EMPLOYMENT TRIBUNALS

Claimant: **Ms A Wright**

Respondent: **The Governing Body of St Stephen's Church of England Primary School**

Heard at: **Leeds** **On: 2-5 December 2019**

Before: **Employment Judge Maidment**
Members: **Mr PR Kent**
Mr L Priestley

Representation
Claimant: **Mr R O'Dair, Counsel**
Respondent: **Miss R Mellor, Counsel**

JUDGMENT

1. The Claimant was unfairly dismissed and the Respondent is ordered to pay to her a basic award in the sum of £12,192.

2. The Claimant's complaint of disability discrimination pursuant to Section 15 of the Equality Act 2010 fails and is dismissed.

REASONS

Issues

1. The Claimant complains of unfair dismissal in circumstances where the Respondent puts forward that the reason for the termination of her employment was her long-term ill-health absence and the view it took regarding her likely future attendance at work. Reliance is therefore placed upon capability and, in the alternative, some other substantial reason such as to justify dismissal. The Claimant contends that the Respondent ought to have allowed her to complete a course of counselling recommended by occupation health before arranging a capability hearing, in circumstances where there was no certainty regarding the Claimant requiring surgery for a knee condition, the Respondent should have waited until she obtained a prognosis and even then not to have dismissed her if surgery would have rendered the Claimant only absent from work for a period of 6 – 12 weeks, the Claimant had provided GP evidence at the appeal hearing that she was

fit for work and, finally, that the Respondent did not consider wider redeployment within Bradford Council.

2. The Claimant also brings a single complaint of disability discrimination based on her being a disabled person by reason of her suffering from post-traumatic stress disorder, vertigo and a knee injury. The Respondent accepts that the Claimant was by reason of those conditions a disabled person. The complaint is of discrimination arising from disability pursuant to Section 15 of the Equality Act 2010 with the unfavourable treatment complained of being the Claimant's dismissal as at 26 February 2019 and the decision at appeal upholding that dismissal given on 21 May 2019. The Claimant had, prior to today's hearing, already withdrawn a number of additional complaints of disability discrimination including a complaint regarding a failure to make reasonable adjustments.

Evidence

3. The Tribunal had before it an agreed bundle of documents consisting of around 300 pages. The Tribunal took some time, having identified briefly the issues between the parties, to privately read into the witness statements exchanged between them and relevant documentation.

4. Evidence was then heard on behalf of the Respondent firstly from Mr Paul Urry, headteacher, Mr Robert Griffiths, governor and Mrs Joyce Simpson chair of the board of governors. The Tribunal then heard from the Claimant and, called on her behalf, from her union representatives, Irene Docherty and Wendy Shuttleworth. The Tribunal also accepted in evidence a written statement of Philippa Parnell who had provided occupational therapy to the Claimant in circumstances where only reduced weight could be given to such evidence in circumstances where the witness was not present to be cross-examined.

5. Having considered all of the relevant evidence, the Tribunal makes the following findings of fact.

Facts

6. The Claimant was employed by the Respondent from 28 September 2015 and by the termination of her employment had reached level 2 of the national teachers' upper pay scale, but was eligible to apply to be paid at the top of the upper pay scale applicable to teachers without a leadership role. She was entitled to 6 months' full and 6 months' half contractual pay during sickness, with a fresh entitlement being revived after any return to work. The Respondent is a voluntary aided 2 form entry infant and junior school taking 460 children from nursery and reception stage through to the age of 11 years. It employed 14 classroom teachers with other specialist teachers and additional teachers to provide cover, as well as 2 deputy heads (reflecting the school operating over two separate sites) and an assistant head. It operates in an area of deprivation in inner-city Bradford.

7. Mr Paul Urry was appointed as headteacher in January 2018 but did not take up his post until September 2018. He was the school's sixth headteacher over a period of three years. The school received an adverse OFSTED report in February 2019 marking the school as "Requires Improvement" overall (whilst highlighting that effective action was now being

taken by Mr Urry) and had been regarded by the local authority as a priority 4 school which equated to "inadequate" and signified the need for additional monitoring.

8. The Claimant was employed to teach a year 5 class.

9. The Claimant was absent from work due to fracturing her foot from 15 May 2016 until 4 September 2016. However, on 7 September 2016 she was involved as a pedestrian in a road traffic accident in which she sustained multiple serious injuries, including to her legs. In addition, this resulted in her suffering from moderately severe post-traumatic stress disorder and vertigo. She was seen by an occupational health advisor on 20 February 2017 who advised that the Claimant was unable to return to work and would be unable to cope with the physical demands of her teaching role. A further report of 27 March stated that her left knee was causing pain and, whilst it was expected to improve, would never recover full functionality. The Claimant was also said to have a right knee problem which might require future surgery. She was said to be making good progress with her mental state. Her vertigo was said to be resolving but she was still prone to episodes twice-weekly on average. Significant difficulties were recorded regarding her mobility and also her remaining too long in a seated position.

10. A further occupational health report of 15 May 2017 confirmed that it was highly likely that she would be deemed disabled. A return to work was anticipated, however, in early to mid-July 2017 with a 4 – 6 week phased return required. It was anticipated that she would complete 1 – 2 weeks of the phased return prior to the summer break. The Claimant was said to be likely to render regular and efficient service in the future.

11. The Claimant attended an absence review meeting on 3 July where a 6 week phased return was agreed and the Claimant returned to work on 5 July 2017. The Claimant described the then headteacher, Simon Scott, as sympathetic to her needs and that as a result she made a successful transition back to her full-time role.

12. The Claimant had had the benefit of workplace assessments organised by Access to Work. The assessment of the Claimant was that she found being seated for long periods of time to exacerbate her symptoms. Physical adaptations were made and equipment provided to assist the Claimant in her work. She was no longer required by the Respondent to teach physical education or take her children to their swimming lessons and was excused from playground duties.

13. The Claimant was absent on 2 days citing a headache, nausea and a high temperature in November 2017 and subsequently for 3 days in February 2018 with similar symptoms said to be due to fatigue. This resulted in an agreement of a reduction of two hours work on a Tuesday afternoon when her class had their swimming lesson. The Claimant instead worked from home.

14. On 18 April 2018 the Claimant's right leg gave way at work and caused a further period of long-term absence.

15. An occupational health report of 9 July described the Claimant as struggling at home with a chronic musculoskeletal problem and not currently fit to undertake her duties. However, the occupational health physician was hopeful that she would be in position to return to work in September 2018 if the current adjustments remained in place. He recommended that the Claimant undertake a 4 week phased return with a slow incremental increase in her responsibilities. He stated that at the end of the phased return a discussion should take place to see if she needed to reduce her hours long term. His opinion was that it was too difficult to predict whether the Claimant would render a regular and efficient service in the future but he was hopeful that with successful rehabilitation and a slow phased return the Claimant would sustain her attendance moving forward.

16. The Claimant did attend the School after hours on 11 July for a training session on a new curriculum at which Mr Urry, as the newly appointed but not yet in post headteacher, gave a presentation.

17. By a fit note dated 30 August 2018 the Claimant was certified as fit for work with potential benefit to be gained from a phased return, amended duties and altered hours. The Claimant's lack of fitness was attributed to her knee and vestibular problems.

18. The Claimant attended work on 3 September which coincided with Mr Urry's first day at work as the School's new headteacher. This was a designated staff training day, the day before pupils were due to commence after the end of the Summer holidays. The Claimant spent the morning attending training on safeguarding and during the afternoon spent some time preparing her classroom.

19. At the end of the day she attended a prearranged meeting to discuss a return to work together with her union representative, Ms Docherty, and her own privately engaged occupational therapist, Ms Parnell. Mr Urry was accompanied by Ms Beck of HR consultants contracted by Bradford Council who provided HR advice to the school. The Claimant outlined the background to her most recent absence and there was confirmation that the workplace adjustments previously made would remain in place. However, the conversation did not progress to consider the details of any phased return to work, which was discussed only in more general terms.

20. There was no proposed return to work plan in place or discussed prior to the meeting. Ms Docherty's recollection to the contrary was a mis-recollection and confusion with an earlier return to work plan in 2017.

21. Mr Urry suggested to the Claimant that she might come into the school the next day or later in the week to say hello to the children in her class. He was keen that the children met their class teacher and went back to their parents telling them that they had done so. The Claimant became immediately upset and somewhat distressed at that suggestion. Ms Docherty explained that the day the Claimant had just completed was enough for that week, but Mr Urry sought to persuade the Claimant that she was not being asked to do any work but simply come in at some point that week for a half day to say hello to her class. The Tribunal rejects any suggestion that the Claimant was being asked to do more than that and that there was any suggestion that she would not enjoy the benefit of a phased return to work. The

Claimant did not make any suggestion of undue pressure until a significant time later when she was invited to a capability hearing. She did not challenge Mr Urry's summary of the meeting as described below. Ms Docherty's witness statement evidence was that Mr Urry had asked the Claimant to meet her class. She made no reference to teaching. The Tribunal does not doubt, however, that the Claimant's perception was one of being put under pressure and that at that point in time her state of mental health rendered her unfit to perform her substantive role.

22. The discussion was adjourned. Mr Urry considered it clear that the Claimant couldn't continue working and he and Ms Beck made contact with the Bradford Council Employee Health and Well-being Unit. They advised Mr Urry to medically suspend the Claimant until she had been assessed. The meeting reconvened and Mr Urry explained his decision to the Claimant and that she was being referred back to occupational health.

23. Mr Urry wrote to the Claimant by letter of 7 September confirming her medical suspension. Within this he said that they had discussed the 4 week phased return and what that would look like, asking for the Claimant's thoughts. He went on that they discussed the importance of the Claimant coming into school the first week to meet the children in her class and that when this was mentioned the Claimant became upset. He said he had suggested that she worked Friday morning to introduce herself to the class and that there would be colleague in the room with her. Again, the Claimant never sought to correct this account, which the Tribunal finds to be accurate.

24. The Claimant was again seen by occupational health on 24 September. The Claimant was said to still have issues with her knees, mobility and pain, but it was said that this had significantly improved. However, it had become apparent, particularly with the failed phased return, that the Claimant was struggling psychologically. She had described elements of post-traumatic stress disorder and remained unfit for work. However, the occupational health physician was fairly confident that with appropriate help and support she would be in position to return to work within 3 months. In terms of medical condition, it was said that the Claimant had both chronic physical and mental health issues at present, repeating that the likely timeframe for return to work was in the next 3 months. It was advised that the Claimant would benefit from counselling and was estimated to require 3 – 4 sessions of counselling prior to be in a position to return to work. A 4 – 6 week phased return was recommended with incremental increases in her hours/responsibilities set out.

25. There was a delay in the referral of the Claimant for counselling which Mr Urry chased up. The Claimant remained absent due to sickness and continued to submit fit notes.

26. By the end of October, Mr Urry decided that the Claimant ought to be invited to attend a preliminary medical capability hearing pursuant to the Respondent's attendance management policy. This was on the basis that he considered the Claimant to have been absent from work continuously for 6 months save for the single day she returned in September. The purpose of the meeting was to consider whether the Claimant's absence should be considered by a final medical capability hearing of the governors. The Respondent's attendance management policy provides that at such a final

capability hearing, the dismissal of an employee would be considered if occupational health could not confirm that the employee is likely to be able to provide a reliable and efficient service. The Respondent wrote to the Claimant on 29 October but unfortunately the invitation was not received by the Claimant. The Claimant had moved out of her home address to live with her partner and in an environment which assisted her in terms of her mobility. Her brother had moved into her own home. The Respondent then sent a further letter on 12 December inviting her to a meeting on 18 December. This meeting was in fact attended by the Claimant's union representative, but not the Claimant who was again unaware of the meeting.

27. Mr Urry then wrote a further letter of invitation on 23 January 2019 which was hand-delivered to the Claimant's home.

28. The Claimant received this and duly attended a capability hearing on 28 January. In the interim period the Claimant had not been declared as fit to return to work and by this point in time her sick notes took her up to the February half term.

29. Mr Urry's letter to the Claimant then of 30 January set out what had been discussed at the meeting at which the Claimant had been accompanied by Wendy Shuttleworth of her union. This was an accurate account. Ms Shuttleworth said to the Tribunal that she would not have challenged the content of such a letter, but would have waited until the formal capability hearing or appeal. She made in fact no challenge at any such subsequent stage to the content of that letter or any other correspondence and notes of meetings.

30. The Claimant updated the Respondent about her state of health including that her fit note took her up to the half term, 12 February, and at that point she would be going back to her GP. It was queried whether she felt well enough to return at that point to which the Claimant responded that her health had deteriorated since the occupational health assessment in September. She had advised occupational health at that point that she had improved, but explained that she had since had a setback and was experiencing problems now in her right knee. She believed that overcompensating on her right knee because of issues in her left had exacerbated her condition. She said she was still seeing her vertigo specialist. By this stage she had seen a counsellor on four occasions and found the sessions to be helpful in her acceptance of her physical limitations and the psychological side of her condition. The Claimant said that she did not feel she would ever be like she was before. The Claimant had asked the Respondent to consider redeployment. Mr Urry's reaction was that he would have explored that option if there had been opportunities available in the school, but there were no vacancies at that time. Mr Urry told the Claimant that there was no alternative role available. Whilst the Claimant raised reduced hours she did not make any specific request or indicate what any alternative working pattern might look like. Mr Urry's view expressed to the Tribunal was that it was not beneficial for a class of children to have 2 teachers, although the school did have a nursery teacher and year 4 teacher who worked less than full-time hours. Any arrangement, he said, had to be mindful of the best interests of the children. The Claimant confirmed to the Tribunal that as at 30 January she was not fit to work. The indication she gave to Mr Urry, the Tribunal notes, was that when that fit note expired, she

would be returning to her GP for another one – not that she was expecting a change in her state of fitness. She also said before the Tribunal, however, in re-examination, that as at 30 January 2019 her knee was no longer an issue for her and, earlier in her evidence, that she had completed sessions to address her vertigo in December 2018.

31. The decision at the meeting was to move forward to a medical capability hearing given that previous occupational health advice been that the Claimant would be fit to return by this point, but this had not been the case. Mr Urry informed the Claimant that the Respondent was unable to sustain her absence indefinitely due to the impact it was having on school finances, other members of staff and, he said, most importantly the children's teaching and learning. Ms Shuttleworth agreed before the Tribunal that a child's education would be adversely affected by a lack of continuity in the person teaching them, although the quality of any supply teacher engaged would make a difference. The letter concluded with a statement that it was hoped that this was a true representation of the meeting and if the Claimant had any queries she should let Mr Urry know. No queries or corrections were forthcoming.

32. The Claimant was invited to a final medical capability hearing by letter of 6 February. This informed her that a possible outcome of the hearing was that she might be dismissed on the grounds of medical capability if the committee of the governors hearing the matter considered her medically incapable of fulfilling her contract of employment. A pack of relevant documentation was included. The Claimant said that she had been intending to obtain a fit note referencing a return to work but that, having received this invite letter, she instead obtained a fit note on 13 February saying that she was unfit for work. This covered the period until 11 April. Ms Shuttleworth confirmed the Claimant's thinking at this time. The Claimant would not accept in cross examination that she was then in fact unfit for work, saying that it was for the capability hearing to determine that.

33. The Claimant was seen further by occupational health on 18 February prior to the hearing. The occupational health practitioner advised that regard still be taken of the contents of the previous September report. Since then it was said that the Claimant had continued to experience problems with both her knees and that she experienced pain and restricted mobility on a daily basis. It was explained that the Claimant had recently had MRI scans and x-rays and was waiting for the results, with a view to discussing further treatment options with her musculoskeletal specialist. The Claimant had reported the counselling to have been beneficial. The Claimant was managing her vestibular symptoms fairly well and they were causing less problems, however stress had been identified as an aggravating factor. The Claimant had been issued with a further sicknote until 11 April, the reason for her absence being given as chronic vestibular disorder and problems following the road traffic accident. It was stated that the Claimant remained unfit for work and this would remain the case at least until Easter. Dependent on reasonable investigations further treatment might be offered in relation to the knee which could include surgery in which case she would not be in a position to return to work until a period of rehabilitation, which was said often to take a period of between 6 – 12 weeks. It was said to be more likely than not that the Claimant would experience some further problems a consequence of her accident. However, the degree to which these could

affect her in the future and whether or not they would affect her ability to render a regular and efficient service "is by no means certain". It was advised that if the Claimant could be accommodated in a sedentary role within school, working part-time hours, she might be able to return to work. Such a role would require her still to be able to stand and move around as often as she needed to.

34. The Claimant attended a medical capability hearing on 26 February accompanied by Ms Shuttleworth. Mr Urry set out for the panel a summary of the Claimant's attendance record, a detailed chronology of her absence and summary of medical assessments. In his management recommendation he stated that all options explored to facilitate a return to work in some capacity had been unsuccessful. He referred to the disruption to class teaching of the Claimant's absence meaning that children had had a variety of teachers over the past 3 years, continuing that this had an impact not only on the standards and progress of the children but concerns of parents. He noted that the Claimant had been given responsibility for a year five class in the current academic year but had not been fit to ever teach them. The Tribunal has been referred to the latest Ofsted report which recognises progress with the Claimant's year group but accepts that experienced teachers were allocated to that year group due to it having been identified by Mr Urry as needing particular attention, with those teachers' classes then being backfilled by other teachers, including supply teachers. Mr Urry calculated the cost of her absence in terms of supply teachers provided to be £89,000 to date. He went on that this spend had meant that the school had had to cut back on resources for children and teachers which was also impacting on standards. He referred to occupational health suggesting a return to work in a sedentary role. However, there were no such available posts. The advice was that the Claimant would not be able to come back until at least April, however further absence was possible dependent upon potential surgery. He opined that there was a likelihood that it would be at least the end of July before she would be able to return to her teaching role with no certainty that she would then be able to render a regular and efficient service. He concluded that, based on the length of absence and medical evidence, it was school's view that they had done everything they could in terms of managing the Claimant's absence and that consideration should be given to the termination of her employment. The Claimant's accumulated absence was of 304 working days against a teacher's full- time commitment of 195 days per school year.

35. The panel hearing the medical capability hearing consisted of three governors chaired by Mr Bob Griffiths. Following Mr Urry's presentation there was an opportunity for questions to be directed at Mr Urry. In evidence, Ms Shuttleworth said that the questioning of the Claimant had been aggressive (in her words "quickfire"), including from the HR adviser present, Ms Paula Dodd. This was not a complaint of the Claimant and the Tribunal cannot accept that any aggressive behaviour would have gone unchallenged by Ms Shuttleworth. Ms Shuttleworth raised the issue as to whether the school was insured in respect of the costs of the Claimant's absence, to which Mr Urry responded that the insurance company would not now insure her.

36. The Claimant then made her own detailed lengthy presentation explaining the history of her absences and their causes. She described herself as feeling a panic/anxiety attack when Mr Urry had asked her on 3 September 2018 to attend the school later that week as she felt she was not being listened to and the timetable for her return was too fast. The counselling she received had only started on 21 November. She explained her lack of response to previous invitations to the preliminary capability hearing. She explained her current position was that she wanted to return to work after Easter and 11 April was the fit note expiry date. She wanted to return with a well-managed phased return. She also said that she would like to submit a formal request flexible working from September 2019 because she could render an effective and sustained service for the school and could use the time she was not in work to address her physical needs. Mr Urry read from the latest occupational health report querying whether she did believe, based on that opinion, that she would be able to return after Easter and raising also the question of the recommendation a sedentary role. The Claimant said that what she told the occupational practitioner was what occupational health had included in their report. She said the 6/12 weeks rehabilitation after surgery was a moot point saying that she had not yet been told about knee surgery and it would not be for 5 – 6 years anyway. She said that she did believe she would be well enough to return to a full-time class teacher role if a phased return could be accommodated. The situation would be different to the anxiety she experienced in September if the return could be well-managed. Mr Urry said his concern was the same as it had been previously.

37. Paula Dodd, present in an HR advisory capacity, said that it was crucial for the governors to consider the medical evidence of 18 February and not allow the Claimant to contradict this. She queried with the Claimant whether she had anything else to say by way of up-to-date medical information. The Claimant said that she had seen the GP before this meeting, who had said there were ongoing issues stemming from the original accident. She talked to the GP about progress and he had given her an Easter fit note given that the counselling would have finished by then. When asked if the GP was suggesting that the Claimant no longer required a sedentary role, she responded that he would recommend in September on a fit note the exceptions that she would need. She had not yet got to that stage. The next fit note would have the stipulations. There was a discussion regarding the report saying the Claimant needed a sedentary role which the Claimant did not in terms contradict. The Claimant's own position was that a teacher needed to be mobile. After a brief adjournment Mr Urry summed up that he did not believe there was medical evidence supporting an improvement in the Claimant's condition and no medical evidence in the last occupational health report or fit note that this would change after Easter or in the future. Ms Shuttleworth submitted that the occupational health report was not conclusive or helpful and should be read in line with the previous September report. It was said that the Claimant was keen to return and committed but realistic to know that after a phased return she might not be able to maintain full-time work and would put in a flexible working request.

38. The hearing was then concluded. Mr Griffiths wrote to the Claimant on 27 February 2019 confirming the panel's decision to terminate the Claimant's employment on health grounds. This referred to the Claimant's submission that on the current medical advice from her GP that she was fit to return on

11 April. In the letter he explained the reasons for the governors' decision. This was reliant on the occupational health report of 18 February which indicated that she was still awaiting the results of scans to her knees which could result in an operation and a further 6 week period of recovery. The Tribunal notes that as of the time of the meeting the Claimant was unable to give timescales for the provision of the results of the scans. However, it was clearly likely that they would be produced shortly and the Claimant stated at the hearing that the operation would not be for 5-6 years. Mr Griffiths went on that as a return to work had been attempted in the previous September and failed, the panel did not feel there to be any guarantee that a second return would be successful and felt there was too big a risk of a return to work not being possible. He went on that the absence levels of the Claimant had become unsustainable affecting the continuity of teaching and learning with pupils having a variety of teachers over the previous three years – he considered the Claimant's entire absence record against her period of employment. The impact on standards and progress could not be allowed to continue, albeit he accepted before the Tribunal that he had not discussed with Mr Urry what the impact would have been of a further delay to give the Claimant a further opportunity to demonstrate her fitness. Mr Griffiths told the Tribunal that any financial implication was not the main reason for dismissal but rather the effect on the school and pupils. He accepted there was no evidence presented of parental concerns. The Claimant was told that her dismissal would take effect as at 26 February 2019.

39. Mr Griffiths misquoted occupational health is his witness statement when he said it was the panel of governors' belief that her absences would continue based on the "clear view of occupational health".

40. The Claimant appealed the decision by letter of 11 March stating that the decision was unfair and contrary to the advice from medically qualified practitioners.

41. An appeal took place before a panel of a further 3 governors chaired by Mrs Joyce Simpson on 21 May 2019. The panel was advised from HR perspective by Ms Hammond but she also, on Mrs Simpson's evidence, was there to provide advice in support of Mr Urry's case in favour of the termination of the Claimant's employment.

42. Mrs Simpson was "not especially aware" that the Claimant was a disabled person. She was not in possession of the occupational health reports obtained prior to the Claimant's dismissal. She had expected to be provided with a full pack of documentation and had the notes of the previous hearing where there were some extracts taken from the medical evidence obtained. Her understanding was that the school had received a call from the Claimant's trade union representative to the effect that this was not necessary as there was no dispute regarding the fairness of the process but simply a desire to bring forward fresh medical evidence. The Tribunal does not accept that Ms Shuttleworth ever informed the school that the appeal panel did not need to consider the evidence previously before Mr Griffiths' panel. Mrs Simpson had not seen the letter of appeal before the hearing and only now recognised that it would have been reasonable for her to infer that the Claimant was saying that the dismissal was unfair because her doctor had said she was fit to work on a particular day.

43. She recognised that within the Respondent's absence management procedure both employee and the school could provide additional medical information. Only the Claimant had submitted additional medical evidence, which the panel did have before it. This consisted of a letter of 9 May 2019 from the Claimant's GP which gave some brief information regarding her medical history and stated without elaboration or any suggestions regarding a return to work (whether in terms of amended hours or duties) that in his opinion the Claimant was now fit for work. The Claimant said before the Tribunal that she had not attended a medical consultation with her GP but simply she had seen him briefly to ask for a letter confirming her fitness. The Claimant also provided a letter from her orthopaedic consultant to say that she did not require surgery.

44. Mrs Simpson was referred to paragraph 4.7 of the Respondent's attendance management procedure which said that, where there was conflicting medical advice, the matter would be submitted to an independent medical referee agreed by both parties. While she had had the policy in front of her at the hearing, it was clear to the Tribunal that the panel had not turned its attention to this particular paragraph. Mrs Simpson did not however believe that the panel had conflicting advice before it. She accepted before the Tribunal that the occupational health report of 18 February said that the Claimant was unfit at that time whereas the 9 May GP letter said that she was fit but clearly the reference was to 2 different points in time. Her view was that there was no requirement to obtain independent medical evidence but rather a need to hear from the Claimant as to her journey to recovery over the previous three months. If she was going to overturn the dismissal decision, she would need to establish confidence in the Claimant's purported improvement in health.

45. Mrs Simpson wrote to the Claimant by letter of 23 May 2019 confirming the appeal panel's decision to uphold the decision to terminate her employment and giving reasons. She stated that whilst the panel understood that her GP felt her to be fit enough to work on that day, which wasn't disputed, the reason for her dismissal was her absence history "and the clear (and uncontradicted) occupational health advice that you would continue to have significant absences going forwards and also that they could not provide any reassurance that you would provide regular and effective service on an ongoing basis." Nothing stated by the GP was thought to contradict that advice. While she had not read the occupational health report referred to, Mrs Simpson said that its substance had been presented to her. When suggested that the occupational health report had said in fact that the effect of the Claimant's impairments on her future attendance was by no means certain, Mrs Simpson responded that the advice did not add up to a clear and unequivocal assurance of future regular service.

46. When put to Mrs Simpson that she couldn't know if the problem which had caused the Claimant's renewed absence after 3 September 2018 had been resolved unless she knew the diagnosis (she accepted that she had not seen subsequent occupational health report) she said that she understood that the problem in September was the Claimant's interaction with the headteacher. Whilst accepting that there were underlying medical problems affecting the Claimant, she considered they had been deemed manageable so as to allow her to continue to function as a teacher in September 2018.

