EMPLOYMENT TRIBUNALS

Claimant: **Emma Thompson**

Respondent: **Vale of Glamorgan Council**

Heard at: **Cardiff** **On: 26, 27, 29, 30 November; 3, 4, 5, 6, 7, 10, 11, 12, 13, December 2018; in chambers on 14 December 2018**

Before: **Employment Judge S J Williams**
Members:
Mr W Davies
Ms T Lovell

Representation:
Claimant: Mrs Thompson
Respondent: Ms Criddle of counsel

JUDGMENT

The unanimous judgment of the tribunal is that:

1. The claimant was not unfairly dismissed;

2. The respondent did not discriminate against the claimant because of her disability;

3. The respondent did not fail in its duty to make adjustments;

4. The respondent did not harass the claimant.

REASONS

Introduction

1 By her claim to the tribunal the claimant alleges that she was unfairly dismissed by the respondent, that the respondent discriminated against her directly because of her disability, failed in its duty to make adjustments and harassed her by its conduct relevant to her disability.

2 For the claimant Mrs Thompson, who is both the claimant's professional representative and her mother, adduced the evidence of the claimant and Mrs Val Burbidge. For the respondent Ms Criddle adduced the evidence of Jenny Ford, Gerard McNamara, Sue Alderman, Christopher Elmore MP, Robert Green, Andrew Thompson, Geraint Hilbourne, Rhys Jones, Dr Ian Johnson, Dr Mathew Griffiths and Lyn Cosgrove. All witnesses gave their evidence in chief in the form of written statements which the tribunal read in advance. The claimants' two witness statements together comprised some 170 typed pages.

3 At preliminary hearings held on 6 December 2017 and 25 October 2018 case management orders were made in preparation for the final hearing covering numerous matters including adjustments required at the hearing, the document bundle, timetabling and the issues to be determined. In particular, on 6 December 2017 it was directed that the parties supply a finalised list of issues; on 25 October 2018 it was confirmed that the list of issues prepared by the respondent was agreed by the claimant. The tribunal has used that list as a framework for this judgment.

4 The tribunal received and was referred extensively to a bundle of documents containing pages 1 – 1806. Despite the direction that there be one agreed bundle containing all documents to be referred to, Mrs Thompson brought to the hearing her own separate, tabulated but unpaginated bundle; however, all documents to which she referred us were also contained in the bundle prepared by the

respondent. With the assistance of Ms Criddle we were able to cross-reference the two bundles satisfactorily. References in brackets below are to pages in the bundle prepared by the respondent. Both representatives prepared closing submissions in writing on which they elaborated orally. The tribunal invited the representatives to deal in their closing submissions with each of the issues to be determined by the tribunal.

Preliminary matters

5 The claimant's witness statements were prepared in English but the claimant elected to be cross-examined by Ms Criddle in Welsh. Because she found Mr McNamara difficult to lip-read she also wanted his evidence interpreted into Welsh. For these purposes simultaneous interpretation facilities were provided which worked extremely well and added nothing to the length of the hearing.

6 Certain adjustments were requested by Mrs Thompson in advance of and during the course of the hearing. The respondent assisted by preparing bundles for the witness table printed on blue paper and Ms Criddle offered to change places with Mrs Thompson when it appeared that the lighting in the tribunal room was causing some difficulty, an offer which was in the event not taken up. Mrs Thompson also requested a particular kind of chair. In the result, she expressed herself satisfied with the way in which she and the claimant had been accommodated and provided with what she termed 'good old-fashioned customer service' by the tribunal staff.

7 For several reasons, the time allocated for the hearing was greater than that which the issues themselves might have been thought to justify. The volume of documents was large and it was foreseen that, because of her dyslexia, the claimant might require extra time and more frequent than usual breaks in the proceedings. Mrs Thompson was also impeded by a lack of manual dexterity and needed extra time to find relevant documents. In the result the tribunal was grateful to both representatives for adhering closely to the projected timetable for

the cross-examination of witnesses, thus enabling the hearing to be completed in the allocated time.

8 On 5 December, day 7 of the hearing, Mrs Thompson presented a written application dated 4 November (presumably 4 December was intended), on which she expanded orally, to amend the claimant's claim to include claims that Mr McNamara selected staff members to be placed on the capability procedure because they were trade union members and to make an example of them, and that accordingly the respondent had discriminated against the claimant because of her trade union membership. Mrs Thompson also sought to argue that the respondent had failed to provide ‘reasonable adjustments taking advantage of tribunal fees to inhibit application for statutory failures.' The tribunal retired to consider the applications.

9 The first limb of the application was based on material in Mr McNamara’s witness statement where he stated, at paragraph 56, that four teachers who had been identified by Estyn as delivering unsatisfactory lessons were each trade union members, and that he therefore discussed the matter with local trade union representatives before placing them on an informal support programme (see below at paragraphs 23-24). Mr McNamara's statement had been in the claimant's possession since, at the latest, 25 October, and, in the judgment of the tribunal, it disclosed no evidential basis for the present application. There was no suggestion, in this statement or elsewhere, that the four teachers had been selected for informal support *because of* their trade union membership. Furthermore, the claimant herself gave no evidence to support a claim of trade union discrimination, nor had her trade union representatives intimated any such contention. The suggestion of any claim based upon the respondent's allegedly taking advantage of the introduction of tribunal fees was in the view of the tribunal unarguable. Accordingly, the applications were dismissed.

10 At the preliminary hearings mentioned above, the question of the correct identification of the respondent(s) to this claim was considered and resolved. The original first respondent, the Governing Body of Barry Comprehensive School, ceased to exist on the closure of the school in July 2018. The then second respondent, accepted that it would be responsible for meeting any judgment in the claimant's favour. Accordingly, the original first respondent was dismissed from the proceedings which continued against the sole respondent named above.

11 The tribunal clarified at the outset that the present hearing would be confined to questions pertinent to liability, including contributory conduct, *Polkey* and any arguments concerning deductions for failure to follow the ACAS code of practice.

The facts found by the tribunal

12 A mass of evidence was put before us, much of which was of at best marginal relevance. We have consciously limited our findings of fact in this case to those matters relevant to our decision.

13 It was common ground that the claimant is and was at all material times a person with a disability. The impairments giving rise to her disability are (1) dyslexia, and (2) hearing impairment. The claimant's dyslexia and hearing impairments are life-long conditions which were diagnosed when she was at university, or even earlier. At a pre-hearing review in a different employment tribunal claim pursued by the claimant against the Management Committee of Barry YMCA and others, by which she was also employed, the claimant was adjudged to be a person with a disability within the meaning of the Equality Act 2010 by virtue of her dyslexia and hearing difficulties. In his judgment following a hearing on 4 June 2013 the employment judge observed that the effects of the injuries suffered by the claimant following a road traffic accident (see below) ‘separately fell away, but were relevant in so far as they worsened the [claimant’s] hearing difficulties’. In the light of allegations made subsequently by the claimant, it is noteworthy that the employment judge noted the claimant’s evidence that ‘the headmaster is

understanding and although work is often returned to her he is able to correct some of the work himself' (see Judgment, paragraph 21).

14 There was no finding, and it was not suggested to us, that the claimant's physical injuries sustained in the road traffic accident resulted in themselves in an impairment of the kind referred to in section 6 of the Equality Act 2010.

15 The claimant trained as a teacher of Welsh as a second language. On qualifying in 1999 she was employed in that capacity at Barry Comprehensive School (BCS) where she worked until her dismissal which took effect on 31 August 2016. The school was an English-medium school in the town of Barry in the Vale of Glamorgan, a predominantly English-speaking area of Wales. Welsh was not a popular subject in the school. When the claimant joined the school the head teacher was David Swallow until his retirement on 31 December 2011. Gerard McNamara was appointed head teacher from September 2012, and in the interim Jennifer Ford, the deputy head teacher was the acting head. Until August 2011 the head of Welsh was Gareth James; then Anwen Jones became head of Welsh until 2014, and she was followed by Geraint Hilbourne.

16 The claimant was fully aware of both her dyslexia and her hearing impairment throughout her time at the school. Moreover, she never made any secret of those matters and the school was also fully aware of them at all times. The claimant did not request any adjustment to her working environment during the early period of her employment.

17 In March 2012 the claimant was involved in a road traffic accident in which she sustained injuries which resulted in a civil claim for damages for personal injuries which was compromised. The tribunal saw contemporaneous notes recording 'mild head injury' as well as later orthopaedic and psychiatric reports which present the general picture of, on one hand, soft tissue, musculoskeletal injuries and a head injury from which the claimant was expected to recover within

months, and, possibly, PTSD which lasted about six months; and, on the other hand, complaints of continuing symptoms from a 'poor and inconsistent historian' (Professor Maden's report, 20 June 2018, p. 1606 at p. 1631) which are not consistent with the initial history and which have a factitious component. Dr Attwood (report 2 May 2018, p. 1602) considered the claimant to be suffering with a 'phobic anxiety disorder'. Mrs Thompson repeatedly described the accident as a 'near decapitation' and as threatening the claimant's life. The tribunal found this to be a significant overstatement and concluded that the claimant had a strong tendency, intentionally or otherwise, to exaggerate the effects of her injuries.

18 Following her road traffic accident on 12 March 2012, the claimant was initially absent from work from 14 to 31 March, returned to work from 23 to 27 April, and was then again absent until 22 October 2012 when she returned on a phased basis.

19 We were referred to evidence provided by David Swallow (p.1298ff.) for the purposes of the claimant's personal injury claim. Mr Swallow acknowledged that 'allocation of curriculum time was an ongoing issue for Welsh. With little engagement and disappointing outcomes, it was difficult to justify allocating large amounts of curriculum time to the subject.' Although timetabling varied over time and from year group to year group, Welsh was generally allocated 2-3 lessons per fortnight.

20 Mr Swallow also made relevant comments on the claimant's abilities as a teacher, stating his opinion that 'Emma's relationship with pupils could also deteriorate where there had been a disagreement ….. Emma struggled to manage classes and pupils who were not engaged in the subject. She had difficulty organising herself and her classroom in order to teach those pupils effectively. My memory of her classroom is that it always appeared in a disorganised state ….', and 'Emmas's weaknesses in teaching posed a real problem to her in terms of her effectiveness in her role', and 'She would, I believe, have continued to struggle in the school and I think it quite possible that she would have left the school in due course'. It is

noteworthy that these comments come from a head teacher with whom the claimant said she enjoyed a good relationship and predate her road traffic accident. They stand in contrast to the case presented to us on behalf of the claimant that (a) before Jennifer Ford and then Gerard McNamara took over the headship role, no one found fault with her teaching, and (b) it was only after her accident that she encountered any difficulty in work, and (c) that she was a good teacher who was undermined by the combined efforts of Christopher Elmore, Gerard McNamara and others. We shall return below to those contentions.

21 Jennifer Ford said (witness statement para. 19) that she had concerns about the claimant's teaching ability and classroom management before her accident and that these weaknesses became apparent after Anwen Jones became head of department and during the claimant's absence from March 2012. This view was significantly corroborated by the assessment of David Swallow (see previous paragraph). Based on the evidence of David Swallow and Jennifer Ford we conclude that weaknesses in the claimant's teaching had been identified long before Jennifer Ford became acting head, and before her accident. Those weaknesses were in some respects strikingly similar to those which ultimately led to her dismissal.

22 On 4 May 2012 (p. 180) the claimant attended a meeting with Jennifer Ford to discuss a phased return to work following her accident. At that meeting Ms Ford handed to the claimant a copy of the respondent's capability procedure.

23 During the claimant's absence Mr McNamara had been appointed to the position of head teacher and took up his post in September 2012. Mr McNamara introduced what has been termed an informal procedure, known as the Individual Support Programme, which was intended to precede, and it was hoped to obviate the need for, a formal capability procedure. Because of the concerns which had arisen the claimant was placed on this support programme commencing 25 April

2013 with three specified improvement targets: lesson planning, classroom management and book-marking quality (p. 218).

24 In March 2013 the school was the subject of a formal inspection by Estyn, the schools inspectorate for Wales, which published its report in May 2013. The report was critical of numerous aspects of the school's performance including, of relevance to our decision, the school's standards in Welsh as a second language and at key stage 3 (p. 200) In addition, four teachers were singled out for criticism, of whom the claimant was one. All four were the subject of the informal support programme.

25 Mr McNamara had observed the claimant in class on 16 January 2013 and during the informal procedure the claimant's lessons were observed on a further two occasions, on 7 June 3013 by Mr McNamara, and on 22 November by Mr McNamara together with Anwen Jones. All observations were assessed as unsatisfactory. Mr McNamara determined that the claimant's progress under the informal procedure was not satisfactory and that she should be placed on the respondent's formal capability procedure. He issued the claimant with a first written warning on 17 January 2014 and stage 1 of the formal procedure commenced. The specific matters of concern were set out for the claimant as: lesson planning; classroom management; marking. On appeal by the claimant a panel of governors decided to continue with the formal capability assessment.

26 During stage 1 the claimant's lessons were observed on 31 March 2014 by Jennifer Ford and Llinos Evans, the head of faculty, and on 2 April 2014 by Ms Ford. At a review meeting on 28 April 2014 it was noted that both observations had been adjudged unsatisfactory. The claimant was again absent from school between June 2014 and March 2015 by reason of anxiety and stress. On 1 May 2015 Mr McNamara issued the claimant with a second written warning and stage 2 of the formal procedure commenced.

27 The claimant had been observed in class on 4 June 2014 by Anwen Jones, and during stage 2 of the formal procedure the claimant's lessons were observed on 4 June 2015 by Andrew Thompson, the deputy head teacher, together with Geraint Hilbourne, and on 15 June 2015 by Mr McNamara together with Mr Hilbourne. At a review meeting on 18 June 2015 it was noted that both observations had been adjudged unsatisfactory and Mr McNamara decided to move the claimant to stage 3 of the formal procedure which was intended to last four weeks. On 22 June he issued her with a final written warning.

28 On 15 July 2015 the claimant's appeal against the decision to move to stage 3 of the procedure was rejected by a panel of governors. The claimant's trade union representative, Geraint Davies, did not argue that the claimant had met the requirements of stage 2, but that the agreed support framework had not been fully implemented and, therefore, stage 2 should be repeated. The panel of governors disagreed.

29 In July 2015 Estyn issued a follow-up report in which, amongst other things, it said that standards in Welsh as a second language remained a cause for concern.

30 During stage 3 of the formal procedure the claimant's lessons were observed on 23 June 2015 by Andrew Thompson together with Rhys Jones, on 7 July by Rhys Jones and on 13 July by Andrew Thompson together with Rhys Jones. Rhys Jones was the head teacher of Treorci Comprehensive School, a 'pathfinder' school with which BCS worked in order to share good practice. Mr Jones is a first-language Welsh-speaker, though not a specialist teacher of Welsh, and is very experienced in the observation and assessment of lessons by other teachers.

31 At a review meeting on 2 September, postponed from the end of the previous term, it was noted that the three lesson observations had been deemed unsatisfactory with regard to pupil progress and teaching. Geraint Davies, the claimant's trade union representative, referred to Welsh Government guidance on

the possible connection between poor performance and disability (p. 421) and asked for an occupational health appointment for the claimant in order to seek a medical view. Mr McNamara agreed with this course, whilst querying why the matter of the claimant's disability had not been raised at earlier occupational health appointments. The claimant said that her dyslexia and hearing impairment had been diagnosed in the early 1990s, that earlier occupational health appointments had been related to her accident injuries, that there had been no issue before the road traffic accident and that she had not raised with occupational health anything about her disability in relation to the capability procedure. Prompted by Ann Jones, personnel officer, the claimant said that her absence from June 2014 to March 2015 had been due to stress caused by the capability procedure.

32 The claimant contested the appropriateness of being assessed by Rhys Jones, although she had previously agreed to his observing her lessons, because he was not a specialist Welsh teacher. She also suggested that Geraint Hilbourne's oral feedback to her had been much more positive that his written report. The meeting of 2 September was postponed.

33 Four reports were obtained: an optometric vision report from Eurfron Nyhan dated 15 September (which was scarcely referred to before us), an occupational health report from Dr Joanna Lever dated 25 September; a short addendum report by Dr Martin Andrew dated 13 October and a report from Ann Rees of Dyslexia Action Cardiff Learning Centre dated 22 October (pp. 1548-1561).

34 Dr Lever noted that the claimant's dyslexia had been classified as a disability (though she made no reference to the claimant's hearing impairment), and that the most recent episodes of sickness had been due to secondary problems related to the road traffic accident and to workplace stress. Both of the latter had led to marked anxiety symptoms aggravated by the stress of the capability procedure. In Dr Lever's opinion the claimant's conditions (meaning the secondary problems

she identified) were causing an adverse effect on her ability to fulfil her role, and the capability procedure would increase the claimant's anxiety levels which might in turn have an impact on the quality of her teaching. Dr Lever advised: that the claimant be allowed additional time to prepare lessons and to mark; that she be provided with any paperwork for capability meetings in advance, possibly in larger font, and be allowed extra time to respond; that voice-activated software might be of benefit if the claimant had to write reports on her laptop; and that it might be preferable for her to use a computer and projector rather than a blackboard or whiteboard.

35 Dr Andrew, having discussed the claimant's case with senior colleagues, did not think that the claimant fulfilled the criteria for PTSD.

36 Ms Rees noted that the claimant did not feel that her dyslexia had an impact on her teaching although she felt it made some administrative tasks more difficult, such as writing lesson plans in English and writing reports, and that she felt that because of the stress she was under her observed lessons did not represent her usual standard of teaching. Mr McNamara, whom Ms Rees also met, stressed that he had no issues with the claimant's spelling or report writing; the primary concern was the progress of children in her classes. Ms Rees listed some fifteen adjustments which had already been made to support the claimant, including an allowance of planning and preparation time (PPA) which was 12% in the previous year and 20% in the current year compared with the usual 10% for other teachers (p. 1559). Ms Rees noted in summary that 'difficulties that may be attributed to Emma's dyslexia, for example, with accurate spelling and writing of reports, are not considered to be important issues by the head teacher. Emma does not consider that her dyslexia affects her teaching, but identifies a range or problems that may be exacerbated by her dyslexia in relation to the capability process, i.e. lesson observation and meetings. However, she accepts that lesson observations are essential for all teachers and therefore she cannot be exempt from them.'

37 Ann Rees made a number of recommendations including text-to-speech software; documents in electronic format; experimentation with paper size, colour and font; agendas provided in advance; audio-recording of meetings or electronic minutes (p. 1560).

38 In her letter of 6 October 2015 to Ann Jones, personnel officer of the respondent, the claimant articulates a strand of argument of which much was made before us. She wrote: 'I have been deliberately set up to fail repeatedly, to dismiss me without any intention of following any course of action to assist me at any time, you have jointly eroded my confidence and belief in myself, I have now considered the situation and believe I am an excellent teacher who has been undermined deliberately, and callously …'

39 After several adjournments the meeting of 2 September to review stage 3 of the formal procedure was reconvened on 5 November 2015. Mr McNamara referred the claimant's case to the disciplinary and dismissal panel of the governing body and said that he would be recommending dismissal. A meeting of the panel was convened on 9 December at the conclusion of which the panel reserved its decision, agreeing to meet to deliberate on 14 December and to announce its decision to the parties on 17 December.

40 On 17 December the panel announced its decision that the respondent's policy and procedures had been followed correctly, but that the panel wanted to obtain further information before reaching a final decision (p. 560). They directed that there should be a four-week extension to stage 3 of the process which was to commence on 4 January 2016; that period was to include: two further lesson observations in the presence of a specialist Welsh second language teacher; two visits to the 'pathfinder' school (Treorci Comprehensive School) in the first of the four weeks, to include lesson observation of Welsh second language classes; a new link person to be identified by the claimant; at least two regular timetabled meetings with the head of department with agreed notes being taken; appropriate

support by a Welsh language teacher to be provided. The panel considered the occupational health, dyslexia and optometry reports and considered that the provision of extra preparation and planning time (PPA) was a reasonable adjustment relevant to lesson planning and the capability assessment. The panel provisionally fixed the date of 11 February 2016 for the reconvened meeting at which the claimant's progress after the four-week extension would be considered.

41 On 18 December at 12.57 the claimant emailed Mr McNamara complaining that he had failed to inform her of details for the two visits to Treorci Comprehensive School. Mr McNamara replied at 13.12 that Treorci had asked for the visits to be Thursday and Friday of the first week of term and, in case the claimant did not check her emails over the holiday, he would write to her with the details but, in any event, that she would have enough time to prepare when she returned on 4 January. Later on 18 December, at 17.47, Mr McNamara emailed the claimant to record that he had hand-delivered his letter to her at 14.36 on his way home. In evidence the claimant made much of the upset Mr McNamara caused her by coming to her home. She complained, firstly, that Mr McNamara had not made the necessary arrangements for her visits to Treorci within half a day, and then complained that he hand-delivered his letter to her in order to ensure that she received it promptly (the claimant had earlier said that she did not always check emails). We could not accept the claimant's evidence that opening the door to Mr McNamara caused her to suffer a nervous breakdown (witness statement, February 2018, paragraph 1238). The tribunal found that the claimant was at this point being extremely unreasonable.

42 On Saturday, 19 December, by which date BCS was closed for the Christmas holiday, Mrs Thompson sent a letter in excess of thirty closely typed pages in length to Ann Jones with a strongly worded demand for a reply no later than midday on 24 December (p. 567ff.). Whilst this letter is an extreme case, it exemplifies a frequently repeated pattern of unduly lengthy, oppressive, onerous and extravagantly worded correspondence from Mrs Thompson, sometimes under

her own and sometimes the claimant's name, to numerous officers of the respondent (pp. 599-603; 605-10). In the latter letter Mrs Thompson writes on 29 December 2015 that the claimant 'is still recovering from PTSD', for which assertion there was then no medical support.

43 On 4 or 5 January 2016 the claimant, together with her mother, attended an appointment with Nicola Johns, occupational health advisor. The claimant and/or her mother disagreed with Ms Johns's opinion and did not authorise full disclosure of the resulting report to the respondent.

44 On 6 January 2016 Mrs Thompson telephoned Nicola Johns stating that the claimant was fearful of attending an appointment with her GP lest she be dismissed for asking for time off and that 'Emma's life is at risk'. Late that evening Mr McNamara emailed the claimant with reference to arrangements in that first week of term. The claimant had expressed a wish to visit Bryn Hafren School instead of Treorci because of the shorter distance involved; a stress risk assessment was to take place on 7 January; and cover was made available so that the claimant could attend her GP on 8 January. Mr McNamara also asked the claimant to make an appointment to meet him to confirm that all aspects of the support to be provided to the claimant were in place. On receiving a copy of this email, the claimant's trade union representative, Geraint Davies, wrote, 'What has all the fuss been about?' When a meeting with Mr McNamara was arranged for 12 January at 12.30 the claimant wrote at 11.18 to say that she had not been given 5 days' notice. By this stage it was becoming extremely difficult for the respondent in general, and Mr McNamara in particular, to manage the claimant's expectations and to satisfy her demands.

45 On 21 January Mr McNamara suspended the claimant on medical grounds because he had been advised that 'taking account of information provided by you and your mother together with the lack of available information from

Occupational Health or your GP … it is felt that it is not appropriate for you to remain in the workplace…' (p. 784-6).

46 The claimant and her mother attended again with Nicola Johns on 27 January and a limited report was disclosed confirming that the claimant was not fit to attend work. She was certified unfit by her GP initially from 20 January to 11 February.

47 By letter of 1 February the governing body reminded the claimant that the panel considering her case was due to reconvene on 11 February to consider her progress. Mrs Thompson wrote on 3 February that the claimant was unfit to attend and, accordingly, the panel decided to fix a further meeting for the 29 February. Dr Ian Johnson, chair of the panel, wrote, '… you will see that Mr McNamara advised that there was a difference from the advice received from Occupational Health and your own doctor and I understand that you have been advised to allow Occupational Health to contact your doctor but you have declined this request. I also understand that you have declined to release two occupational health reports following previous health referrals. You need to be aware that the committee will make their determination on the basis of the information available to them at the meeting on the 29 February 2016.'

48 The claimant and her mother attended Nicola Johns again on 24 February. The claimant remained certified unfit and did not return to work before her dismissal.

49 The disciplinary and dismissal panel of the governing body met on 29 February. The claimant did not attend. An application by Geraint Davies, a trade union official representing the claimant, for a postponement so that the claimant could return to full health, return to work and complete the envisaged four-week extension to stage 3 of the procedure was refused because occupational health guidance had not been released and there was no indication when the claimant would be fit to return. Mr Davies then left the meeting. The panel heard from Andrew Thompson and Geraint Hilbourne who both confirmed the accuracy of

the reports they made following their observation of the claimant's lessons. The decision of the panel was to terminate the claimant's employment on the following grounds:

a. Consistently unsatisfactory judgments on teaching capability;
b. Lack of medical information to determine a return to work date;
c. Lack of engagement since the meeting of 16 December;
d. Requirements of the school and the Welsh department in particular highlighted in an Estyn inspection as requiring additional support;
e. The four-week extension period had been agreed in order to provide additional support, however there had been a lack of engagement, a refusal to provide detailed occupational health information and the claimant was currently on sick leave with no return date known.

50 The decision was confirmed to the claimant by letter of 8 March which gave the claimant notice that her employment with BCS would terminate on 31 August 2016. The letter also informed the claimant that she had a right of appeal by setting out her reasons for appeal in writing within five working days of receipt of the letter.

51 Mrs Thompson wrote on 9 March 2016 to the chair of governors referring to '… the "bad faith" collaboration on and prior and not less subsequently of the 18 October 2013 at 07:39 where there is definitive proof that Emma Thompson was set up to fail with the knowledge and collaboration of Mr McNamara, Sue Alderman … and Ann Jones…' We will return below to the matter to which this letter refers. Mrs Thompson wrote another letter of the same date to the chair of governors complaining of psychiatric assault, victimisation and harassment.

52 On 10 March Mrs Thompson submitted an appeal in writing on behalf of the claimant together with a covering letter extending to 37 pages (p. 912 ff.). The complaints made were very far-reaching. She referred to the claimant's 'impeccable work record proceeding (sic) the vendetta of Chris Elmore', a

'conspiracy to dismiss Emma Thompson', a '"sham process" and subterfuge to settle old scores by Chris Elmore', a 'grossly negligent and malicious' process, to there being 'no actual proof the meeting [of 29 February] did go ahead'. She asserted that the claimant's 'observation would have been passed for any other teacher but due to the driving force of Chris Elmore to settle a vendetta against IT WAS CONTRIVED ET (sic) was unfairly failed', and made numerous very serious allegations against Mr Elmore concerning his alleged vendetta.

53 In addition to the allegations made against the respondent and Mr Elmore, Mrs Thompson alleged that the claimant's trade union representative, Geraint Davies, was 'sleeping in the same bed as the vexatious employer'.

54 By letter of 6 April the governing body informed the claimant that a meeting of the disciplinary and dismissal appeals committee on 22 April would consider her appeal. By her letter of 12 April Mrs Thompson referred to paragraph 7.4 of the respondent's capability procedure and asserted that due to date of the proposed hearing the governors were now 'time-barred from hearing appeal'. Paragraph 7.4 of the procedure states: *The employee can appeal against this decision in writing within 5 working days of receipt of written decision. The appeal must be heard within 10 working days of receipt of letter of appeal.*

55 By his letter of 13 April Mr Quigley, Assistant General Secretary (Regional Development and Support) of NASUWT, protested to the claimant about her 'deployment of threat, the repeated practice of making wild allegation and the routine use of gratuitously offensive language' and the claimant's failure to provide support for 'the extremely serious allegations you have made about Councillor Elmore [as he then was]'. In fairness to the claimant, it is in the view of the tribunal highly probable that the author of the language complained of was Mrs Thompson rather than the claimant.

56 On 14 April Mrs Thompson wrote, again at length, saying that she was '… now officially taking over from the unions as Ms Thompson's Legal Representative post 12 April 2016 3.15 pm …' The very precise wording of that letter cast doubt on Mrs Thompson's assertion to us that she had informed the respondent during the Christmas school holiday that she was now acting on the claimant's behalf in place of the trade union. We found that this letter was the first indication the respondent received concerning the claimant's change of representation. Notwithstanding the terms of Mrs Thompson's letter, NASUWT appeared to be under the impression that they were still required to represent the claimant at her appeal, and requested a postponement of the hearing from 22 April to accommodate their officer. In those circumstances we could not criticise the respondent for acquiescing in that request despite Mrs Thompson's assertion that the respondent knew that the union was no longer acting.

57 The date of the appeal hearing was postponed from 22 April to 29 April, and in response to Mrs Thompson's allegation that the appeal was time-barred, the chair of governors, Antonia Forte, explained the reasons in her letter of 15 April as follows: 'I accept that the appeal has now been arranged outside of the 10 working day timeframe (as set out in section 7.4). There are a variety of reasons for this, including the Easter holiday period, the availability of both governors and Emma's trade union representative'. Antonia Forte also referred to the complexity of the case, the difficulty of securing a panel of governors who had not been involved with the claimant's case before and the voluminous correspondence received from Mrs Thompson after the appeal was presented. She concluded, 'In the light of the above, I do not feel that there has been an unreasonable delay in arranging the appeal hearing, and confirm the intention to continue with arrangements for the appeals hearing on 29 April 2016', albeit that it was accepted that it was outside the ten working days provided for in the procedure.

58 On 20 April Nicola Johns confirmed that the four occupational health appointments attended by the claimant since January had generated four reports,

of which the claimant consented to only the last two being disclosed to the respondent.

59 At the appeal hearing held on 29 April the claimant did not attend, nor was she represented. This was because Mrs Thompson took the view that the appeal was time-barred and that the claimant had won her appeal by default. The panel reviewed the informal stage and the three formal stages of the procedure. They considered the six staff members of BCS and Rhys Jones, head teacher of Treorci Comprehensive School, who had observed the claimant's lessons. They considered the adjustments requested by the claimant because of her disability and injuries, and were told that it was not until stage 3 of the procedure that the claimant had linked issues regarding her teaching capability with her disabilities. They also considered the claimant's complaints against the respondent's staff, alleged corruption between the respondent's staff, the head teacher and the claimant's trade union and the allegation of a vendetta.

60 The appeal committee heard evidence from Mr McNamara, Geraint Hilbourne, Andrew Thompson and Rhys Jones. These four had all observed the claimant's lessons. Mr McNamara said that prior to September 2015 the claimant had never requested any aids or adaptations to carry out her role. He said the greater amount of reading the claimant had to do was reading and marking students' books and that voice-activated software would not have helped her to improve her teaching. Messrs Hilbourne, Thompson and Jones confirmed their unsatisfactory assessment of the claimant's teaching.

61 The appeal committee noted that the claimant was one of four teachers identified as needing additional support, and that she was the only one of the four who did not improve and consistently failed to reach the required standards. The committee rejected the argument that the claimant had been set up to fail. It also dismissed the arguments that there had been corruption or a vendetta and saw no connection between building improvement work being undertaken at the school

and the standard of the claimant's teaching. Whilst regretting that they had not had the opportunity to hear from the claimant or a representative on her behalf, the committee decided not to uphold the claimant's appeal.

62 The chair of the appeal committee, Lyn Cosgrove, wrote to the claimant on 6 May 2016 confirming that the decision of the staff disciplinary and dismissal panel was upheld and that the appeal committee had instructed the respondent to terminate her contract with effect from 31 August 2016.

63 On 16 May Jennifer Hill, Director – Learning and Skills in the respondent, wrote confirming the termination of the claimant's employment and informed her that, 'In line with the statutory duty contained in the Education (Supply of Information) Regulations 2009 we will now be reporting this matter to the Education Workforce Council.'

64 We heard evidence that whilst the claimant's capability procedure was going on some building work was being undertaken in areas adjacent to her classroom. The tribunal found that the appeal committee reasonably concluded that was not a contributory factor to the claimant not being able to deliver effective lessons. There was no evidence at all to support Mrs Thompson's extravagant claims that the respondent was negligent of its duty of care to staff and students, whether by ignoring the possibility of harmful asbestos being present in the relevant area or otherwise.

65 Notwithstanding some change of wording to describe the professional standards by which the claimant was being judged, there is no doubt in the mind of the tribunal that the claimant at all times knew very well what she was required to achieve and received extensive feedback, oral and written, from those who observed her lessons informing her in what respects she was failing to achieve it.

66 From 1999 to late 2015 the claimant requested no adjustments of any kind relating to her disabilities of dyslexia and hearing loss. As she told Ann Rees, she did not consider that her dyslexia affected her teaching. That view was supported also by Rhys Jones who told the appeal committee that he had experience of teachers with dyslexia which did not prevent them from delivering effective lessons. The claimant had developed her own coping strategies such as lip-reading.

67 Following the claimant's road traffic accident in 2012 she was provided with a different chair, a footrest and a writing slope. A list of adjustments made for the claimant was set out by Ann Rees (p. 1559), of which the most significant was the increase in PPA from 10% to 20%. Both Dr Lever and Ann Rees suggested specialist software: either voice-activated (Dr Lever) if the claimant had to write reports on her laptop, or text-to-speech (Ann Rees) to help with reading fluency and recall. The claimant's classroom was fitted with blinds of the kind used throughout the school, about which the claimant made no complaint until 2015. The tribunal was satisfied that any defects in the blinds had no significant effect on the claimant's performance in class. The claimant's complaint about the precise location of her table in her classroom was a matter of small importance in that, with assistance if necessary, the claimant could easily have moved it if she wished. The only stipulation by Mr McNamara was that the teacher's table should not be placed so as to impede the visibility of the whiteboard to the students.

68 It has been noted above that the claimant made extremely serious allegations, primarily against Christopher Elmore MP. The claimant stated, 'I believe [Christopher Elmore] is the root cause of my employment issues in both the YMCA and the school where he was a governor in both. I believe this was a vendetta held against me for matters Mr Elmore was embroiled in …' (witness statement, February 2018, paragraph 24). The fact is that Mr Elmore was a member of the board of management of the Barry HUB YMCA at the time of the claimant's earlier litigation against that body, and was a governor of BCS between

September 2012 and July 2016. The evidence went no further than showing that in April 2016 Mr Elmore was informed by the respondent of the allegations made against him by the claimant. However, he had no involvement whatsoever in any matter related to the capability procedure involving the claimant, her dismissal or her appeal.

69 In order to further this line of attack the claimant was compelled to broaden it to include those who did have such involvement, namely the numerous teachers who observed her lessons, officers of the respondent authority who dealt with her case and, by implication, governors of the school. She did not shy away from doing so, alleging that all were variously involved in corruption and conspiracy to dismiss her.

70 The allegation of corruption extended as far as the claimant's own trade union representative, Geraint Davies, on the basis that Mr McNamara wrote on 18 October 2013 to Sue Alderman, 'Emma Thompson has been on support programme. The support package in general was agreed with the unions ….. Geraint Davies is alright. I could meet him on my own as this is informal support. If you think it's best to be present you are more than welcome.' In fact, this was no more than Mr McNamara checking whether Ms Alderman thought that the respondent's HR department should be present at a meeting between him and a trade union official.

71 It is no more than fair to those who were thus publicly attacked by the claimant that this tribunal should state with absolute clarity that no shred of credible evidence was adduced to support the claimant's allegations of vendetta, corruption or conspiracy.

The law

72 The Employment Rights Act 1996 provides:

98 General

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

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

(b) that it is ..... a reason falling within subsection (2) .....

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

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

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

73 The Equality Act 2010 provides:

13 Direct discrimination

(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.

20 Duty to make adjustments

(2) The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

26 Harassment

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

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

(b) The conduct has the purpose or effect of –

(i) violating B's dignity, or

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

Submissions

74 Ms Criddle submitted that the reason for the claimant's dismissal related to her capability and that there was no discrimination, harassment or failure by the respondent in its duty to make adjustments. The capability procedure, through its informal stage, three formal stages and an extension of the third formal stage, was fairly and honestly conducted, the claimant failed throughout to demonstrate the required standard of capability and that that alone was the reason for her dismissal. She also contended that a number of the claimant's allegations of discrimination were out of time.

75 Mrs Thompson submitted that the claimant's dismissal resulted from a vendetta initiated and driven by Christopher Elmore, because of his antipathy to the claimant following her litigation against the YMCA, in which vendetta numerous

of the respondent's witnesses conspired. Implicit in that were several further contentions, namely that (i) the claimant was a competent teacher who performed capably during the capability procedure, (ii) the professional witnesses who observed the claimant were dishonest in their assessments of her and in the evidence they gave to this tribunal, (iii) the observations of the claimant's lessons were deliberately 'engineered' so that the claimant would fail by, for example, selecting classes with the most challenging behaviour and deliberately selecting non-Welsh specialists to observe her, and (iv) that Mr Elmore himself was untruthful when he said that he had no involvement in the claimant's employment at BCS.

76 Mrs Thompson submitted that the claimant was always a good teacher, that the respondent did not wish to acknowledge that fact, and that the respondent would be under a duty to report the claimant's dismissal to the EWC only if the dismissal were 'safe'.

77 Mrs Thompson further submitted that the tribunal prevented her from exploring the background to Mr Elmore's alleged grudge against the claimant.

Discussion and conclusions on the issues before the tribunal

78 Concerning the respondent's arguments that certain of the complaints were 'out of time', in deference to the very full arguments put before us we have considered firstly the merits of the claims. If we had found merit in any of them we would necessarily have had to go on to consider whether they were brought in time. That has not arisen in this case.

79 We have already made clear our finding as a fact that there was no vendetta, conspiracy or corruption underlying the claimant's dismissal. Save in the case of Mr Elmore himself, there was no suggestion of any ulterior motive on the part of the large number of people involved in the claimant's case - teachers at BCS, Rhys Jones and officers of the respondent – which would explain their supposed

desire to dismiss her; and, as we have found, Mr Elmore had no part whatsoever in the claimant's dismissal.

80 Concerning Mrs Thompson's submission that she was prevented from exploring Mr Elmore's alleged grudge in cross-examination, the tribunal ruled that it was first necessary for Mrs Thompson to establish some connection between Mr Elmore and the taking by BCS or the respondent of a decision adverse to the claimant. If that could be done, then it might be arguable that he had the opportunity to influence the decision, and to further any grudge which he might hold. The background to the alleged grudge might in those circumstances become relevant. But if no connection could be established between Mr Elmore and any decision adverse to the claimant then the background remained irrelevant. Since Mr Elmore had no involvement whatsoever in any decision relating to the claimant's employment at BCS, any grudge which he might have held against her was irrelevant to our decision.

81 We found that the dismissal panel and appeal committee were reasonably entitled to conclude that the teachers who observed the claimant conducted themselves with professional integrity, that they were experienced teachers who were well qualified to judge the claimant's performance and that they gave honest judgments which were entitled to respect. The dismissal panel and appeal committee were reasonably entitled to find the weight of their evidence compelling.

82 The disciplinary panel and appeal committee were reasonably entitled to reject the claimant's assertions that those who observed her and found her wanting were in some way unqualified to judge because they were not Welsh speakers, or were not Welsh teachers, or were not Estyn inspectors. Before us the claimant's approach was routinely to blame others rather than to acknowledge any deficiencies on her own part.

83 We could not avoid entertaining serious doubts about the claimant's reliability as a witness. She made extravagant and unsupported allegations, gave inconsistent and exaggerated accounts of the road traffic accident (p. 1634) describing in evidence a ‘near decapitation' compared with the ‘mild head injury’ noted at the time (p. 1335); it was considered that 'factitious disorder' was the likely explanation of some of her complaints (p. 1630-31); and she insisted she continued to suffer PTSD well beyond Sept 2012, the latest time for which there was any supporting medical diagnosis.

84 Throughout the capability procedure the claimant was represented by her trade union save at the appeal when she dispensed with their services.

85 The evidence in this case did not begin to establish any case of direct disability discrimination or of harassment. No treatment of the claimant by the respondent was because of her disability. No conduct of the respondent had any of the purposes proscribed by section 26 (1) of the Equality Act 2010, nor was it reasonable in the circumstances, including the perception of the claimant, for any conduct of the respondent to have any of those effects.

86 It is conceded by the respondent that BCS had a capability procedure and that it required teachers to achieve a good standard of teaching. Those were provisions, criteria or practices (PCPs) for the purposes of section 20 of the Equality Act 2010. It is in our judgment not possible for ‘refusing to make reasonable adjustments’ to constitute such a provision, criterion or practice. The failure to comply with a duty cannot itself give rise that duty.

87 Whilst we accept without reservation that the capability procedure must have been a stressful experience for the claimant – as it would for any teacher – we could not accept the claimant’s contention that the PCPs put her at the substantial disadvantage of suffering a nervous breakdown. Even if it had been established that she did suffer such a breakdown (which it was not), the claimant in evidence

stated (see paragraph 41 above) that it was opening the door to Mr McNamara which caused it. Nor could it be a disadvantage to which a disabled person is put in comparison with persons who are not disabled.

88 We do not think the drafting of the issues at this point properly reflected one strand of the claimant's case before us. One of the arguments put forward by the claimant was that the PCPs, without any adjustment, made it likely that she would fail the procedure and that therefore some adjustment would have been reasonable. There is obvious tension between this strand of argument and the further proposition that the claimant was throughout a good and successful teacher who was the victim of a vendetta, in the absence of which she would have passed the procedure. In that latter case she would have needed no adjustment to the procedure. We have considered each of the adjustments contended for (see list of issues, paragraph 12 (a-j)), and have looked at both strands of her argument set out above.

89 There was no satisfactory evidence that the PCPs placed the claimant at any disadvantage by reason of her dyslexia or her hearing impairment. The claimant told Dyslexia Action Cardiff Learning Centre that dyslexia did not affect her teaching (p. 1556ff.), but that writing lesson plans in English and writing reports caused some difficulty. This rings true because the claimant had been teaching, with dyslexia (and her hearing impairment) since 1999 and did not ask for any adjustments till mid-2015. There was nothing required by the capability procedure which was not part and parcel of the claimant's ordinary teaching load.

90 When adjustments were requested the respondent considered them and made some of them. Importantly, the claimant was allowed twice as much PPA as usual for a teacher; and when, in 2015, documents printed on blue paper were requested, this was done. Whilst we are not satisfied that the respondent was reasonably required to take any steps in this case, that additional time provision was generous. Given the nature of the claimant's work we do not think that it was

reasonably necessary for the respondent to provide specialist computer software, whether voice-activated or text-to-speech. We were satisfied that it was not reasonably necessary for the respondent to make any other of the adjustments argued for.

91 We turn to consider the complaint of unfair dismissal (see list of issues, paragraphs 15-17). There was one reason only for the claimant's dismissal, namely that after an exhaustive capability procedure which was scrupulously honest and fair, the claimant's teaching was found not to be to the standard required of a classroom teacher. The claimant was given ample opportunity to improve her performance and was warned that failure to do so might result in her dismissal. The reason thus related to the claimant's capability. BCS did not appoint a permanent replacement for the claimant until September 2016 and the decision to dismiss her, and dismiss her appeal, were not for that reason foregone conclusions.

92 We are quite satisfied that in all the circumstances the disciplinary and dismissal panel and the appeal committee acted reasonably in treating the claimant's lack of capability as a sufficient reason to dismiss the her. That reason was not tainted by any improper motive.

93 The referral by the respondent of the details of the claimant's case to the Education Workforce Council following her dismissal for lack of capability followed as a matter of statutory obligation placed on the respondent.

94 The only aspect of the respondent's procedure which calls for further comment is the timing of the appeal hearing. We remind ourselves that the test to be applied is whether the respondent acted reasonably. The appeal letter dated 10 March was received on 14 March. According to paragraph 7.4 of the procedure it should have been heard within 10 working days; that is (excluding the Easter holiday) not later than 12 April, the second day of the summer term. It was actually heard on 29

April, thirteen working days late. If the appeal had not been heard, as Mrs Thompson argued, then it seems to us that the position would have been that the dismissal would have stood and the claimant would have been deprived of the opportunity of an appeal. We do not think Mrs Thompson's argument that the appeal would have been 'won' by default and the dismissal overturned is correct. Bearing in mind the complexity of the issues and allegations raised, the extremely voluminous correspondence submitted by Mrs Thomson (before and after the appeal was presented), the intervening Easter holiday, the need to enlist the services of volunteer governors and the request by the claimant's trade union for a postponement of a week, we do not think that the respondent can be criticised as acting unreasonably for convening the appeal when it did. The fact that the claimant did not attend and was not represented was her choice. Lateness in the hearing the appeal did not render the claimant's dismissal unfair.

95 The thirty-six respects (see list of issues, paragraph 16) in which the claimant alleges that her dismissal was unfair have no substance in our judgment. They amount to unjustified attempts to criticise others rather than to acknowledge and confront the criticism directed at the claimant herself.

Conclusion

96 The claimant's complaints are dismissed.

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Employment Judge S J Williams
Dated: 30 January 2019

REASONS SENT TO THE PARTIES ON

……30 January 2019……..

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS