deliver an effective education to the students.

78. Mr Haran was then questioned by both Mr Mistry, Mr Finnegan and the claimant. Mr Mistry asserted that the stress risk assessment was not complete and it had not been reviewed. The claimant stated that she had not had a Performance Management Review in three years. She said that she had worked very hard on the stress risk assessment and it had made a difference. The fourth column of it was completed in October and it had not been revisited since then. She said that she had requested her personnel file and performance management reports but they had not been included. Mr Mistry asked Mr Haran whether he had reviewed the Occupational Health reports during the Sickness Management Meeting to which Mr Haran replied that they were touched upon, but not as extensively as it might have been because the claimant had become very distressed. Sufficient discussion and consideration of the Occupational Health reports were made to enable the school to issue a warning.

79. Mr Potts asked Mr Haran to clarify what was meant by a breakdown in relationship with the claimant. Mr Haran explained that it was the relationship between the claimant and the Head Teacher.

80. The claimant presented her case and read out an email from Mr Freear suggesting that she, that is the claimant, should seek a meeting with her or take out a grievance. She asserted that the email exacerbated her condition and that she had been absent from work since then.

81. Mr Mistry said that the school had not dealt with the claimant's absence fairly and had already made the decision to dismiss her. It had refused a request from the claimant to have mediation with a neutral party to resolve the issues and move forward. Comments made by senior staff and the behaviour of the school caused further relapses. He stated that the school did not go far enough in its care nor did it recognise the claimant's needs sufficiently and neither did it support her and that Mr Haran in response to a question put to him was unable to state whether the claimant came within the provisions of the Equality Act. Mr Mistry suggested mediation with an external mediator such as ACAS.

82. Mr Haran commented that the claimant had written in her letter dated 1 October setting out her grounds of appeal, that she no longer wanted a meeting with Mr Freear.

83. Mr Haran and the claimant then gave their closing submissions.

84. Mr Finnegan asked the claimant, if there were any alternative positions at the school would she consider taking up one of those positions? The claimant replied "Yes" as she believed the demands of her substantive role were too great.

85. Mr Potts then outlined the options available to Mr Finnegan as the Final Absence Reviewer which were: to defer decision and review at a later stage; issue a warning; issue a final warning; and dismiss with notice.

86. Mr Finnegan confirmed that he would consider the issues raised and would inform the parties of his decision within five working days. (145-149)

The claimant's dismissal - 16 December 2016

87. He wrote to the claimant on 16 December 2016, setting out his outcome. He stated that management explained that she had been ill since 16 March 2016 and that the Occupational Health Doctor had advised that the issues causing her to remain away from work were essentially managerial. Mr Haran had stated that her current illness was having a significant impact on the function she had at the school in mentoring pupils who required assistance. Her work colleagues had taken on her responsibilities in addition to their own. Mr Haran had concluded that the length of time she had been absent and the likelihood of her returning to give regular and efficient service was unlikely and that in his view, the appropriate course of action would be dismissal with notice.

88. Mr Finnegan then addressed the claimant's response. He wrote that she had informed him that the reasonable adjustments she set out in her appeal would enable her to return to work. She felt that the Occupational Health reports and risk assessments had not been considered earlier and that it was unfair. She felt that a decision had been taken to dismiss her and was pre-determined.

89. Mr Finnegan then wrote the following:

> "I considered very carefully both the Occupational Health reports that had been tabled. It seemed clear that the operative reason for your absence related to managerial issues and not direct medical issues. There was some reference to mental health issues within the report, in terms of these being something which were additional and outside of the stress at work, it being agreed that this was caused by a managerial situation at the school. You did not refer me to any medical facts or evidence that were mentioned in the report and so the basis of the medical evidence that I had was that contained in the two reports as well as your sick notes which also recorded your reason for absence as work related stress. In terms of determining whether a complete recovery was likely I felt that the relevant issue related to the viability of the reasonable adjustments that you had proposed. However, I did consider that in addition to the current period of absence there had been previous periods of ill health prior to the current one.
>
> It seemed agreed that your role is a key job with much responsibility attached to it. Your role is very important to the pupils that use your service as it provides an important pastoral service which assist those pupils to better access the curriculum. The current situation, is again by agreement not entirely satisfactory as other members staff are having to cover for your absence and it is likely that a full reproduction of your role is not taking place which has a concomitant negative impact of this important pastoral position.
>
> The adjustments which you put forward as being beneficial to your return where headed by the suggestion of another person being allocated to you so that they could assist you in

the event that one or more pupils had to be removed from a group work setting. Mr Haran indicated that there was neither the budget nor the flexibility in the staff structure to enable this to take place because of the shrinking budget which already has other calls upon it.

Adjustments that had been deployed in the past including working closer than usual with your supervisor to enable support to be close at hand; exercising a tight control of your workload; moving areas of your responsibility elsewhere; ensuring that you only had three areas of work to ensure your workload was manageable; being given time off to attend counselling sessions; monitoring of your workload; given the support of colleagues and the formal risk assessment process that was designed to reduce or distinguish any work related stress that was present. I was also told that mediation between yourself and Mrs Freear was offered but declined in the past, even though you now say that you would be prepared to have mediation through the good offices of ACAS.

Taking all of these factors into account I have to take a decision whether to take no action, issue a further warning, issue a final warning or dismiss with notice. Taking into account your length of service with the school; your previous absence record and your current absence record which commenced in March 2016, the various adjustments that have been made over an extended period of time; the fact that obtaining the assistance of another member of staff does not appear practical; the fact that you have not always helped yourself in managing your workload and the fact that you are in a key post, I consider that taking no action is not an option that I can reasonably adopt. I am mindful that a lower level warning has not secured a return to work either. For these reasons I have decided that it is unlikely that you will be able to return to work to give regular and efficient service within a reasonable period of time and that as such you should be dismissed with notice.

There are two alternatives to dismissal which are ill health retirement which does not seem applicable as there is no medical condition to justify it and the possibility of a transfer to another suitable role. I heard that there are no vacancies within the school that are available for your skill set and so this is not something that can be progressed however, should any suitable vacancy arise during your period of notice then you should be informed of it accordingly.

You have the right to appeal against this decision, if you wish to do so then you should do so within ten working days of the date of this letter setting out your grounds in full.

You will be written to separately in respect of the practicalities of your formal dismissal and leaving paperwork." (150-151)

90. During the Final Absence Review Meeting held on 12 December 2016, it was not challenged what Mr Haran said that the claimant had said that she no longer wanted a meeting with Mrs Freear. Mr Mistry did not argue before Mr Finnegan that the claimant was still willing to engage in mediation. The respondent had explored alternative employment, but no such position was available in the workplace.

The claimant's grounds of appeal - 28 December 2016

91. The claimant appealed on 28 December 2016 setting out her grounds, many of which were a repetition of what she had stated in her grounds of appeal letter dated 1 October 2016. In addition, she alleged that Mr

Finnegan had failed to consider mediation. He asserted that mediation was offered with Mrs Freear in the past, but the claimant challenged that assertion as being incorrect. She stated that she had suggested to Mr Haran during the return to work meeting on 11 March 2016 and in the Final Absence Review Meeting on 21 April 2016, but mediation was not considered as an option by Mr Haran nor was training for Mrs Freear in her approach to the claimant and her mental illness. The Occupational Health reports were not used as a way of managing her return to work. (152-158)

92. The claimant was sent a termination of employment letter by Mrs Trapp dated 13 January 2017 and was informed that she would be paid six weeks in lieu of notice and that her employment terminated, effectively, on 16 December 2016. (160)

Appeal hearing on 23 February 2017

93. The appeal was heard on 23 February 2017, by Mr John Skinner and Ms Marina Tranza, Governors. In attendance were Ms Mary Waplington described as an independent and Miss Lillian Caller, Advisor to the panel. Mr Haran and Mr Potts were present. The Clerk was Ms Deepti Bal.

94. Neither the claimant nor Mr Mistry attended because they raised objections to the statements of Mrs Freear, Ms Bornman and Mrs Peppiatt being included in the appeal documents. Mr Mistry emailed Ms Bal on 22 February 2017 expressing his and the claimant's concerns in relation to the statements and stressed that the appeal hearing should only take into account evidence which was presented at the dismissal hearing. He stated that he would continue with ACAS conciliation in the hope of securing a resolution and should that fail to issue legal proceedings under the Equality Act 2010. The claimant was not going to attend the hearing if Mrs Freear was going to be present. (169-170)

95. Although the hearing was rearranged to consider the claimant's availability and that of her union representative, they both did not attend. The panel had to consider whether to withdraw or dismiss the claimant's appeal; postpone the hearing to another date; or proceed in the absence of the claimant and her representative. They decided to continue with the hearing taking into account the claimant's written submissions as they had already postponed an earlier hearing at the claimant's request and on this occasion Mr Mistry did not request a further postponement nor the withdrawal of the appeal.

96. Taking into account the claimant's comments in relation to the witness statements, the panel decided to discharge all the witnesses and not accept their written evidence. This was to ensure a balanced and fair hearing.

97. They considered the claimant's three main grounds of appeal: whether there was a material breach in the procedure used at the initial Final Absence Review Meeting; whether the decision made by Mr Finnegan was too harsh or unreasonable; and whether there was evidence which Mr Finnegan took

into account at the Final Absence Review Meeting which should not have been taken into account or whether there was evidence available which Mr Finnegan did not take into account?

98. In the claimant's grounds of appeal, she neither suggested nor did she complain about any specific breaches in procedure, therefore, the panel did not consider this point further. In relation to the evidence, the panel reviewed and considered the evidence in relation to whether or not Mr Finnegan's decision to dismiss was too harsh and/or unreasonable. It also looked at the evidence taken into account by him and whether there was evidence he should not have taken into account or had failed to take into account. Questions were put by the panel to Mr Haran.

99. In the end the panel decided to uphold the claimant's dismissal as there was no medical condition diagnosed in the Occupational Health reports. The claimant had been absent for nearly one year in the last two years. There was no likelihood of a return to work in the foreseeable future. During her absence the school had suffered two permanent exclusions and had she been present she would have ensured that the exclusions did not occur. The level of her absence was placing substantial demands on other staff. The school had made reasonable adjustments for her benefit and there were no suitable alternative posts for her in the school. Having regard to all of these factors, the panel concluded that the decision to dismiss was neither unreasonable nor too harsh. Further, the hearing had taken into account all appropriate evidence in a satisfactory manner. Mr Skinner wrote to the claimant on 28 February 2017 setting out the panel's outcome. (175-177)

100. We find that panel were not provided by the claimant with her fit notes but they obtained copies of the Occupational Health reports.

101. From the claimant's medical notes covering the period from 29 September 2014 to 27 March 2017, there have been several periods from 1 October 2014 when she had been diagnosed as suffering from stress at work. On 13 April 2016, she was diagnosed as suffering from stress at work, anxiety and depression. The fit note covered her from 13 April to 16 May 2016. Then on 6 May 2016 she was again diagnosed as suffering from stress at work, depression and anxiety. The fit note covered her to 6 July 2016. Thereafter from 13 July 2016 to 8 December 2016, the diagnosis was stress at work. (179-184)

102. The two occasions when reference was made to depression are contained in the fit notes for April and May 2016. (203-204)

103. We find that only from 13 April 2016 to 6 July 2016 was the claimant diagnosed as suffering from depression, as well as other diagnoses.

104. The claimant's diagnoses were stress at work, anxiety and depression. She described the impact on her daily life in her Disability Impact Statement. She said that she was unable to get out of bed; was fatigued; suffered from

insomnia; had no interest in her personal appearance or maintenance; no motivation to maintain her household; suffered from panic attacks; low moods and emotional outbursts. Her parents would bring her food and do her washing. In April 2016 she moved in to live with her parents as she was too distressed to take care of herself and her home. In May 2016 she began attending talking therapy as part of her Stress Management Group. This was to help her to be aware of her triggers and to develop learning coping mechanisms. Also, to create structures and systems when she would experience a depressive episode.

105. We further find that adjustments were made during her employment which took into account her stress and the manner in which she conducted herself to her work. With Ms Bornman's input the claimant focused on three aspects of her work, namely one-to-one mentoring with a limit on her caseload; small groups; and daily check-ins. Further adjustments were made such as: having two KS3 behaviour groups; providing a communication forum in Inclusion meetings; shared responsibility across the Inclusion Team to relieve the claimant's workload; re-location of her office; and support while under a new line manager. Restorative justice meetings between students were passed to the Pastoral Support Managers; mentoring training was removed; the claimant was to longer lead circle time meetings on a regular basis; and she was required to log the support offered.

106. The claimant describes her race as Jamaican, Tanzanian, Goan and Swiss and relies on Ms Laura Normoyle as her actual comparator. Ms Normoyle is white Irish and the claimant alleged that she was employed by the respondent in September 2010 and was quickly promoted to the position of Special Educational Needs Co-ordinator "SENCO". She further asserted that having commenced employment with the respondent on 5 January 2010, she, the claimant, had not been promoted to Special Educational Needs Co-ordinator. However, the claimant said in evidence that she did not know much about Ms Normoyle's role, who started with the respondent as a Learning Assistant and later became a Higher Learning Assistant. Although the claimant said that she was unaware of the SENCO position being advertised, we are satisfied that it was advertised internally and the claimant did not apply for it and did not know the job specification for the role. Ms Normoyle did not have the same level of sickness absence as the claimant.

107. We have concluded that Ms Normoyle is not an appropriate comparator, as she was engaged in a different role to that of the claimant. There is no evidence that she was encouraged to engage in training and apply for senior positions. She did not have the claimant's level of sickness absence.

108. The respondent's Senior Leadership Team comprised of White British, White European and White Irish. The Governors comprise of one Afro-Caribbean, five white Europeans/British/White Irish; two parent Governors, one Irish and one mixed race.

109. There were the support staff who were of a broad ethnic make-up: mixed race; Afro-Caribbean; Asian, White British, White Irish an White European.

110. The student body comprises of Afro-Carribeans; Asians; Eastern Europeans; White British and Latin American.

Submissions

111. We have taken into account the submissions by the claimant, in writing and the oral and written submissions by Mrs Huggins, counsel on behalf of the respondent. In addition, we have taken into account the authorities they referred us to. We do not propose to repeat their submissions herein, having regard to rule 62(5) Employment Tribunal (Constitution on Rules of Procedure) Regulations 2013, as amended.

The law

112. Section 6 and Schedule 1 of the Equality Act 2010, "EqA" defines disability. Section 6 provides;

> "(1) A person (P) has a disability if –
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

113. Section 212(1) EqA defines substantial as "more than minor or trivial." The effect of any medical treatment is discounted, schedule 1(5)(1) and where a sight impairment is correctable by wearing spectacles or contact lenses, it is not treated as having a substantial adverse effect on the person's ability to carry out normal day-to-day activities, schedule 1(5)(3).

114. Under section 6(5) EqA, the Secretary of State has issued Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011), which an Employment Tribunal must take into account as "it thinks is relevant."

115. The material time at which to assess the disability is at the time of the alleged discriminatory act, Cruickshank v VAW Motorcast Ltd [2002] IRLR 24

116. In Appendix 1 to the Equality and Human Rights Commission, Employment: Statutory Code of Practice, paragraph 8, with reference to "substantial adverse effect" states,

> "A substantial adverse effect is something which is more than a minor or trivial effect. The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people."

117. The time taken to perform an activity must be considered when deciding whether there is a substantial effect, Banaszczyk v Booker Ltd [2016] IRLR 273.

118. Section 20, EqA on the duty to make reasonable adjustments, provides:

> "(1)Where this Act imposes a duty to make reasonable adjustments on the person, this section, sections 21 and 22 and the applicable Schedule apply; for those purposes a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion of practice of A's put a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as is reasonable to have taken to avoid disadvantage."

119. Langstaff J, President, Employment Appeal Tribunal, Nottingham City Transport Ltd v Harvey [2013] EqLR 4, held,

> "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability…disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply.", paragraph 18.

120. Guidance has been given in relation to the duty to make reasonable adjustments in the case of Environment Agency v Rowan [2008] IRLR 20**,** a judgment of the EAT. An employment tribunal considering a claim that an employer had discriminated against an employee by failing to comply with the duty to make reasonable adjustment must identify:

> (1)the provision, criterion or practice applied by or on behalf of an employer, or
>
> (2)the physical feature of premises occupied by the employer;
>
> (3)the identity of a non-disabled comparator (where appropriate), and
>
> (4)the identification of the substantial disadvantage suffered by the claimant may involve a consideration of the cumulative effect of both the provision, criterion or practice applied by or on behalf of an employer and the physical feature of premises. Unless the tribunal has gone through that process, it cannot go on to judge if any proposed adjustment is reasonable because it will be unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage.
>
> A tribunal deciding whether an employer is in breach of its duty under section 4A, now section 20 Equality Act 2010, must identify with some

particularity what "step" it is that the employer is said to have failed to take.

121. The employer's process of reasoning is not a "step". In the case of General Dynamics Information Technology Ltd v Carranza [2015] ICR 169, the EAT held that the "steps" an employer was required to take by section 20(3) to avoid putting a disabled person at a disadvantage, were not mental processes, such as making an assessment, but practical actions to avoid the disadvantage. In order to decide what steps were reasonable, a tribunal should, firstly, identify the pcp. Secondly, the comparators. Thirdly, the disadvantage. In that case disregarding a final written warning was not considered to be a reasonable step.

122. In relation to the shifting burden of proof, in the case of Project Management Institute v Latif [2007] IRLR 576, EAT, it was held that there must be evidence of a reasonable adjustment that could have been made. An arrangement causing substantial disadvantage establishes the duty. For the burden to shift;

> "…it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.", Elias J (President).

123. Paragraph 6.10 of the Code 2011 provides:

> "The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one off decisions and actions."

124. In relation to the comparative assessment to be undertaken in a reasonable adjustment case, paragraph 6.16 of the Code states:

> "The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular provision, criterion, practice or physical feature or the absence of an auxiliary aid disadvantages the disabled person in question. Accordingly and unlike direct or indirect discrimination - under the duty to make adjustments there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's."

125. The proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements. It is not with the population generally who do not have a disability, Smith v Churchills Stairlifts plc [2006] IRLR 41, Court of Session.

126. In the case of Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216, a judgment of the Court of Appeal, Elias LJ gave the leading judgment. In that case the claimant, an administrative officer, was employed by the Secretary of State for Work and Pensions. She started to experience symptoms of a disability identified as viral fatigue and fibromyalgia. She was absent for 62 days for a disability related sickness. After her return to work her employer held an attendance review meeting. Its attendance

management policy provided that it would consider a formal action against an employee if their absence reached an unsatisfactory level known as “the consideration point". “The consideration point” was 8 days per year but could be increased as a reasonable adjustment for disabled employees. The employer decided not to extend the consideration point in relation to the claimant and gave her a written improvement notice which was the first formal stage for regular absences under the policy. She raised a grievance contending that the employer was required to make two reasonable adjustments in relation to her disability, firstly, that the 62 days disability related absence should be disregarded under the policy and the notice be withdrawn. Secondly, that in future “the consideration point” be extended by adding 12 days to the eight days already conferred upon all employees. Her employer rejected her grievance and proposals.

127. Before the Employment Tribunal the claimant argued that her employer failed to make the adjustments and was in breach of the section 20 EqA 2010, the duty to make reasonable adjustments. It was conceded that she was disabled within the meaning of the Act. The tribunal, by a majority, found that the section 20 duty was not engaged as the provision, criterion or practice, namely the requirement to attend work at a certain level in order to avoid receiving warnings and possible dismissal, applied equally to all employees. The Employment Appeal Tribunal dismissed the claimant’s appeal upholding the tribunal's findings and adding that the proposed adjustments did not fall within the concept of "steps". It further held that the comparison should be with those who but for the disability are in like circumstances as the claimant.

128. The Court of Appeal held that the section 20 duty to make reasonable adjustments had been engaged as the attendance management policy had put the claimant at a substantial disadvantage but that the proposed adjustments had not been steps which the employer could reasonably have been expected to take. The appropriate formulation of the relevant pcp in a case of this kind is that the employee had to maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. Once the relevant pcp was formulated in that way, it was clear that a disabled employee's disability increased the likelihood of absence from work on ill health grounds and that employee was disadvantaged in more than a minor or trivial way. Whilst it was no doubt true that both disabled and able-bodied alike would, to a greater or lesser extent, suffer stress and anxiety if they were ill in circumstances which might lead to disciplinary sanctions, the risk of this occurring was obviously greater for that group of disabled workers whose disability resulted in more frequent, and perhaps longer, absences. They would find it more difficult to comply with the requirements relating to absenteeism and would be disadvantaged by it.

129. The nature of the comparison exercise under section 20 is to ask whether the pcp puts the disabled person at a substantial disadvantage compared with a non-disabled person. The fact that they are treated equally and may both be subject to the same disadvantage when absent for the same period

of time does not eliminate the disadvantage if the pcp bites harder on the disabled, or a category of them, than it does on the able-bodied. If the particular form of disability means that the disabled employee is no more likely to be absent than a non-disabled colleague, there is no disadvantage arising out of the disability but if the disability leads to disability related absences which would not be the case with the able-bodied, then there is a substantial disadvantage suffered by the category of disabled employees. Thereafter the whole purpose of the section 20 duty is to require the employer to take such steps as may be reasonable, treating the disabled differently than the non-disabled would be treated, in order to remove a disadvantage. The fact that the able-bodied are also to some extent disadvantaged by the rule is irrelevant. The Employment Tribunal and the Employment Appeal Tribunal were wrong to hold that the section 20 was not engaged simply because the attendance management policy applied equally to everyone.

130. There is no reason artificially to narrow the concept of what constitutes a "step" within the meaning of section 20(3). Any modification of or qualification to, the pcp in question which would or might remove a substantial disadvantage caused by the pcp is in principle capable of amounting to a relevant step. Whether the proposed steps were reasonable is a matter for the Employment Tribunal and has to be determined objectively.

131. In the case of Kenny v Hampshire Constabulary [1999] IRLR 76, a judgment of the Employment Appeal Tribunal, it was held that the statutory definition directs employers to make reasonable adjustments to the way the job is structured and organised so as to accommodate those who cannot fit into existing arrangements.

132. The test under is an objective test. The employer must take "such steps as….is reasonable in all the circumstances of the case." Smith v Churchills Stairlifts plc [2006] IRLR 41.

133. In relation to discrimination arising in consequence of disability, section 15 provides,

> "(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 that A did not know, and could not reasonably have been expected to know, that B had the disability."

134. In paragraph 5.7, Equality and Human Rights Commission Code of Practice on Employment (2011), unfavourable treatment means being put at a disadvantage. This will include, for example, having been refused a job;

denied a work opportunity; and dismissal from employment, paragraph 5.7.

135. In paragraph 4.9 it states the following,

> " 'Disadvantage' is not defined by the Act. It could include denial of an opportunity of choice, deterrence, rejection or exclusion. The courts have found that 'detriment', a similar concept, was something that a reasonable person would complain about - so an unjustified sense of grievance would not qualify. A disadvantage does not have to be quantifiable and the worker does not have to experience actual loss (economic or otherwise). It is enough that the worker could reasonably say that they would have preferred to be treated differently."

136. In the case of Pnaiser v NHS England [2016] IRLR 170, the EAT, Mrs Justice Simler DBE, held that 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 amount to an effective reason for or cause of it. A tribunal should not fall into the trap of substituting motive for causation in deciding whether the burden has shifted. A tribunal must, first, identify whether there was unfavourable treatment and by whom in the respects relied on by the claimant. Secondly, the tribunal must determine what caused the treatment or what was the reason for it. An examination of the conscious and unconscious thought processes of the alleged discriminator will be required. Thirdly, motive is irrelevant as the focus is on the reason or cause of the treatment of the claimant. Fourthly, whether the reason or cause of it was something arising in consequence of the claimant's disability. The causation test is an objective question and does not depend on the thought processes of the alleged discriminator. Fifthly, the knowledge required in section 15(2) is of the disability.

137. A similar approach was taken in the case of City of York Council v Grosset UKEAT/0015/16 relying on the guidance in Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305, Langstaff P.

138. In determining justification, an Employment Tribunal is required to make its own judgment as to whether, on a fair and detailed analysis of working practices and business considerations involved, a discriminatory practice was reasonably necessary and not apply a range of reasonable responses approach, Hardy & Hansons plc v Lax [2005] ICR 1565.

139. Under section 13, EqA direct discrimination is defined:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

140. Section 23, provides for a comparison by reference to circumstances in a direct discrimination complaint:

> "There must be no material difference between the circumstances relating to each case."

141. Section 136 EqA is the burden of proof provision. It provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred."
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

142. In the Supreme Court case of Hewage v Grampian Health Board [2012] ICR 1054, it was held that the tribunal is entitled, under the shifting burden of proof, to draw an inference of prima facie race and sex discrimination and then go on to uphold the claims on the basis that the employer had failed to provide a non-discriminatory explanation. When considering whether a prima facie case of discrimination has been established, a tribunal must assume there is no adequate explanation for the treatment in question. While the statutory burden of proof provisions have an important role to play where there is room for doubt as to the facts, they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other.

143. In Madarassy v Nomura International plc [2007IRLR 246, CA, the Court of Appeal approved the dicta in Igen Ltd v Wong [2005] IRLR 258. In Madarassy, the claimant alleged sex discrimination, victimisation and unfair dismissal. She was employed as a senior banker. Two months after passing her probationary period she informed the respondent that she was pregnant. During the redundancy exercise in the following year, she did not score highly in the selection process and was dismissed. She made 33 separate allegations. The employment tribunal dismissed all except one on the failure to carry out a pregnancy risk assessment. The EAT allowed her appeal but only in relation to two grounds. The issue before the Court of Appeal was the burden of proof applied by the employment tribunal.

144. The Court held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status, for example, sex and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more , sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

145. The Court then went on to give a helpful guide, "Could conclude" [now "could decide"] must mean that any reasonable tribunal could properly conclude from all the evidence before it. This will include evidence adduced by the claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in testing the complaint subject only to the statutory absence of an adequate explanation at this stage. The tribunal would need to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the acts complained of occurred at all; evidence as to the actual comparators relied on by the claimant to prove less favourable

treatment; evidence as to whether the comparisons being made by the claimant is like with like, and available evidence of the reasons for the differential treatment.

146. The Court went on to hold that although the burden of proof involved a two-stage analysis of the evidence, it does not expressly or impliedly prevent the tribunal at the first stage from the hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce in evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not because of a protected characteristic, such as, age, race, disability, sex, religion or belief, sexual orientation or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination.

147. Once the claimant establishes a prima facie case of discrimination, the burden shifts to the respondent to show, on the balance of probabilities, that its treatment of the claimant was not because of the protected characteristic, for example, either race, sex, religion or belief, sexual orientation, pregnancy or gender reassignment.

148. In the case of EB-v-BA [2006] IRLR 471, a judgment of the Court of Appeal, the employment tribunal applied the wrong test to the respondent's case. EB was employed by BA, a worldwide management consultancy firm. She alleged that following her male to female gender reassignment, BA selected her for redundancy, ostensibly on the ground of her low number of billable hours. EB claimed that BA had reduced the amount of billable project work allocated to her and thus her ability to reach billing targets, as a result of her gender reassignment. Her claim was dismissed by the employment tribunal and the Employment Appeal Tribunal. She appealed to the Court of Appeal and her argument was accepted that the employment tribunal had erred in its approach to the burden of proof under what was then section 63A Sex Discrimination Act 1975, now section 136 Equality Act 2010. Although the tribunal had correctly found that EB had raised a prima facie case of discrimination and that the burden of proof had shifted to the employer, it had mistakenly gone on to find that the employer had discharged that burden, since all its explanations were inherently plausible and had not been discredited by EB. In doing so, the tribunal had not in fact placed the burden of proof on the employer because it had wrongly looked at EB to disprove what were the respondent's explanations. It was not for EB to identify projects to which she should have been assigned. Instead, the employer should have produced documents or schedules setting out all the projects taking place over the relevant period along with reasons why EB was not allocated to any of them. Although the tribunal had commented on the lack

of documents or schedules from BA, it failed to appreciate that the consequences of their absence could only be adverse to BA. The Court of Appeal held that the tribunal's approach amounted to requiring EB to prove her case when the burden of proof had shifted to the respondent.

149. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory. In the case of B-v-A [2007] IRLR 576, the EAT held that a solicitor who dismissed his assistant with whom he was having a relationship upon discovering her apparent infidelity, did not discriminate on the ground of sex. The tribunal's finding that the reason for dismissal was his jealous reaction to the claimant's apparent infidelity could not lead to the legal conclusion that the dismissal occurred because she was a woman.

150. The tribunal could pass the first stage in the burden of proof and go straight to the reason for the treatment. If, from the evidence, it is patently clear that the reason for the treatment is non-discriminatory, it may not be necessary to consider whether the claimant has established a prima facie case, particularly where he or she relies on a hypothetical comparator. This approach may apply in a case where the employer had repeatedly warned the claimant about drinking and dismissed him for doing so. It would be difficult for the claimant to assert that his dismissal was because of his protected characteristic, such as race, age or sex.

151. A similar approach was approved by Lord Nicholls in Shamoon-v-Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, judgment of the House of Lords.

Conclusion

Unfair dismissal

152. In relation to the unfair dismissal claim, we are satisfied that the reason for the claimant's dismissal is capability. In relation to the procedure, had the respondent followed is sickness absence management procedure to the letter, the claimant would have had a first written caution or warning 12 weeks after going on sick leave which would have been on or around 17 June 2016. Thereafter a final written caution on or around 17 September 2016. The respondent does have a discretion whether to skip from the first written caution stage to the Final Absence Review Hearing. The claimant was consulted during her absence and occupational health reports were obtained and considered. The respondent looked at alternative positions but none was available. The difficulty, however, was that the claimant did not have a return to work date. She had been absent for 197 days in two years. A school year has 195 days. Fit notes and the occupational health reports were considered. There was nothing medically preventing the claimant's return to work and her absence increased the work load of her colleagues and affected the performance of the school.

153. At the appeal stage the respondent took into account the written representations from the claimant and did not rely on the witness statements as they were not before the dismissing officer, Mr Finnegan. There was no medical reason for the absence, there was no return to work date and there was no position available to the claimant. In addition, her absence was affecting the performance of the school and the workload of her colleagues.

154. We are unable to conclude that the decision fell outside the range of reasonable responses. Accordingly, the claimant's unfair dismissal claim is not well-founded and is dismissed.

Direct race discrimination

155. In relation to the claim of direct discrimination because of race, the claimant was treated less favourably in that she was dismissed when compared with Ms Normoyle who remains in the employment of the respondent. Ms Normoyle did not have the same level of sickness absence as the claimant and is in a different role when compared with the claimant's position. She is, therefore, not an appropriate comparator. Even if she is, was the less favourable treatment because of race or of the claimant's race? We have conclude that the less favourable treatment was unrelated to the claimant's race, but to the period of time she had been absent from work, 197 days in two years, and the application of the respondent's Sickness Absence policy. Ms Normoyle did not have the same level of sickness absence and that the reason for the claimant's treatment was capability and not race. This claim is not well-founded and is dismissed.

Discrimination arising in consequence of disability

156. As regards discrimination arising in consequence of disability, the claimant does not have to establish that, at the material times, she suffered from a clinically well-recognised mental impairment. The diagnoses were stress at work, anxiety, depression and she described the impact on her daily life. She was unable to get out of bed; was fatigued; suffered from insomnia, had no interest in her personal appearance or maintenance; no motivation to maintain her household; she suffered from panic attacks, low moods and emotional outbursts. Her parents would bring her food and do her washing as she was unable to do these things. We found that in April 2016 she moved in to live with her parents as she was too distressed to take care of herself and her home and in May 2016, she began attending talking therapy as part of her Stress Management Group. This was to help her to be aware of her triggers and to develop learning coping mechanisms. Also, to create structures and systems when she would experience a depressive episode. She continues to suffer in the ways she described to us in evidence.

157. We are satisfied that the claimant comes within section 6, schedule 1 of the Equality Act 2010, as a disabled person from April 2016.

158. We find that the claimant was absent from work from 17 March 2016 because of her disability. Her dismissal was following the application of the Sickness Absence Policy and was something arising in consequence of her disability, Griffiths.

159. Could the claimant's dismissal be justified? The legitimate aim is to have a policy to fairly manage sickness absences. The respondent had a responsibility to its students to ensure that the claimant's role was functional. Her absence was putting a strain on her work colleagues and the school. The respondent was not meeting its obligations to students as the two permanent student exclusions could have been avoided if the claimant had been at work. Though the claimant had been continually absent since 17 March 2016 and on four previous occasions, the formal sickness absence procedure did not commence until 7 September 2016.

160. Both the dismissal and appeal outcome letters made it clear the important role performed by the claimant and the impact her absence was having on the students, her wok colleagues and the school. The occupational health reports did not have a return to work date which was another factor the respondent took into account. Her dismissal was effective on 16 December 2016 at a time when there was no indication of a return to work date and reasonable adjustments were previously made. We have, therefore, come to the conclusion that the claimant's dismissal could be justified as the steps taken were proportionate to meet the legitimate aim. This claim is not well-founded and is dismissed.

Failure to make reasonable adjustments

161. In relation to failure to make reasonable adjustments claim, it was not clear to the tribunal what the pcps were, the adjustments the claimant was seeking to alleviate and the substantial disadvantages. In the course of the hearing she focused on the absence of mediation. We bear in mind that although she asked for an independent mediator on 21 April 2016, at the appeal stage, she stated that she could not be in the same room as Mrs Freear and would not attend the appeal meeting because Mrs Freear would be present. It was not clear what the pcp was that required mediation as a reasonable step.

162. As a disabled person, adjustments were made to her work. It was at the respondent's suggestion the claimant agreed that she would focus on the three areas of work already referred to in findings of fact to which the claimant did not object.

163. The respondent did not have knowledge of the claimant's stress, anxiety and depression prior to April 2016, though it made adjustments to the claimant's work to reduce her stress. It was difficult to see what adjustments could be made while the claimant remained on sick leave.

164. In our view, the claimant had not clearly identified the provisions, criteria or practices allegedly relied on by the respondent which placed her at a substantial disadvantage. This claim is not well-founded and is dismissed.

165. The provisional remedy hearing date listed on 16 July 2018, is hereby vacated.

_____

Employment Judge Bedeau

Date: 19 June 2018

Sent to the parties on: .....

.....
For the Tribunal Office