Case Number: 3200069/2017

MF

EMPLOYMENT TRIBUNALS

Claimant: **MM**

Respondent: **St Elizabeth Roman Catholic Primary School**

Heard at: **East London Hearing Centre**

On: **26-28 June, 20 and 28 August 2018 (in chambers)**

Before: **Employment Judge Elgot**

Members: **Mr D Kendall**
Dr J Ukemenam

Representation

Claimant: In person
Respondent: Ms A Palmer (Counsel)

The Tribunal having reserved its decision it now gives judgment as follows. Written reasons are attached.

RESERVED JUDGMENT

1. **The claim of unfair dismissal SUCCEEDS. The compensation to which the Claimant is entitled shall be determined at a separate remedy hearing which is listed for 10am 30 October 2108 at East London Hearing Centre. A notice of hearing will be sent out in due course. A case management order is attached in relation to this hearing.**

2. **The claim of disability discrimination does not SUCCEED and is DISMISSED.**

REASONS

1. As a result of an anonymisation order made on 18 September 2017 reference to the Claimant (MM) in this judgment and written reasons is anonymised so that she cannot be identified publically.

2. The Claimant worked as a Teaching Assistant at the Respondent school and began her employment there on 16 January 2007; she has worked nine full years up to the date of termination of her contract of employment. The school has approximately 400 pupils of primary school age up to the age of 11 and 80 staff, around 25 of those staff are Teaching Assistants. Each qualified teacher has one or more Teaching Assistants to help out in the class and sometimes more than one. The class to which the Claimant was allocated had a newly qualified teacher (NQT).

3. The Claimant worked 30 hours per week from 8:45am to 3:45pm in term time only. Page 102 of the bundle shows that she accepted those working hours consisting of six hours per day and one hour for lunch. It is clear that the presence of a Teaching Assistant in class and in the school is an integral part of the Respondent's staffing arrangements for the effective teaching and care of the young children at this primary school. There are no "supply" teaching assistants that can be obtained from agencies in the way that supply teachers can be substituted for qualified teachers who are absent.

4. The Claimant was dismissed from her employment on 7 July 2016 on notice until 7 September 2016. She did not work any part of the notice period but most of that period occurred over the school summer holidays. The letter of dismissal is at pages 133-134 of the bundle. It refers clearly to a dismissal under the Sickness Absence Policy (SAP) of the Respondent following a Final Written Caution dated 23 May 2016. The letter refers to "*high levels of sickness absence in recent years and the significant impact your absences are having on your work colleagues and the children in the school*".

5. The Respondent states, therefore, that the Claimant was dismissed for lack of capability or alternatively for some other substantial reason by reference to section 98(4) Employment Rights Act 1996 ("the 1996 Act").

6. The Claimant, in a Claim form dated 24 January 2017 claims that she was unfairly dismissed. Her complaint of race discrimination was withdrawn on 27 March 2017. She also complains of disability discrimination by reference to sections 15 and 20 Equality Act 2010('the 2010 Act').

7. The Respondent denies disability discrimination and unfair dismissal. The Respondent has conceded that the Claimant is disabled as a result of a fistula from which arise symptoms of frequent and recurrent urinary tract infection which means that she needs to access toilet facilities frequently and sometimes urgently.

8. The parties in this case have had the benefit of two Preliminary Hearings on 27 March 2017 and 26 May 2017 before Employment Judges Foxwell and Hyde respectively. At each Preliminary Hearing it was possible to clarify and refine the issues and claims in this matter.

9. At the Hearing before Employment Judge Hyde on 26 May 2017 the Employment Judge decided that the Tribunal did not have jurisdiction to consider the disability discrimination allegations listed in paragraphs 7.9.1-

7.9.7, 7.10-7.13 and 8.1 of the Order of EJ Foxwell made on 27 March 2017. All those complaints were dismissed because they were presented out of time and it was not just and equitable to extend the time limit.

10. We therefore reiterate that all the claims under section 15 Equality Act 2010 ("the 2010 Act") of discrimination arising from disability except in relation to the dismissal itself (paragraph 7.9.8) have been dismissed or removed from this case. We did not have jurisdiction to consider the unfavourable treatment alleged by the Claimant consisting of failure to provide her with counselling until February 2016 (paragraph 7.9.1) and the treatment of the Claimant around the school trip to Joss Bay on 24 June 2016 (paragraphs 7.9.3 and 8.1.1 and 8.1.2 in the Foxwell Preliminary Hearing Summary).

11. In her evidence and submissions the unrepresented Claimant was naturally still keen to point out and explain the unfavourable treatment she felt she had suffered, particularly in respect of those two matters but also with regard to some of the other time barred incidents but we are satisfied that it is clear from EJ Hyde's Judgment on 26 May 2017 that those complaints would not be dealt with at this substantive hearing and no findings of fact would be made about them.

12. Thus the end result of the preliminary case management orders is that this Tribunal had jurisdiction to decide whether the Claimant had been unfairly dismissed and whether that dismissal also consisted of discrimination arising from disability (section 15 of 2010 Act). It also considered whether there had been a failure to make reasonable adjustments by reference to section 20 of the 2010 Act. We looked at the Claimant's contention that she asked for an adjustment in being permitted to permanently change her hours of work and reduce them to 16 hours per week. She contends that she was at a substantial disadvantage compared to non disabled employees because the stress of full-time work exacerbated her anxiety and depression. She states that the provision, criterion or practice (PCP) placing her at the substantial disadvantage was the continuing requirement of the Respondent for her to work full-time.

13. For completeness the limits on the Tribunal's jurisdiction in this case are restated in the second Preliminary Hearing (Open) Judgment of EJ Hyde dated 26 May 2017 at paragraph 2.

14. In that second Open Preliminary Hearing EJ Hyde decided that the Claimant is a disabled person not only by reason of having a fistula (which the Respondent had conceded) but also by reason of her asthma, depression and anxiety, either taken singly or together. EJ Hyde re-states her decision to allow the complaint of unfair dismissal and the disability discrimination claims: "*relating to the dismissal and the [ongoing] failure to make reasonable adjustments in relation to the reduced hours of work to go ahead*" and be heard by this Tribunal. For completeness, she did not accept that kidney stones amounted to a disability (paragraph 24 of her judgment). She was certain that the combined effects of the impairments of asthma, a fistula, and anxiety and depression met the definition of disability.