Mrs Simpson confirmed that she understood that there was no longer a question of surgery being required. She also understood that the Claimant was able to manage her vertigo but said that she did not know what impact her presence in class might have upon the Claimant's ability to do so. When asked if she would want evidence on that, she said that she was agnostic on the matter. She accepted that it was realistic for someone in the Claimant's position not to be able to guarantee that vertigo or her knee condition would not affect her at some future point.

47. It is clear from Mrs Simpson's evidence that she did not feel that the Claimant had sought to keep abreast and up-to-date with changes in the school during her period of absence. The Claimant reading the school's newsletter was described as a little bit of evidence that the Claimant retained interest. The same applied to the Claimant having read the latest OFSTED report, but Mrs Simpson said: "I could have wished for more". She was not sure she had been aware at the time that the Claimant had spent around £4000 on private medical assistance which might have assisted in a return to work. She accepted however that there was a reference to this in the internal notes. Mrs Simpson said that there was not a requirement that the panel be 100% sure that the Claimant would be able to render effective service but considered that the panel was not sure enough. However, she accepted that she had not sought who qualify or amend the notes taken of the panel's deliberations where it was stated the governors were not 100% sure that the Claimant would provide a regular and effective service.

48. As regards the Claimant's psychological issues, Mrs Simpson considered that emotional and psychological factors had had a bearing on the case and she was concerned that the Claimant seemed now to exhibit a similar reluctance to be in the classroom as she was perceived to have had on 3 September 2018. She accepted there was no reference to this in the appeal decision letter. Mrs Simpson referred to a question at the hearing as to whether the Claimant would be back teaching the following Monday in response to which the Claimant said that to do so she would have to be "superwoman. I missed a lot; I am out of the loop; I don't think I could do an all singing all dancing Monday". Mrs Simpson said that she couldn't help but feel that there was discrepancy between what the Claimant was saying and her GP's letter saying that she was fit for work. Indeed, Ms Shuttleworth said that if the Claimant was to return to work, she should return to her doctor to get a fit note which included a phased return and that the Claimant would not be teaching straightaway.

49. The Claimant before the Tribunal said that she could not say if she could resume her role until a return to work became a reality. If she had been going to return, she would have needed a phased return because of her extended period away from work to allow her to get up to speed with any changes. She did not refer to needing any new adjustments (i.e. beyond the equipment provided and accommodations made up to the April 2018 absence). There might need to be a slow build up, but the Claimant's evidence was that that did not need to be for long.

50. As arose further from the evidence before the Tribunal, neither Mr Griffiths nor Mrs Simpson had not had any training in equal opportunities or in the conduct of capability hearings.

51. The Claimant's absence was covered by insurance to pay for replacement staff up to but not beyond May 2018.

52. The Respondent was aware of the Claimant's personal injury claim in respect of a road traffic accident and through Bradford Council had exercised its right of subrogation in respect of monies recovered by her to compensate it for payments made to her during sickness. This was not something of which the governors were aware. The evidence is however that the right was not fully exercised so as to allow for the recovery of all those payments.

53. The Respondent's absence management procedure referred to the possibility of redeployment through Bradford Council but as a voluntary aided school all it could do was approach the Council to ask if an employee could be put on the Council's redeployment list. However, at the time the Council did not have an open list or redeployment pool. Within the school alternative positions were limited. With the exception of some office based support staff, where there were no vacancies, all of the positions within the Respondent were classroom based.

Applicable law

54. In a claim of ordinary unfair dismissal, it is for the employer to show the reason for dismissal and that it was a potentially fair reason. One such potentially fair reason for dismissal is a reason related to capability pursuant to Section 98(2)(a). This is the reason relied upon by the Respondent, albeit with some other substantial reason such as to justify dismissal pleaded in the alternative. If the Respondent shows a potentially fair reason for dismissal, the Tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the ERA, which provides:-

> *" [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) –*
> *depends upon 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*
> *shall be determined in accordance with equity and the substantial merits of the case".*

55. Classically in cases of long-term ill health a Tribunal will consider whether reasonable medical evidence was obtained, the degree of consultation with the employee and the possibility of alternative employment or changes to the employee's role. The Tribunal must not substitute its own view as to what decision it would have reached in particular circumstances. The Tribunal has to determine whether the employer's decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that

this test applies both to the decision to dismiss and to the procedure by which that decision is reached. In long-term ill health cases it is essential to consider whether the employer can be expected to wait longer for the employee to return – see **Spencer v Paragon Wallpapers Ltd 1977 ICR 301**.

56. A dismissal, however, may be unfair if there has been a breach of procedure which the Tribunal considers as sufficient to render the decision to dismiss unreasonable. The Tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 in capability cases of poor performance (not applicable here), but the basic principles of fairness are still relevant in long-term ill health capability cases.

57. If there is such a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142** determine whether and, if so, to what degree of likelihood the employee would still have dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.

58. In addition, the Tribunal shall reduce any compensation to the extent it is just and equitable to do so with reference to any blameworthy conduct of the Claimant and its contribution to his dismissal – ERA Section 123(6).

59. Under Section 122(2) of the ERA any basic award may also be reduced when it is just and equitable to do so on the ground of any conduct on the employee's part that occurred prior to the dismissal.

60. In the Equality Act 2010 discrimination arising from disability is defined in Section 15 which provides:-

> *"(1) A person (A) discriminates against a disabled person (B) if – A treats B unfavourably because of something arising in consequence of B's disability,and*
> *A cannot show that treatment is a proportionate means of achieving a legitimate aim."*

61. There can be no liability if A shows that A did not know and could not reasonably be expected to know that B had the disability.

62. The Respondent must prove that the treatment was a proportionate means of achieving a legitimate aim. The Tribunal must make its own judgement as to proportionality. The test is not whether the Respondent's actions fell within a band of reasonable responses.

63. The Tribunal is urged by Mr O'Dair to consider with great care evidence advanced in support of a purported justification which is or may be based on discriminatory assumptions or patterns of thinking. This, he says, is likely to be the case where a decision-maker says that they acted on a hunch or an impression and where there has been a failure to obtain obviously necessary medical evidence. It is nevertheless open, he accepted, to a Respondent to make out a justification defence by reference to considerations which it did not have in mind at the time. However, he submitted that it would be difficult in practice for to do so as it was unlikely that the Respondent would have assembled the necessary evidence.

64. In applying the proportionality test the question is not whether the Respondent's absence management policy was in some general sense justified, but rather whether its application to the Claimant in her personal circumstances and in the light of its effect on her personally was a proportionate means of achieving a legitimate aim.

65. The Tribunal is referred in particular to the case of **O'Brien v Bolton St Catherine's Academy2017 IRLR 547**. In that case the Claimant appealed against her dismissal, a decision taken on the basis that she would have been absent for a significant length of time with no substantive progress and a lack of prognosis that indicated that a return to work was likely in the near term. The Claimant appealed that decision presenting a fit note from her GP and a letter from a psychologist recommending a course of treatment such that the Claimant could be expected to return to pre-trauma functioning within 10 – 12 sessions. The Claimant told the appeal panel that she had undergone the treatment by the time of the appeal and was fit to return to work full-time. However, the panel was not satisfied that the fresh evidence really established that she was fit to return to work and her appeal was dismissed.

66. The Court of Appeal held that the Claimant's dismissal was the product of the combination of the original decision and the failure of her appeal and it was that composite decision that required to be justified. The Tribunal had not erred in concluding that the dismissal, more particularly the dismissal of her appeal had been (on the basis of the material then available) disproportionate. The Tribunal was not wrong to require detailed evidence of the impact on the school of the Claimant's continuing absence. What kind of evidence was needed in a particular case was primarily for the assessment of the Tribunal. The available evidence suggested that the Claimant might well have been fit to return in the near future and it was hard to say that the Tribunal was perverse in wanting more evidence about the school's ability to put up with the Claimant's absence for a short further period. It was disproportionate of the school to pull the plug at that point, rather than take the further step of obtaining its own medical evidence.

67. The Respondent will normally fail to make good the Section 15 defence if it has failed to establish that it made any adjustments which it was in fact reasonable to make (see paragraph 5.21 of the EHRC Code of Practice). In the context of a reasonable adjustment complaint, Mr O'Dair reminds the Tribunal an adjustment may be reasonable if it might have enabled the employee to remain in the workforce, i.e. have given her a prospect of doing so rather than it be necessary for to there to be a good or even a real prospect of success.

68. The Respondent cannot justify discrimination by saying that not discriminating is too costly.

69. The Tribunal was also referred by Mr O'Dair to the cases of **City of York Council v Grosset 2018 IRLR 746** and **Buchanan v Commissioner of Police of the Metropolis 2016 IRLR 918**.

70. Applying these legal principles to the facts as found, the Tribunal reaches the following conclusions.

Conclusions

71. It is accepted by the Respondent that the Claimant was at all material times a disabled person by reason of her knee injury, vertigo and post-traumatic stress disorder. The Respondent also accepts that it had knowledge of her disability so as to be potentially liable in a claim pursuant to Section 15 of the Equality Act 2010.

72. The Respondent dismissed the Claimant because it considered her to be incapable from a health point of view of performing her substantive role as a class teacher and/or of rendering future efficient service. The Claimant's absences and periods of lack of fitness up to the point of her dismissal (and appeal against it) arose out of her disability impairments. The Respondent must therefore show that the dismissal and upholding of dismissal on appeal was a proportionate means of achieving a legitimate aim.

73. The Respondent has satisfied the Tribunal that it had a legitimate aim. That is the aim of ensuring the provision of effective and efficient teaching to pupils of such quality as would enable them to progress in their learning. The Claimant does not say that this was not a legitimate aim and/or one genuinely pursued by the Respondent.

74. The issue then, in the Claimant's complaint of disability discrimination, is one of proportionality. That assessment involves a balancing of competing interests by the Tribunal which is very much dependent on the prevailing facts and context which will inevitably differ from one case of ill-health capability to another.

75. One feature of this case is the Claimant's level of absence of over 300 working days in around three and a half years of employment, where a full-time teacher would have 195 working days in any school year. Whilst the Claimant could not at the point of dismissal have been regarded as permanently unfit for work, occupational health could not confirm that the Claimant was likely to be able to provide reliable and efficient service – a ground for considering dismissal under the Respondent's attendance management policy. Her dismissal was against a background of a lengthy absence, with improvements in the Claimant's health, setbacks and a number of different types of impairment affecting the Claimant differently and at different times.

76. On 15 May 2017 occupational health were able to say that it was more likely than not that the Claimant would render a regular and efficient service in the future. The Claimant did thereafter return to work and after a phased return, with adjustments to her duties and physical aids provided. Those would

have continued to have been provided thereafter on any return to work. This has never been in dispute. However, a further period of absence occurred from April 2018, obviously through no fault of the Claimant and for entirely genuine reasons.

77. By 9 July 2018 occupational health was hopeful that, but it was too difficult to predict whether, the Claimant would render a regular and efficient service in the future. The Claimant attempted to return to work on 3 September 2018 but, arising out of a reasonable request to come in an additional day to meet the children (not to teach a class), the Claimant was significantly upset which triggered the symptoms of her underlying post-traumatic stress disorder. The Tribunal considers medical suspension at that stage to have been an appropriate step to have been taken by the Respondent.

78. On 24 September 2018 occupation health declared the Claimant as unfit for work, with counselling and physical rehabilitation providing the Claimant with the "best chance" of sustaining her attendance at work in the future. By the preliminary capability meeting on 28 January 2019, the Claimant had had that counselling. She was still unfit for work. She was going to go back to her doctor for a further fit note which would certify her as being unfit beyond 12 February 2019.

79. The Claimant's expressed view was that her health had deteriorated. She had had a setback with her right knee. The Claimant raised redeployment including part-time hours but without any specific suggestion and where the school had no vacancies for non-teaching staff. There was no indication as to how part-time work might assist her, in the context of her statements regarding her continuing ill-health. There was no information which ought reasonably to have caused Mr Urry to think that a referral to a final medical capability hearing to determine the Claimant's future employment was not appropriate.

80. After being invited to the capability hearing, the Claimant returned to her doctor and was certified further as unfit for work. This is how she saw herself. She sought that confirmation from her GP, she said, on receiving the reasonable invitation to the capability hearing. There is no basis for the Tribunal concluding that, had the Claimant not received it, she would have been declared fit. The Claimant's expressed logic in ensuring she was declared unfit because she was facing a potential dismissal for lack of fitness is difficult to understand. The Tribunal would comment that the Claimant knew how she felt, knew the demands of the job and, given the nature of her health issues, any GP opinion was (or other medical opinion would be) inevitably based predominantly on that, rather than any clear/definitive clinical diagnosis or prognosis.

81. The subsequent 18 February occupational health report referred to the Claimant experiencing pain and restricted mobility on a daily basis. The Claimant remained unfit. Further treatment might be offered. It was more likely than not that she would experience future problems arising out of her impairments. The degree that these might affect her future attendance was by no means certain. This was not a positive prognosis.

82. A sedentary role working part-time hours was said to potentially enable a return to work.

83. Before the formal capability panel, the Claimant expressed a desire to return to work. This might be after Easter i.e. mid-April. She said that she could resume her job if the return to work was well managed. On the other hand, she did not challenge the occupational health recommendation regarding a sedentary role, yet did recognise the need in a teacher for a significant degree of mobility. She would wish to apply for flexible working of an unspecified nature to commence from September as she said that that would be needed to assist her to maintain regular service. Following a return to work, her doctor would recommend "exceptions" she would need in September 2019. The Claimant confirmed that she remained absent still from work due to both her mental and physical health impairments.

84. Clearly, the effect at this point of time of a dismissal on the Claimant was bound to be very significant. The Claimant at the time was in her early 50s, had a recent history of ill-health. She was an experienced career teacher who valued her role, but would struggle to get equivalent employment elsewhere. The Respondent's arguments as to proportionality have to be balanced against those significant effects and hardships on the Claimant of a decision to terminate her employment (and to uphold that decision on appeal).

85. However, at the point of the dismissal there was a long recent history of non-attendance, a continuing lack of fitness, lack of evidence as to future likely fitness and little more than the Claimant's assertions and hopes against a background where she had had such hopes previously. The Claimant's position as to her current ability to work, lack of challenge to the recent occupational health report and her need to return to the doctor in September lacked coherence and consistency.

86. At the appeal stage, there was then a GP letter stating that the Claimant was fit for work. The question arises as to the weight that ought to have been given to it and what further steps the Respondent could potentially have taken. The letter provides no detail whatsoever nor an explanation of the Claimant's health improvement to be set against the pronounced lack of fitness evident in February 2019. It provides no future diagnosis or reference to anything which might assist her in a return to work. The GP had been asked by the Claimant for a statement that she was fit to work and had been prepared to give it. The Claimant's own evidence was that this had not been the result of a full medical consultation/assessment.

87. The Respondent's attendance management policy provides for a reference to be made to an independent medical expert if there is a conflict of medical evidence. Mrs Simpson did not see there to be a conflict. The Claimant had been previously certified as unfit and now she was certified as fit for work. She was prepared to take that fitness note at face value. However, at the appeal hearing, the Claimant's position was not straightforwardly that she was fit to return to work. Ms Shuttleworth, on the Claimant's behalf, was of the view that the Claimant needed to return to her doctor to get a fit note with a phased return and said that the Claimant would not be teaching straightaway. The Claimant said that she could not say if she could resume her role until her return became a reality.

88. The Tribunal does not consider in all the circumstances it to have been necessary, in terms of proportionality, for the Respondent to have sought an independent medical opinion. Again, the aforementioned context is important. This was not a situation where there could be any certainty in terms of future attendance. Nor could a doctor provide that. At the appeal, the Claimant herself recognised that she couldn't return to work the next week, despite being declared by her GP as fit to work. Her own opinion did not coincide with that expressed by her GP. She needed a more than understandable period of re-familiarisation with the workplace, but also felt that she needed to go back to the doctor regarding her future needs from a health point of view. There was still a question over whether the Claimant could ever return to her substantive full-time role. Ms Shuttleworth said that she would not be teaching straightaway.

89. The facts in the **O'Brien** case are quite different. In that case there was clear evidence and assertion, beyond a one line GP statement of fitness, of a change in the Claimant's medical position and the reason for it. There had been a successful completion of a particular course of treatment. Ms O'Brien was expressing herself as fit to return to her substantive role. The Claimant was not expressing herself in such terms and the Claimant and her union representative were not significantly challenging the evidence the Respondent did have, including the most recent occupational health report.

90. The Tribunal accepts that an employer will struggle to justify an act of unfavourable treatment arising from disability if it has failed to make reasonable adjustments. Of course, no freestanding complaint of a failure to make reasonable adjustments was before the Tribunal for its determination. The Tribunal, in any event cannot say on the evidence presented which of the Claimant's impairments put her at any particular disadvantage in a return to work at any particular point in time, to what extent and how any adjustment might have alleviated that disadvantage to allow a successful return to work. At the dismissal stage, the Claimant was saying that she would be able to return to her substantive role after a well-managed return to work. On the other hand, she did not challenge the recommendation of a sedentary role, accepting that in reality a classroom teacher of young children had to be mobile. She "might not" be able to maintain full-time working and would obtain from her doctor in September (after her return to work) recommended exceptions she would need. She did not know what those would be. She has not told the Tribunal. Nor is there any evidence to which impairment they might relate or how. The evidence is not that a phased return might in itself have allowed her to sustain future regular attendance – the Claimant was not saying that at the time of the capability hearing or appeal. In any event, had an easing back into the workplace been the solution, the evidence is not that the Respondent would have rejected it. Phased returns had been a feature of the Claimant's previous returns to work after ill health. The Claimant's position before the Tribunal (although not the same as that before the Respondent in the internal procedures) was that at the point of her appeal she just needed a slow build up on a return to work but not for an extended period and nothing additional related to her disabilities. She told the Tribunal that by 30 January 2019 her knee had got significantly better and was no longer an issue. Treatment for vertigo had ceased the previous December. She did not say that her mental health impairment was preventing a return

to work. That evidence does not support a fresh duty to make reasonable adjustments arising.

91. The Tribunal is critical of the Respondent's general attitude to part-time working expressed by Mr Urry and it is in danger of laying itself open to a variety of complaints in the right circumstances by its scepticism regarding the effectiveness of a part-time job share arrangement. However, on the facts here, the Respondent could not conclude on the evidence before it that the Claimant would be fit to sustain a classroom teaching role and had before it a lack of indication of what the Claimant might be seeking, why and how it could assist her. Nor is that evidence before the Tribunal. The Tribunal notes that the Respondent had previously been willing to change the Claimant's working pattern as a reasonable adjustment.

92. Again, on the facts, the Respondent did not, in order to act proportionately need to pause and seek further advice in circumstances where the Claimant was in essence and substance not saying that she was now fit to return to and sustain her attendance in her substantive role, how the situation had changed since the February capability meeting and where there was no indication of what, if anything, would help her and how. The appeal panel did not act disproportionately in wishing to be satisfied against the entire background of the case that the Claimant was ready, willing and able to render effective service (as provided for when considering dismissal under the attendance management policy) and in concluding that there was insufficient basis to overturn the earlier panel's decision. Again, there is no evidence of any alternative roles being available.

93. In this case money/cost was not the driving issue. The Respondent's (net) costs have been overstated given insurance cover available to cover alternative staffing costs and the recovery of wages available as part of the Claimant's personal injury complaint, although clearly the Claimant reached the point in May 2018 where her absence was no longer insurable.

94. The Tribunal considers that the Respondent has shown that the school was in a precarious state and the teaching of pupils suffered due to a lack of consistency in staff. It accepts that the learning of pupils in the Claimant's class would have suffered and been disadvantaged by the lack of a consistent teacher and the use of supply teachers or alternatively, if the Claimant's class had been prioritised in terms of teaching resources, there would have been a similar knock-on effect elsewhere in the school. The Claimant's own union representative recognised the need for a consistent class teacher if pupils were to have the best chance of progressing, as indeed she had to. Whilst no evidence of parental disquiet was provided beyond Mr Urry's assertion, parents are inevitably concerned if their children are taught by a variety of teachers, including supply teachers, rather than having a consistent teacher and point of contact.

95. The Tribunal rejects the proposition that the Respondent has failed to show the adverse effect of the absence and uncertainty regarding the presence of the Claimant, as a very experienced classroom teacher.

96. The suggested "damage", as Mr O'Dair puts it, had endured for a lengthy period, therefore, he would say, why not wait a little longer. The Tribunal considers it was not disproportionate to seek to draw a line rather than allow

a further period of employment, again given the evidence before the school from the Claimant, those who had provided a medical opinion and the history of the Claimant's absence.

97. The Respondent has shown that its decision to dismiss the Claimant (and not uphold her appeal against that decision) was a proportionate response in pursuit of its desire to achieve a legitimate aim. The complaint of disability discrimination pursuant to Section 15 of the Equality Act must fail.

98. Turning to the complaint of unfair dismissal, the Tribunal finds the dismissal to have been unfair. Fundamentally, the governors in both panels came to conclusions which were not supported by the evidence and which were not accurate statements as to the Claimant's health and its prognosis. Those conclusions are derived from decision letters drafted by human resources advisers where the Tribunal does not consider that their importance was fully understood, but they are nevertheless put forward as the reasons for the Claimant's dismissal.

99. Mr Griffiths was inaccurate as regards the likelihood and timing of the Claimant having to undergo an operation. Her expected absence arising out of that was given as a significant reason for dismissal. He misquoted the occupational health assessment in his evidence before the Tribunal. He was looking for certainty regarding the Claimant's future attendance where that was too high a hurdle to be reasonably set.

100. Mrs Simpson's decision was influenced by her own assessment of the Claimant's emotional state which was not evidence-based. The same applies to her understanding of the reason for the breakdown of the return to work on 3 September 2018. The Claimant was unreasonably thought not to have taken enough of an interest in the school during her sickness absence, unreasonably particularly in the light of the Claimant's mental health impairment. There was not the clear and uncontradicted evidence from occupational health that Mrs Simpson represented there to have been in her decision letter. The appeal panel did not have before it all of the relevant information considered at the dismissal stage and viewed the nature of the Claimant's appeal to be much narrower than it actually was, as would have been clear from the appeal letter itself. She too was looking for an unrealistic level of certainty regarding future attendance. The decision to dismiss the Claimant and reject the appeal was not a decision at each stage arrived at on reasonable grounds.

101. The dismissal was not procedurally unfair. The governors' lack of training in how to conduct a capability hearing did not render dismissal unfair. Those who conducted the hearings were in appropriate positions of authority with relevant knowledge and experience of the Respondent. They were advised by human resources professionals.

102. The Respondent's process was proper in terms of invitations to meetings, the conduct of meetings where the Claimant was accompanied and had the chance to make any representations she wished and where appropriate questions were asked in an appropriate manner. Reasoned decisions were provided at each stage and the Claimant was given a right of appeal.

103. Human resources involvement strayed beyond advising the governors and into a role in assisting Mr Urry to put his case. However, the human resources representatives did not act improperly in asking questions of the Claimant and ultimately the decision making was that of the governors. There is not any evidence that the decision-making was led by human resources. Human resources involvement was flawed, but was not of a nature sufficient, on its own, to render dismissal unfair.

104. During the case management process, particular criticisms of the Respondent's decision making and process were raised as matters which were said to render the Claimant's dismissal unfair. One of these was that the Claimant's dismissal was upheld on appeal at a time when she was fit to work. That was not again, however, the Claimant's straightforward position at the hearing, where the Respondent could and did reasonably conclude that the Claimant's position was not that she was ready to and would be able to render effective future service in her substantive role. The Tribunal would additionally note that by the time of the Claimant's dismissal, she had completed the number of counselling sessions recommended by occupational health as a pre-requisite to a return to work, albeit Mr Urry initiated the absence management process prior to her having done so. By the time of the dismissal, there was still uncertainty about future knee surgery, but clarity that this would not, if necessary, be in the short to medium term. As already found, Mr Griffiths' conclusions, as set out in the decision letter, were not based on reasonable grounds. By the point of the appeal, it was clear that surgery was not an issue and was not a consideration which led to the Claimant's appeal failing. There were no opportunities for redeployment beyond the Respondent, within Bradford Council.

105. However, whilst the governors' reasoning was flawed, had they considered the circumstances as they ought reasonably to have done (removing the flawed conclusions and beliefs from their thinking) they would have concluded nevertheless that the Claimant ought to be dismissed and fairly so. For reasons already stated in the Tribunal's conclusion that the Respondent acted proportionately, the Tribunal concludes that the Claimant would have been fairly dismissed. By the point of her dismissal the Claimant's periods of absence, particularly in the context of her length of employment, were significant. Her latest absence had been of significant length. Her GP had stated that the Claimant continued to be unfit. The Claimant had herself referred to a deterioration of her health. The Claimant was not positive in her own view of her future attendance. She did not challenge the latest occupational health report, against a background of uncertainty in prognosis, whereas previous reports had been more optimistic. This is a case where the Respondent had waited for a reasonable period to see whether the Claimant might be able to return and sustain a return to work. It was not unreasonable in concluding that it could not be satisfied on the evidence provided that the Claimant could render future regular attendance at work. At the appeal stage the Claimant represented that she was fit to return, but when a quick return was raised the Claimant's position was that she would need to return to her doctors. Again, this was not in the context of her requiring any disability related adjustments. Ms Shuttleworth reaffirmed that the Claimant was not ready to teach straightaway. Mrs Simpson did reasonably conclude that she could not be satisfied that the Claimant was ready and willing to render regular

and efficient service as a class teacher. She did not act unreasonably in not seeking further medical advice, when the Claimant had sought and obtained a one line confirmation of fitness, but did not at the hearing herself hold that straightforward position. The Claimant was not saying at the appeal stage that she was ready to and would be able to render effective future service in her substantive role. The Claimant was not at all clear as to what she thought might assist a return to work and how. There was no flexible working request. The Respondent had limited resources and it was imperative that settled teaching be provided to pupils in the context of a school in difficulties and under continuing scrutiny. The Claimant would have been dismissed in any event and that decision would have been in the band of reasonable responses.

106. It follows, pursuant to the principles established in **Polkey**, that no compensatory award can flow from the claim of unfair dismissal. The Claimant is nevertheless entitled to a basic award. The Tribunal considers there to be no basis for any consideration of a reduction of that award on a just and equitable basis otherwise.

107. The Tribunal indicated that it considered that a basic award entitlement in the claim of unfair dismissal arose in the sum of £12,192. The Claimant had 18 years continuous service as at the point of her dismissal and was aged 53 years. That gave an applicable multiplier of 24 to be applied against the maximum level of a week's pay of £508. Following a brief adjournment, the parties reverted to say that they agreed that figure.

Employment Judge Maidment

Date 31 December 2019