15. Having established the accurate parameters of this hearing we heard evidence which consisted of oral evidence from the Claimant herself and her trade union representative Ms Kay Ground. The Respondent's witnesses were Ms Angelina John the Head-Teacher and Ms Melian Mansfield the Local Education Authority Governor who chaired the panel of governors hearing the Claimant's appeal against dismissal on 20 September 2016. There was an agreed bundle of documents and the Respondent helpfully provided a chronology and cast list. The Tribunal read only those documents in the bundle to which it was specifically referred by the parties, the witnesses and/or the representative. The Special Leave Policy in the bundle at pages 231-235 was, as the result of an Order by EJ Jones on 22 January 2018 apparently disclosed late, the original order for disclosure having been for 16 June 2017, by list.

16. There is a schedule of loss at pages 59-6 which includes pension loss.

17. It is clear that the Respondent knew that the Claimant was disabled within the meaning of the 2010 Act at least by reference to her fistula. This is because there is an occupational health report dated 6 August 2012 at pages 321-322 of the bundle stating "*she is in my opinion likely to be covered by the Equality Act 2010 with regard to the fistula there is therefore a duty of reasonable adjustment*". That 2012 report was known of and referred to by Ms John because it is listed on the Colour Absence Timeline at page 315-320 of the bundle and Ms John prepared that Timeline before she took the decision to dismiss.

18. <u>The Colour Timeline</u>

    It is helpful at this stage to set out our findings about this key document (the Colour Timeline). It was disclosed late and sent to the Claimant in the colour version by email attachment on the evening of the first day of the Hearing on 26 June 2018. A version of the document was disclosed on the first day of the Hearing printed only in black and white but it was almost illegible. The document has colour coded boxes in red, yellow and green. It covers the period from 15 November 2010 to 5 October 2016 encompassing the date of dismissal on 7 July 2016 (mistakenly typed as 2017 at page 316) and the date of the appeal meeting on 20 September 2016. It was prepared by Ms Angelina John who was the Head Teacher at the Respondent school, having been appointed in March 2014 following a secondment to the school in July 2013 when it was struggling under what is sometimes called "special measures" and when the Head Teacher was Ms McDaid. Ms John took the decision to dismiss the Claimant.

19. Ms John prepared the Colour Timeline prior to her taking the decision to dismiss on 7 July 2016. She told us that she devised and completed this colour coded spreadsheet in order to get the chronology of the Claimant's absences and other events 'clear in my mind'. The document has been updated intermittently from the date of dismissal to include later dates and events as can be seen from page 316.

20. We are satisfied that this Colour Timeline was not shown to the Claimant until the appeal hearing. It was not in the pack for the appeal panel's consideration. Ms Mansfield told us that it was produced on the day of the appeal hearing and the panel were given 10 minutes to look at it. She is certain that the Claimant also saw it on that day and had not seen it before but she is not certain that the Claimant had her own copy handed to her. The Claimant says she has not seen the document at all before this Hearing. What is certain is that, even if she saw it at the appeal hearing, she had little or no opportunity to study it, to meaningfully respond to its content or to ask questions about it. We make further findings about this document and its significance below.

21. The Claimant told us that the document which was in the original appeal pack is the Sickness Absence Timeline which appears at pages 128-132 of the bundle. It is a document also prepared by Ms John on the advice of her Human Resources (HR) business partners. Ms John told us that her HR advisers had told her to concentrate on the sickness absences in preparing a timeline for the appeal meeting. However for the reasons explained below she substituted the Colour Timeline and put that forward for the appeal panel's consideration. The Colour Timeline shows all the Claimant's absences, for whatever reason including sickness and other (many authorised unpaid) reasons for the period November 2010 to July 2016. We are satisfied that Ms John and the Appeal Panel relied on this document to provide the key information which was taken into account in making the decision to dismiss and the decision to uphold the dismissal upon appeal.

22. So far as documents are concerned there was also a late and substantial amendment to Ms John's witness statement at paragraphs 16-20 which was permitted by the Tribunal the Claimant identifying no particular prejudice to herself and having been given time to look at the statement and prepare relevant questions. Finally, on the second day of the Hearing, 27 June 2018, Ms Ground said that she had notes in her handbag, not previously disclosed or placed in the bundle, of a meeting she attended as the Claimant's trade union representative on 27 January 2016. The Tribunal did not admit those documents into evidence. It was not feasible that they could not have been disclosed. Ms Ground was able to give direct oral evidence about the content of and dialogue at the meeting in question. There was a difference between the late disclosure of the Colour Timeline, described by Ms Palmer as a 'core' document in relation to the Respondent's case, which is a document that clearly existed before the Hearing and the sudden appearance of Ms Ground's notes which had not been mentioned or cross-referenced previously. The Colour Timeline is, for example, referred to at page 161 of the bundle in the minutes of the appeal hearing. The Claimant had the opportunity to read and study the Colour Timeline over the evening of Wednesday 27 June 2018 and thereafter cross-examine Ms John and Ms Mansfield about it.

23. The Respondent has, contrary to good practice as Ms John acknowledges, destroyed and therefore not been able to disclose any minutes or other written record of the formal absence review meetings held with the Claimant under its SAP. There are two sickness policies in the bundle. The policy which is

relevant for the period to October 2015 is at pages 205-215 and the relevant SAP from June 2016 onwards is at page 217-229. We have assumed that the Claimant was dismissed in accordance with the later document which is the one the Tribunal has closely examined.

24. Sickness Policy

We make some important findings about the Respondent's Sickness Policy which is understandably robust given the effect of unpredictable absences by teaching and support staff on the learning and welfare of the young pupils. The necessity to state those findings arises specifically from the evidence of Ms John concerning her interpretation of the wording of the SAP and particularly of paragraph 11.2.2 thereof at page 226 of the bundle. It is clear from Ms John's evidence that when she took the decision to dismiss the Claimant she took into account the totality of all the Claimant's absences whether for sickness or any number of other reasons. She told us that she considered the effect of the Claimant's poor overall absence record and frequent, intermittent and unpredictable absences upon the school, the Claimant's colleagues and the children.

25. The SAP in its latest version begins at page 217. It is headed 'Sickness Policy' and is expressed to:-

"*establish a framework for the effective management of staff sickness absence taking into account both the welfare of employees and the requirements of the school to deliver an effective education to its pupils.*"

26. At paragraph 7 on page 223 it is clear that the Claimant, who is classed as "other support staff", will have her initial sickness absences monitored and dealt with by "*a person appointed by the Head Teacher*" but that the Final Absence Reviewer will be the Head Teacher and that there is an appeal to the Governors' Appeal Panel.

27. At paragraph 8.1 there is a definition of 'persistent intermittent absence' which is "*frequent short term absences from work that are normally sporadic and attributable to minor ailments, in many cases unconnected*." Persistent intermittent absence is distinguished from long term absence defined at paragraph 9.1. We are certain the Claimant's was a persistent intermittent absentee. She was not long term absent: "*for a considerable number of weeks or months as a result of a serious health problem*".

28. There is at paragraph 8.3 of the SAP a description of the triggers commonly found in sickness absence policies which, if triggered, "*will normally lead to a Formal Absence Review Meeting*". It is made clear: "*each case of sickness absence should be considered individually*". Those triggers and the reference to formal absence review meetings clearly relate to sickness absence (our emphasis). At paragraph 10 the nature of a sickness absence review meeting is described and it is prescribed that, in advance of such a meeting, the Absence Reviewer "*will also send you a copy of the Absence Report which*

they have prepared". The nature of the report is described at 10.1.1-10.1.3 as is the way in which the meeting will be conducted (paragraph 10.2).

29. It is in relation to paragraph 11 on page 225 that there is a difficulty in the Respondent's case about the interpretation of the SAP. Paragraph 11 describes the formal responses by way of Cautions which may be issued in response to monitored and recorded absences. We are certain that the absences to which paragraph 11 refers are sickness absences and indeed there is again a distinction made in that paragraph between long term sickness absence and persistent intermittent [sickness] absence. There are specific references in paragraph 11 to 'Occupational Health', to 'medical evidence' and a cross reference back to the definition in paragraph 8.1 of 'persistent intermittent absence' the wording of which we quote at paragraph 27 above. At paragraph 11.2 there is a description of the circumstances which may lead to the possibility of the ultimate response to sickness absence which is 'Dismissal with Notice'.

30. Ms John told us that when adjudicating upon the Claimant's case as the Final Absence Reviewer and in making the decision to dismiss she was advised to, and did consider, the factors set out at paragraph 11.2.1 on page 226 of the bundle. We are satisfied that those factors relate only to persistent intermittent sickness absence. Thus where paragraph 11.2.1(a) requires the final Absence Reviewer to take notice of "*total absence and pattern of absence*" it is a reference to the total sickness absences and pattern thereof. (There is in fact an earlier reference to the "*trend or pattern*" of sickness absences in paragraph 8.3.4 which describes the triggers). The remainder of the factors under 11.2.1 clearly refer, particularly in (b), (c), (h) and (i), to medical and disability information and considerations.

31. Instead of taking this approach, Ms John told us she felt obliged to consider and take into account the Claimant's total absences for whatever reason and look at the pattern of all her absences and not just her persistent intermittent sickness absences. This was in our determination a misreading of the Respondent's Sickness Policy. The Colour Timeline therefore shows all absences for whatever reason, paid or unpaid, for sickness or for authorised leave. This approach unfortunately does not take into account that there is a separate policy of the school, namely the Special Leave Policy at page 231 of the bundle, which refers to five major categories of "*acceptable reasons for leave of absence*". Those categories include time off pursuant to employees' statutory rights under the Employment Relations Act 1999, compassionate and bereavement leave, unpaid time off to make arrangements for the care of sick dependants and, under paragraph 5, ten more sub- reasons which also encompass many of an employee's statutory entitlements to paid or unpaid time off.

32. We find that Ms John as the dismissal decision maker failed to distinguish between sickness absence and any of the other absences which might be "acceptable" or "authorised" by discretion under the Special Leave Policy. Thus when compiling the definitive Colour Timeline which she used to inform her decision to dismiss and which she presented to the Appeal Panel as

recorded at page 161 as 'the timeline of events' she included both the sick and non-sickness absences of the Claimant. In doing so she acted in reliance upon a mistaken interpretation of paragraph 11.2.1 of the Respondent's Sickness Policy with the result that the dismissal was unfair as set out below.

33. We find that , at the Appeal, the Colour Timeline was presented as superseding the 'Sickness Absence Timeline 2016' in the bundle at page 128-132 which was originally in the appeal pack and which the Claimant saw in advance of the appeal hearing. Both documents contain errors and discrepancies and we have set out below where some of the material errors in the Colour Timeline have occurred.

34. We note that there is a separate request form, an example is at page 295 of the bundle headed: "Request for Leave of Absence" which is not relevant to sickness absence. On several occasions such forms, signed by Ms John, appear in the bundle authorising unpaid leave for the Claimant for reasons other than sickness.

35. To re-iterate, we do not accept the submission of the Respondent that any type of caution can be issued or a dismissal instigated under the Sickness Policy except by reference to sickness absence. Other absences for other reasons do not count for the purposes of the Triggers or the monitoring periods.

Data used for sickness absence monitoring

36. As stated above, the SAP makes specific mention of the necessity, at formal absence review meetings, for the employee to be supplied with an Absence Report as described at paragraphs 10.1.1-10.1.3 of the SAP. The employee should also be given the opportunity to present his or her own medical evidence and make 'suggestions' of reasonable adjustments. As Ms Palmer points out in paragraph 13 of her submissions on behalf of the Respondent the Claimant's sickness absence record is recorded in numerous reports, timelines and other documents in the bundle, some of which overlap and are occasionally inconsistent. As Ms Palmer states: "*it is difficult to form an overall picture*". Our experience in this case has been the same and leads us to conclude that the Absence Reports required at review meetings, none of which appear in the bundle with that specific heading or apparent purpose, may well not have been prepared or, if they were, be accurate. The document, for example at page 103-4 is a Payroll Absence Report and does give separate totals for sickness absence and other reasons for absence. There is only one column headed 'Days Lost'. The Respondent concedes that all the minutes of review meetings have not been retained none of that data was therefore available to us. Page 117 is a similar document.

37. Our conclusion is that the history of Cautions leading up to Ms John's decision to dismiss is more likely than not to have been based on a poor recording of relevant data about the Claimant's sickness and other absences. Page 103, for example, records several different reasons for absences for the period 1 September 2013 to 31 August 2014 including not only SIC-Sickness but also generic categories such as 'Unpaid Leave-Unpaid auth', 'Paid Leave'

'Compassionate Leave' 'UNP-unpaid authorised' and PUB-paid absence' without clear indication as to which days lost should or did count towards the sickness absence triggers in the SAP.

38. This is the type of unsafe data which Ms John used to devise the Colour Timeline.

39. Counselling

The Claimant was concerned, in her own evidence and in cross-examination of the Respondent's witnesses, to stress that she had been "failed" by the Respondent because no prompt arrangements were made for her to obtain bereavement or psychological counselling as initially recommended in a letter from Occupational Health at page 84 on 24 January 2014. Despite further OH correspondence at pages 88 and 96 of the bundle the request for such counselling was apparently declined by Ms John on 17 March 2015 because:-

"*You may benefit from psychological counselling but there is currently no underlying medical condition which affects your attendance at work. As there was no further mention of the suggestion it was not acted upon.*"

40. We find this to be an example of poor personnel management by the Respondent. It is not until 11 February 2016, at page 124 of the bundle, that the Claimant has an appointment booked at the instigation of Ms Augustin, School Business Manager, despite the fact that counselling was recommended some two years earlier. It is clear from the Preliminary Hearing conducted by EJ Hyde that this conduct of the Respondent is an alleged act of disability discrimination but equally clear that the Employment Judge decided that the Tribunal has no jurisdiction because the discrimination claim is out of time. The Claimant says that the failure to provide timely counselling for her is a factor making her dismissal unfair. Her line of argument is somewhat unclear but she appears to suggest that, had she been given the counselling earlier her attendance would have improved and she would not have reached the relevant triggers of the Sickness Policy culminating in dismissal. That position certainly seems to be confirmed by the post-dismissal letter from the Claimant's GP dated 12 July 2016 on page 137 suggesting that the strain of family stressors since 2013 and her consequent symptoms of low mood and anxiety have only recently been addressed, three years on, by 'counselling through her employer' and confirming that there is a very long NHS waiting list for such help. That letter should arguably have been in the appeal pack but was not.

41. We have found the dismissal of the Claimant to be unfair in any event. We therefore find it unnecessary to make specific detailed findings in relation to the Respondent's delay in providing counselling save to mention it as an example of the Respondent's apparently defective management of the Claimant. We are also satisfied that the Respondent had clear knowledge of the significant family difficulties which the Claimant experienced from 2013 onwards which exacerbated her anxiety and depression.

The decision to dismiss

42. By 2 February 2016 the Claimant had been issued with a First Written Caution which is at page 123 of the bundle. It is signed by Ms Augustin as the Absence Reviewer. It is not clear what Absence Report or absence data was used. There are no minutes of the meeting on 27 January 2016.The Claimant did not appeal.

43. In late January and early February 2016 the Claimant's teenage daughter was suffering from serious bullying at school and was in danger of harm and/or self-harm. This caused the Claimant deep distress, she is a single parent, and she felt she must support her daughter particularly in accompanying her to and from school to keep her safe. In addition the Claimant's daughter was unwell and suffered a 'collapse' on 9-11 March 2016 resulting in blackout and injury. The Respondent agreed, for example at pages 286 and 295 of the bundle, to grant unpaid leave of absence 'family related leave'. We are satisfied that none of those absences should have counted towards any trigger point nor be taken into consideration in the decision to dismiss for persistent intermittent sickness absence.

44. On 5 May 2016 the Claimant was notified that she had triggered a Formal Absence Review Meeting under the SAP. She was issued by Ms Augustin with a Final Written Caution dated 23 May which is at page 171 referring to '*a further 6 days absence for personal sickness. We separated off the time you have had for special leave purposes '.*It is not clear from the Review outcome letter what Absence Report or absence data was used. The Claimant did not appeal the Caution.

45. The Claimant's further unauthorised sickness absence on 24 June 2016, the day of the whole-school trip to the seaside at Joss Bay was what Ms John calls *'the final straw amounting to a breach of the Final Caution issued to her on 23 May 2016'.* There is a self-certification at page296 referring to diarrhoea/vomiting/kidney infection. There is a GP's Statement of Fitness to Work at page 178 advising that the Claimant was not fit for work for the period 28 June for one month to 28 July 2016, by which date the summer term would be over.

46. <u>Dismissal</u>

The Claimant had, by this one additional day of sickness absence on 24 June 2016, triggered a review meeting with Ms John as Final Absence Reviewer and the SAP makes it clear that a possible outcome is Dismissal with Notice. The Claimant was aware of this fact when she attended, with her trade union representative, at the review meeting on 5 July 2016. Mr Upton, the Respondent's HR Advisor, took notes which have not been challenged as to accuracy and are at page 302. The Claimant was dismissed with notice by letter of 7 July 2016, pages133-134 of the bundle, stating:-

' your high levels of sickness absence in recent years and the significant impact your absences are having on your work colleagues and the children in the school

have left me, regrettably, with no option but to inform you that your employment is terminated'

47. We find that at no stage during the Final Absence Review Meeting did Ms John show the Claimant or her trade union representative a copy of the Colour Timeline or explain to them that she was relying upon the information set out in that document when she considered the factors listed in paragraph 11.2.1 and ultimately took the decision to dismiss.

48. We repeat that Ms John told us in evidence that she prepared the Colour Timeline: "*for myself to cover all the considerations in paragraph 11.2.1 of the sickness policy*" and said that this was done prior to the dismissal "*to get it straight in my head*". She then updated the document and tabled it at the appeal panel.

49. The Claimant challenged her dismissal on a number of grounds including her feeling that she was '*penalised for the events which took place in my life'* and sets out those events in detail in the grounds of appeal she filed on 21 July 2016.

50. The Colour Timeline shows, in the red boxes, the dates when the Claimant was 'Sick', in the yellow boxes what Ms John calls "Special Leave" and in the green boxes references to information received from 'Occupational Health'. Ms Mansfield told us that the Special Leave Policy was not in the appeal pack. We are satisfied that the yellow boxes record many of the "acceptable reasons for leave of absence" which are set out in the Special Leave Policy.

51. Ms John said in evidence that she believed she was required to look at the 'total absence and pattern of absence' and told us that she understood that to mean all absences for whatever reason. We cannot agree that Ms John took the correct approach to her decision under paragraph 11.2 of the Sickness Policy for all the reasons set out above. All other types of absence apart from personal sickness absence were mistakenly taken into account when reaching the decision to dismiss under the Sickness Policy and the Claimant did not have sight of the key document on which the decision maker relied in coming to that decision.

52. For the sake of completeness Ms John also confirmed that she looked back at patterns of absence which occurred before 1 October 2015 which is the date at which the Claimant believed she had been given a fresh start. We address this issue below

53. Ms John clearly states at page 161, in making her presentation to the appeal panel:

'*The reason for submitting the timeline is to show we have gone through and summarised the amount of time that has been taken in terms of sickness absence and special leave as well. All of these have been taken into account in coming to the decision'*.

In her oral evidence she said, "*Yes we counted any day off at the end of this procedure when coming to the decision to dismiss because it is the total absence that affects the children's well-being, causes bad feeling with parents, decreases the morale and increases the stress of other members of staff*.

Ms Mansfield agreed that the appeal panel relied on the Colour Timeline and, as she said, "*We were looking at the totality of absences the sickness absences and the other absences as a totality … There are, I agree, a whole range of other reasons on the timeline in yellow boxes*".

Ms Mansfield was asked about the sub-divisions of authorised reasons for absence which are contained in a Special Leave Policy and asked whether she had considered those as an experienced Chair of the appeal panel. She replied: "No no". Page 162 records Ms Mansfield's remark that there are '*a lot of reasons'* and '*a series of circumstances that has been faced [by the Claimant] which is very unusual'* but eventually the panel agreed that '*the school's sickness policy and procedures have been followed' 'on the basis of 12 preceding months'*. We are unable to agree that this is the case and we find that the appeal stage of this dismissal was also unfair in all the circumstances of this case.

54. The dismissal letter at page 174 dated 7 July 2016 makes it clear in terms that the decision to terminate the Claimant's employment has been taken "*in accordance with our policy on sickness absence*". The terminology of the letter including the heading 'Outcome of Final Absence Review" refers to the SAP and '*your high levels of sickness absence'.* It does not refer to other absences as being the reason for the dismissal. There is no reference in the dismissal letter to any period of time which has been taken into account in assessing the Claimant's relevant level of sickness absence. The Colour Timeline covers five years and eight months. The appeal panel notes refer to a twelve month period.

55. By contrast at page 168 is the appeal outcome letter dated 22 September 2016 sent to the Claimant by Ms Mansfield as Chair. That letter does not refer to the Sickness Policy or indeed any policy. It does not refer to sickness absence but gives the reason for dismissal as being: "*your attendance had been at an unacceptable level during the last <u>three</u> years*".(our emphasis)

56. We are therefore convinced that the reason for dismissal varies between the respective decision-makers. The reason given i.e. an unacceptable level of sickness absence, by Ms John is different from the reason given by the appeal panel which refers to general unacceptable attendance levels over an arbitrary three year period. We are unsure why three years was selected and Ms Mansfield was not able to assist.

57. The discrepancies are surprising because in cross-examination Ms Mansfield confirmed that she had seen the original dismissal letter at page 133 and understood that the Claimant had been dismissed for what she called a "*high level of sickness absence as explained in the letter*". She conceded that the same reason was not given in the appeal outcome letter which refers to overall

attendance. Nevertheless she was certain, as were her appeal panel colleagues she told us, that the school's policies and procedures had been properly followed.

58. Finally, the Colour Timeline also contains numerous errors and examples of irrelevant extraneous information which may advertently or inadvertently caused prejudice to the Claimant. For example at page 317 the document refers to a disciplinary investigation resulting in an informal warning on 17 June 2015. This information is irrelevant to a dismissal for sickness absence and to the consequent appeal.

59. We have determined that the authorised unpaid leave granted to the Claimant should not fairly have counted towards the sanction of dismissal under the Sickness Policy, There are inaccuracies, for example, the yellow box entry on page 317 for 23 October 2015 is for authorised unpaid leave granted to the Claimant in respect of her cousin having been stabbed in an unprovoked attack and the necessity for her to attend hospital. She had one day off which was the Friday 23 October but the Respondent has counted two days including part of a weekend.

60. We are surprised that at page 318 in the entry for 12-24 November 2014 Ms John entered on the Colour Timeline, a document intended to inform and influence the appeal panel, a reference to eight days sickness: "*following a fall in the classroom*" This absence had been disregarded because it related to an accident at work and consequent injury but there is no record on the Colour Timeline of the fact that those eight days off with back problems were not counted by the Respondent in calculating the triggers or issuing any caution.

61. The entry for 8 March 2016 on the Colour Timeline (page 317) when compared with the entry on the original timeline at page 128 is also incomplete and misleading. Both timelines refer to one day off for family related personal leave (unpaid). Page 128 suggest that this was not a complete day off, it was not for sickness absence, and the Claimant that she would make up the two hours she took off and stay later another day. That information has not been transposed on to the Colour Timeline.

62. As a further example there is a discrepancy in respect of the 9 March 2016 entry. Page 317 records in the yellow box that the Claimant had paid leave for three days in relation to her daughter's collapse and head injury- "personal leave-family related". However at page 128 in the original timeline it is shown that paid leave was requested but granted without pay. The Claimant's time off to deal with this emergency is, on its face, the type of special leave envisaged under paragraph 1 in the Special Leave Policy where there is a statutory right to unpaid time off to make arrangements for the care of a dependent child or where there is a sudden emergency relating to dependents.

63. Finally, there is a repetition of inaccurate data by reference to the entry relating to 23 May 2014 which is marked in red and arguably should also have a yellow box showing 44 days 'special leave'. The entry relates to data on page 86 of the bundle. It repeats an error made throughout this case by the Respondent

because it refers to 62 days sick and 44 days special leave over a period from 25 April 2013 to 12 May 2014. In fact the data on page 86 shows a total of 106 days working days lost but it is over a period from February 2012 to 4 February 2014. In other words the total days lost relate to a two year and not to a one year period. The parties agreed during the course of this Hearing that looking carefully at page 86 it is a record of 59.5 days (47.5 for sickness and 12 for other absences) over the period 25 April 2013 to 12 May 2014. It is of concern therefore that the Colour Timeline repeats this rather obvious miscalculation. We note that this inaccurate entry may have misled the appeal panel since it falls within the three year period of unacceptable general absence which is referred to in the appeal outcome letter at page 168.

64. The 'fresh start'

We have considered the Claimant's submission that Ms John as decision-maker should not have taken into account the Claimant's sickness absence record at all insofar as it related to the period before 2 October 2015 when, as appears from page 121, Ms John, as the final Absence Reviewer, decided to remove the Claimant from formal (sickness absence) monitoring as a result of: "*significant improvement in your absence*". Again this is clearly a decision under the Sickness Policy as appears from the penultimate paragraph.

65. We cannot agree with the Claimant that to look at sickness absence prior to what she calls her 'fresh start" makes the dismissal unfair. We have found the dismissal to be unfair for other reasons. However we accept that with reference to paragraph 11.2.1 on page 226 Ms John was entitled to look at the pattern of [sickness] absence without time limit. We considered the authority of *Airbus UK Ltd v Webb* [2008] a copy of which was provided to us by Ms Palmer. It is a case which concerned expired disciplinary warnings. The Court of Appeal held that a Tribunal was not required to find that consideration of expired warnings necessarily made a dismissal unfair. The Court held that the employer was permitted to take expired warnings into account as part and parcel of the objective circumstances relevant to whether an employer was acting reasonably or unreasonably. We find that Ms John was entitled to undertake a similar exercise in the Claimant's case.

The school trip to Joss Bay, Broadstairs: 24 June 2016

66. On Friday 24 June 2016 there was the annual school trip to the seaside. In the working week preceding the Friday trip the Claimant worked Tuesday, Wednesday and Thursday although Monday afternoon 20 June she had gone home early at 2pm for the reason given at page 296 on her sickness self certification form that: "*antibiotics knocked me out*". She had a urine infection/kidney infection for which she was taking antibiotics.

67. Again these facts are not recorded accurately on the Colour Timeline which shows her to have gone home early on 24 June and had one day's sickness absence on 27 June 2016. This is illustrative of a lack of attention to detail by the Respondent.

68. In her Claim form the Claimant complains that the Respondent's inability to guarantee that there would be toilets on the coach to Joss Bay, which is a 2 hour journey, was an act of disability discrimination. She argued for the reasonable adjustment of ensuring provision of a toilet for her to use because her frequent urinary tract infections, arising from her fistula, means she needs regular and reliable access to toilets. This incident of alleged disability discrimination was ruled out of time by EJ Hyde in her judgment of 26 May 2017.

69. The disability discrimination claim being no longer in issue we make the following findings of fact only with regard to the unfair dismissal and the potential issues, at remedy stage, of a *Polkey* and/or contributory conduct reduction of the compensatory and/or basic awards for unfair dismissal.

70. Our findings are as follows:-

70.1 The Claimant asked for a guarantee that there would be toilets on the coaches and was told that no such guarantee could be given. That conversation took place with the Office Manager, Tom Stewart, who told her that she would not be permitted to have the day off (presumably because all staff were needed to supervise the children on the trip) so that she should please attend in the morning and if there were no toilets on any coach she could then go home or be redeployed inside the school. The Claimant did not attend at all on the morning of 24 June 2016 in breach of a reasonable management instruction. Mr Stewart did not give evidence at the Hearing.

70.2 The Claimant contends that even by 6pm on the evening of Thursday 23 June she had not been told whether there would be toilets even though, she says, she had been promised that information no later than the evening before the trip. This contention is not in her witness statement but was only made in her oral evidence before us. She also told the Tribunal "*I wanted to take the day off*".

70.3 When no-one telephoned the Claimant to 'guarantee' toilets on a coach she did not attend at school in the morning and later self- certified as being sick with diarrhoea and a kidney infection (page 296). That additional day of sickness absence triggered the Final Absence Review on 5 July 2016 by which time the Claimant had a sick note for one month because of renal stones, 'significant family stressors' and pyelonephritis (inflammation of the kidney).

70.4 We find it fair and reasonable that this additional day of sickness activated the relevant trigger. We also find that the Claimant's account of her conduct and treatment by the Respondent is inconsistent and lacking in credibility. In her Claim she says that she did not attend the trip to the seaside because the reasonable adjustment of guaranteed toilet facilities was not afforded to her. She then disobeyed a reasonable management instruction to turn up on the morning and see what facilities were available. She decided to treat that day as an incident of sickness

absence and self- certify accordingly. In fact there were some coaches which had working toilets and Ms John gave credible evidence to that effect. Ms Ground gave evidence that there were no toilets on any of the coaches or buses at all but then retracted her account and explained that she meant there were no toilets on the vehicles on which she travelled. Her evidence is less credible than that of Ms John.

71. Unfair dismissal

We have reminded ourselves of the provisions of section 98(4) Employment Rights Act 1996 and asked ourselves whether, in all the circumstances of this case, taking into account equity and the merits of the case, the Respondent acted fairly or unfairly in dismissing the Claimant by reason of lack of capability. We have taken into account the size and administrative resources of the Respondent which has had access to specialist HR advice throughout. In all those circumstances we have determined that the Respondent acted unfairly in deciding to dismiss the Claimant for the following reasons:-

1) The Respondent acted unfairly at both the Final Absence Review meeting resulting in dismissal and at the appeal hearing by relying upon documentary evidence (the Colour Timeline) which had not previously been in the appeal pack or disclosed to the Claimant or her representative in advance of the date of the decision to dismiss. She first saw the document very briefly at the appeal hearing; it is not certain that she was given her own copy. The Timeline is described by the Respondent as a 'core' or 'key' document supporting its case for a fair dismissal of which the appeal forms an integral part. The Claimant therefore had no opportunity to study, check or challenge the information on the Colour Timeline during any part of the dismissal process and procedure.

2) The dismissal occurred on 7 July 2016 by reference to the overall total absences and the pattern thereof as recorded on the Colour Timeline yet the Claimant's employment was terminated by specific reference to the Respondent's Sickness Policy which relates to sickness absence only. Some of the absences for which she was dismissed were not sickness but were, for example, for authorised unpaid absences granted pursuant to statutory entitlement. Those non-sickness absences were not, we find, encompassed by the Sickness Policy, do not count towards the triggers for formal cautions and were mistakenly taken into account for a sickness absence capability dismissal. The Claimant had little or no opportunity to challenge the dismissal because she did not see the document which recorded the 'absences and patterns of absence' upon which the Respondent relied until she attended the appeal hearing and even then she had no reasonable opportunity to study, analyse or dispute the Colour Timeline.

3) The appeal hearing was procedurally flawed for the reasons stated in 1) above. The appeal outcome letter is inconsistent by reference to the rationale for dismissal as compared with the letter of dismissal written by Ms John. It refers to total absences of whatever type and makes no specific reference to

sickness absences or the SAP. We conclude that the Claimant did not really know what absence or patterns of absence she was dismissed for.

4) The Colour Timeline contains a repetition and reproduction of inaccurate data and error together with irrelevant and prejudicial information which the Claimant was not enabled to contradict because of its late disclosure.

We cannot agree with paragraph 137 of Ms Palmer's submissions on behalf of the Respondent that it is inappropriate or unreasonable for us to take into account the procedural and substantive unfairness described above particularly where we identify discrepancies in calculations of absence. It is the Respondent's submission that we should not pursue arguments which the un-represented Claimant has not taken herself whether in the pleadings, in evidence or in cross examination. We are satisfied that no such inhibition applies when the late disclosure of an important document opens up a line of enquiry and concern which we have been obliged to explore and take into consideration by reference to the overriding objective and the interests of justice.

72. Disability discrimination

The remaining extant disability discrimination complaint under section 20 Equality Act 2010 is that the Respondent failed to comply with its duty to make a reasonable adjustment by permitting the Claimant to work 16 hours a week instead of her contracted 30 hours.

73. It is not in dispute that the relevant provision, criterion or practice (PCP) applied by the Respondent was a requirement for the Claimant to work full time in accordance with her contract of employment.

It is certainly arguable that the Claimant was placed at a substantial disadvantage by this PCP as compared to the non-disabled employee because she needed time to attend to her daughter's needs and to cope with the stress, anxiety and depression which the 'significant family stressors' described by her doctor in the 12 July 2018 letter and by earlier Occupational Health reports placed upon her. However we are certain that the Claimant made no request for this reduction in hours in relation to a job which she not only 'loved' but 'needed' to do financially.

74. We have come to this conclusion because we find that the Claimant made no written request for a reduction in her working hours to 16 per week or at all. She has had trade union guidance and representation for a considerable period; no TU representative wrote to the Respondent on her behalf. She has the confidence and intellectual ability to articulate her requests and is able to record, in detail, those matters about which she is aggrieved and where she feels she has been treated badly. For example she was the author of detailed and eloquent grounds of appeal at pages 141-145 of the bundle. Indeed in her own curriculum vitae at page 191 the Claimant refers to herself as '*proactive', 'organised with excellent communicational skills'* and "*always one step ahead.I work to a plan*". It is not conceivable that she was unable to make a written request for a major alteration to her terms and conditions of employment.

75. We have asked ourselves why the Claimant refers to an alleged request to work 16 hours specifically rather than,say,20 per week. Ms Ground explained to us that this was a "standard part-time contract for a teaching assistant" i.e. half the full time hours. There is no other explanation save a possible connection to entitlement to working tax credits; we have insufficient knowledge of the Claimant's financial situation to know this. The Claimant was originally employed on a 16 hour per week contract which may be where the figure of 16 comes from.

76. On page 170 of the bundle is a handwritten draft witness statement made by Ms Ground at the Claimant's request on 21 March 2017. It contains confirmation from Ms Ground that she attended sickness absence review meetings with the Claimant on 22 January 2016 and 17 May 2016 (she did not in fact attend on 5 July 2016 as she now admits). This initial draft version of Ms Ground's evidence only says: "*I am aware that she has asked to reduce her hours of work due to stress*". She does not say she is aware of any refusal or prevarication on the part of the Respondent.

There is no mention of 16 hours per week or of any request to move to that working pattern.

77. Neither the Claimant nor her trade union representative followed up any such request by lodging a grievance upon refusal or when, as they allege, the request was ignored. The Claimant's explanation is that she was not able to gain access to the 'policies' including the grievance policy. This explanation is not credible. Her trade union representatives could have asserted an entitlement to see the relevant school policies even if they did not have their own copies (as might be expected). Ms John gave credible evidence that several of the policies were available on a bookshelf in the staff room, the Claimant was able to log in to the Respondent's intra-net where she could have discovered the documents on-line.

78. We did not hear directly from the Deputy Head Teacher, Tracy Jennings, but there is a written record of Ms Jennings' evidence on page 149 which is part of the Head Teacher's comments on the Claimant's grounds of appeal. Ms John interviewed Ms Jennings about the allegation that the Claimant "offered" to decrease her hours to 16 per week.

79. An 'offer' is not the same as a request but, be that as it may, Ms Jennings is certain that this was a 'corridor conversation' where the Claimant indicated that she may approach Ms John in due course. It was not a formal request or demand for a reasonable adjustment. Ms Jennings says she discussed with the Claimant that a conversation might be had with the Head Teacher about this possibility and they left it there. The Claimant had no conversation with Ms John as Ms John unequivocally confirmed in response to a direct question from the Employment Judge.

80. It is surprising that the Claimant did not approach Ms John with a direct request because we find that the relationship between them at this stage was

apparently cordial and supportive. For example, the texts between the two women at pages 313 and 314 in the bundle demonstrate that the Claimant acknowledges the help and care she is given by Ms John and she expresses her gratitude. We are satisfied that Ms John was approachable and had an 'open door' policy. She had previously assisted the Claimant with payroll loans and in drafting letters to the Claimant's daughter's school. It is very unlikely that the Claimant felt that she could not approach her on the subject of reduced hours as a reasonable adjustment.

81. The Claimant says in her grounds of appeal: "*I went into Angelina John and explained to her that I felt that I was having a breakdown and needed support from work as I was emotionally drowning with life*". At that point the subject of reduced hours could have been introduced by the Claimant but was not.

82. We find that the Claimant asked for and was granted an adjustment to, and reduction of, her working hours during the course of the family crisis when her teenage daughter was being bullied and threatened at school and needed to be escorted, for safety reasons, to and from her GCSE examinations by either the Claimant or her partner. The Claimant took the exam timetable into Ms John's office. They marked off the times when she would need to leave early or come in late. Some of those hours were unpaid but the Head Teacher agreed to the emergency ad hoc arrangements.

83. The Claimant confirms at page 151, in the left hand column which is a transposition of her grounds of appeal, "*If I have a problem or need support I would always go to Angelina or Tracy instead of moaning or inappropriately speaking with other members of staff*".

84. Finally, there is some evidence in the bundle that the Claimant was, at the relevant time, in financial difficulties, requiring loans from the school and articulating her debt problems. This would seem to suggest that she could not afford the reduction in hours but we make no further comment.

85. We agree with paragraph 67 of the Respondent's submissions which sets out a detailed analysis of how, in Ms Palmer's phrase, the Claimant's case on this point has "*grown and grown*". The analysis which derives from the documents in the bundle and the accurate content of cross-examination is, in our view, correct and we adopt it. We particularly note the discrepancy and incompatibility in the Claimant's evidence described by Ms Palmer at the fourth bullet point of her paragraph 67

86. We have asked ourselves whether the Respondent should, of its own initiative, pursuant to its duty to make reasonable adjustments, have considered and offered half time working to the Claimant. We find that the Respondent made a reasonable adjustment in agreeing to ad hoc reductions in the Claimant's working hours granting her flexibility to cope with the crisis in the Claimant's daughter's life around the time of her GCSE examinations. Those adjustments were effective in removing the substantial disadvantage the Claimant experienced as an employee with anxiety and stress- related symptoms which were exacerbated by family stressors. In those circumstances where there

was, as we have determined above, no request by the Claimant for a permanent reduction of working hours, we are satisfied that the duty to make reasonable adjustments did not extend to an obligation upon the Respondent to suggest or implement such an arrangement. Indeed we think such a suggestion was more likely to upset and/or aggrieve the Claimant rather than assist her.

87. Was the dismissal an act of disability discrimination by the Respondent by reference to section 15 of the 2010 Act?

It is axiomatic that many of the Claimant's persistent intermittent sickness absences directly relate to her identified disabilities of fistula, asthma, anxiety and depression. In those circumstances section 15 of the 2010 Act identifies a type of disability discrimination where 'something' arising in consequence of a Claimant's disability may be held to cause less favourable treatment to her as a disabled person. The 'something' in this case is the persistent intermittent sickness absences of the Claimant insofar as they arise out of her disabilities. The unfavourable treatment is her dismissal.

However the Respondent can show that the unfavourable treatment is 'justified'. To use the words of the 2010 Act it is able to show that the treatment is a proportionate means of achieving a legitimate aim'. The legitimate aim is clear. The Respondent must provide a stable high quality education and good pastoral care to all the children attending the school and it must promote a co-operative and supportive working environment for all it's staff in the school, which requires the maintenance of a high level of morale and motivation. We are satisfied that the Claimant's persistent intermittent sickness absences resulted in considerable disruption to the pupils, parents and her colleagues at the school. Teaching schedules were disrupted, the workload of the Claimant's colleagues was increased and there were pressures on the Respondent and its business which could not be sustained indefinitely. When balancing welfare considerations for the Claimant against the business needs of the Respondent it is clearly a proportionate means of achieving a legitimate aim and therefore justifiable to take the decision that the situation could not continue.

88. Respondent's Counsel produced an absence spreadsheet in Appendix A to her submissions and a breakdown of absences for the calendar years 2012-2016 which is at paragraph 17 of the submission. We have no reason to doubt its accuracy or take issue with the method by which the data has been collated from the documents disclosed and contained in the agreed bundle. The spreadsheet and breakdown was not of course available to the decision-maker at the time of the dismissal or to the appeal panel. The spreadsheet is not a document which can have influenced the relevant decisions at the relevant times. However it is apparent from the spreadsheet summary and the breakdown of absences which Ms Palmer has devised that on any measure and by any standard the Claimant's sickness absences for reasons potentially relating to her disabilities were considerable and exceeded the triggers in the SAP on several occasions. Indeed the Claimant herself does not take issue with that description of the situation: she knew she had a bad sickness absence record but she wished to be given more support and more than once

she required ‘another chance’. There came a point however when the inevitable disruption to the efficient working of the school in its primary purpose which is to educate and care for small children could not be tolerated and it was not discriminatory , although we have found it to be unfair, to end the Claimant’s contract of employment.

89. The complaints of disability discrimination do not succeed and are dismissed.

90. Remedy

The compensation for unfair dismissal to which the Claimant is entitled will be determined at a separate hearing listed at 10 am on **30 October 2018** at East London. The Claimant must send to the Respondent on or before 23 October 2018 an up-dated Schedule of Loss. In accordance with the case management directions given by EJ Hyde on 26 May 2017 the Claimant should already have disclosed all the documents relevant to the remedy sought but if she has any additional such documents she should also send a copy of those documents to the Respondent on or before 23 October 2018 and bring four copies of any additional documents to the remedy hearing for the use of the Tribunal.

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Employment Judge Elgot
Dated: 19 September 2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE