



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE C HYDE

**MEMBERS:** Ms J Moore  
Mrs C Upshall

**BETWEEN:**

Ms B Hanafin

Claimant

AND

(1) London Borough of Southwark  
(2) The Governing Body of Michael Faraday Primary School  
Respondents

**ON:** 17, 18, 19, 20 and 21 June 2019 and in  
Chambers on 22 July 2019

**Appearances:**

**For the Claimant:**

Mr G Temme, Legal Assistant on 17 June 2019;  
and thereafter in person until 21 June 2019. No  
attendance by or representation of the Claimant  
on 21 June 2019 but pursuant to an Interlocutory  
Order sent to the parties on 1 July 2019, written  
submissions were presented both by the  
Claimant and on her behalf by Mr G Temme

**For the Respondents:**

Mr P Linstead, Counsel

## **RESERVED JUDGMENT**

The unanimous judgment of the Tribunal is that: -

1. The unfair dismissal complaint under section 98(4) of the Employment

Rights Act 1996 was not well founded and was dismissed.

2. The complaint of failure to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010 in respect of the allegation that the Respondent should not have made significant adaptations to the Claimant's role (para 16.1 of the List of Issues) was dismissed on withdrawal.
3. The remaining failure to make reasonable adjustment complaints in paragraphs 16.2 and 16.3 of the List of Issues were not well founded and were dismissed.

## **REASONS**

### **Preliminaries**

1. Reasons are provided in writing for the Judgment above as the Judgment was reserved. They are set out only to the extent that the Tribunal considered it necessary to do so in order for the parties to understand why they won or lost. Further, they are set out only to the extent that it is proportionate to do so.
2. All findings of facts were reached on the balance of probabilities.
3. This claim was presented on 27 February 2018. It concerned a complaint by a teacher that she was subjected to disability discrimination by way of failures to make reasonable adjustments in breach of the Equality Act 2010, and that she was unfairly dismissed on 5 October 2017 from her employment at the Second Respondent ("the school"), a primary school located within the London Borough of Southwark, the First Respondent ("the local authority").
4. Although the List of Issues below referred in the singular throughout to "the Respondent", the two named Respondents remained respondents throughout the case. In the text of these reasons however, that style has been largely maintained, for the sake of consistency and because distinguishing between them was not relevant to the issue of liability. There is occasional reference to them individually where necessary.

### **Evidence Adduced/Documents Considered**

5. On behalf of the parties the Respondent had compiled a bundle of documents in accordance with the Tribunal's directions, running to some 250 pages and marked [R1]. Further, at the commencement of the hearing also as directed by the Tribunal, a list of people from whom or about whom the Tribunal was likely to hear (a 'cast list') and a

chronology had been prepared by the Respondent. These were marked [R2]. Further, in accordance with the directions of Employment Judge Andrews at a preliminary hearing on 24 May 2019 and as set out in a note of the discussions which was sent to the parties on 28 May 2019, Mr Linstead provided to the Claimant and her representative on the first day of the hearing and to the Tribunal a list of anticipated areas of cross-examination of the Claimant. This was an adjustment to mitigate possible disadvantage to the Claimant by reason of her disability when she gave her evidence. This document was marked [R3].

6. On behalf of the Respondent, the following witnesses gave evidence, namely: Mrs K Fowler, the Head Teacher of the school at which the Claimant worked; Mr Norman who was Chair of The Governing Body of the school and who made the decision to dismiss the Claimant; and finally, Ms Meriam Wilson, also Governor of the school and who chaired the panel which dealt with the Claimant's appeal against her dismissal. The witness statements which stood as the evidence in chief of these three witnesses were marked respectively [R4-R6].
7. The Claimant gave her evidence in chief by way of a witness statement which the Tribunal marked [C1].
8. Pursuant to the Interlocutory Order which gave directions about the presentation of closing submissions in writing, the Tribunal also received the following documents as closing submissions:
  - a) dated 19 June 2019, from Mr Linstead, Counsel for the Respondent, with copies of authorities. This document was left with the Tribunal on 19 June 2019 and contained manuscript amendments;
  - b) dated 19 June 2019 but sent by email to the Tribunal on 15 July 2019 at 12.31, a copy of Mr Linstead's submissions but with the manuscript amendments converted into typed script;
  - c) by email sent on 15 July 2019 at 15.05 and consisting of ten numbered pages, an email from Mr Temme attaching the Claimant's written submissions;
  - d) an email sent on 19 July 2019 at 17.12 from Mr Temme attaching the Claimant's replies to the Respondent's submissions dated 19 July 2019 and consisting of two pages;
  - e) a copy of amended submissions from the Claimant consisting of twelve pages and still dated 15 July 2019 under Mr Temme's signature on page 9; and
  - f) an email sent by Mr Linstead's instructing solicitor, Mrs Corbett, at

17.44 on 19 July 2019 attaching the Respondent's replies to the Claimant's amended closing submissions.

9. Having reviewed the documents before the Tribunal and also read the contents of the covering emails to which these were attached especially in relation to the latter productions, the Tribunal was satisfied that we had the relevant documents which the parties intended the Tribunal to see and that each party had, in effect, had an opportunity to comment on the other party's submissions as originally intended by the directions.

### **The Issues**

10. At the commencement of the hearing it was agreed that the applicable list of issues was that which had been set out in an Order and Summary of the preliminary hearing which was sent to the parties on 27 June 2018 following a hearing before Employment Judge Harrington on 25 May 2018 (pp 56-58 of the bundle). The relevant text, with the original paragraph numbers from the Summary, and including this Tribunal's annotations in ordinary font and in square brackets, was as follows:

#### **"Unfair Dismissal**

4. *What was the reason for the Claimant's dismissal? The Respondent asserts that it was a reason related to capability which is a potentially fair reason pursuant to the Employment Rights Act 1996. The Claimant accepts that the reason for her dismissal was capability, in so far as she had had a long-term absence from her employment because of health problems.*
5. *Was the dismissal fair or unfair in all of the circumstances?*

*The Claimant's challenges to the fairness of the dismissal are identified as follows:*

- 5.1 *The context to the Claimant's absence from work was a significant reduction in resource for addressing special needs and dyslexia within the school and the Respondent requiring the Claimant to cover additional duties with KS2 children. The Claimant will say she was the only qualified teacher dealing with KS2 children with special needs/literacy difficulties;*
- 5.2 *The Claimant was fit for work as set out in an Occupational Health report dated 25 September 2017;*
- 5.3 *The Claimant was fit to carry out the role she had been doing up until November 2015 or a combination of that role and the role she had most*

recently been carrying out. The Respondent however was unwilling to make these changes to the Claimant's ongoing employment;

- 5.4 The Claimant will say that she received no warning of the possibility of her dismissal other than in two sickness guidance letters sent on 12 January and 24 February 2017 and that, other than an initial guidance meeting held on 17 March 2017, there were no further meetings with her prior to the formal capability meeting on 5 October 2017;
- 5.5 The capability hearing was premature because the Claimant's Union Representative, Henry Fowler, had sent a letter dated 25 September 2017 raising the possibility of reasonable adjustments being made to the Claimant's role following the Occupational Health report and no substantive response was received to this letter.
6. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?
7. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct?
8. If the dismissal was unfair, does the Respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event? And / or to what extent and when?
9. If the Claimant is found to have been unfairly dismissed, what compensation is she entitled to? Has the Claimant adequately mitigated her loss and what, if any, increases / reductions should be made for the Respondent's / Claimant's alleged failure to comply with the ACAS Code?

Disability Discrimination

10. Does the Claimant have a mental impairment, namely depression and anxiety?
11. If so, does the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?
12. If so, is that effect long term? In particular, when did it start and:
  - 12.1 has the impairment lasted for at least 12 months?
  - 12.2 is or was the impairment likely to last at least 12 months?
13. Are any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

[By the end of the hearing, the Respondent had conceded in the terms set out in para 7 of Respondent's closing submissions that the Claimant had a qualifying disability from February 2017 onwards.]

Reasonable adjustments: section 20 and section 21

14. *Did the Respondent apply the following provision criterion and/or practice generally namely:*
  - 14.1 *Adapting the duties of the school's staff depending upon the needs of the children;*
  - 14.2 *Requiring its staff to attend for work and / or to attend for work in an adapted role.*
15. *Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that because of her mental health issues, the Claimant was unable to adapt quickly to an adapted role?*
16. *Did the Respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the Claimant however it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:*
  - 16.1 *The Respondent should not have made significant adaptations to the Claimant's role; [withdrawn]*
  - 16.2 *At a meeting on 17 March 2017 with the Claimant, Ms Patel (Respondent's HR team), Mrs Fowler (Headmistress) and Betty Joseph (the Claimant's union representative), the Claimant's continued absence from work was discussed. The Claimant had also sent a letter on 22 February 2017 asking for her old role back. The Respondent should have changed the Claimant's role back to what it had been prior to November 2015 or should have changed her role to a hybrid role encompassing both her original role and the adapted role.*
  - 16.3 *The Respondent should have followed the recommendations of Occupational Health to amend the Claimant's role."*
11. The first complaint alleged unfair dismissal under section 98(4) of the Employment Rights Act 1996 (the 1996 Act"). The second set of complaints was brought under the Equality Act 2010 ("the 2010 Act") to the effect that the Respondent had failed to make reasonable adjustments under sections 20 and 21 of the 2010 Act. The first of these, alleging a failure to make reasonable adjustments as set out in paragraph 16.1 of the Case Management Summary was withdrawn by

the Claimant at the hearing. Paragraphs 16.2 and 16.3 above contained the remaining failure to make reasonable adjustments allegations.

12. In addition, the Respondent asked the Tribunal to determine whether the complaint in Paragraph 16.2 was out of time.
13. Her unfair dismissal claim was in time. This was not disputed by the Respondent by the date of the Tribunal hearing.

### **Relevant Law**

14. The Tribunal has summarised below the main principles of law in the context of the issues which arise in the case, based on Mr Linstead's submissions **which were not challenged on behalf of the Claimant.**

### **Unfair dismissal**

15. As was confirmed in the List of Issues, the Claimant did not dispute that the reason for dismissal was capability (p56, para 4). The issue under s.98(4) of the 1996 Act was whether the Respondent acted reasonably in treating her capability as a sufficient reason for dismissal having regard to all the circumstances, including the size and administrative resources of the undertaking.
16. The generally accepted requirements of procedural fairness in relation to dismissal based on long term absence are that
  - (i) The employee is consulted about her position and the effect of the continued absence on the employer;
  - (ii) The employee is adequately warned about the risk of dismissal due to continuing absence;
  - (iii) The employer takes reasonable steps to obtain appropriate medical evidence about prognosis and diagnosis;
  - (iv) There is a hearing with appropriate notice and representation at which the employee is given a chance to state her position.
17. The ACAS guide to Discipline & Grievances at Work (2017) Appendix 4 contains similar provisions, including:
  - That the employer and employee should keep in regular contact with each other;
  - That the employee must be kept fully informed if there is any risk to employment;
  - Various provisions relating to the employer obtaining permission to receive medical reports and obtaining appropriate medical evidence
18. Recent guidance on the principles to adopt, in the context of unfair dismissal and disability discrimination, was given by the Inner House of the Court of Session in the case of **BS v Dundee City Council** [2014]

IRLR 131 at para 27 as set out below:

“First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasize, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer is required to do is to ensure that the correct question is asked and answered.” [emphasis added]

19. This reflects earlier judicial guidance on the subject in particular in the case of **East Lindsay District Council v Daubney** [1977] IRLR 181.

#### Reasonable adjustments

(i) The scope of the Respondent's concession

20. The Respondent accepted that the Claimant had a qualifying disability throughout the relevant period (ie from February 2017 onwards, corresponding with the time frame in para 16.2 of the List of Issues (p58)).

(ii) Knowledge

21. The definition of disability covers a situation in which substantial impairments are likely to recur. The Respondent did not concede either that the Claimant had a substantial impairment in her ability to carry out normal day to day activities at any particular point in time, or that the Respondent knew that she had a disability.
22. By para 20 of Schedule 8 to the 2010 Act, the employer is not subject to the duty to make reasonable adjustments if it does not know and could not reasonably be expected to know that the Claimant “has a disability and is likely to be placed at the disadvantage referred to [emphasis added]” (i.e., that a provision, criterion or practice (“PCP”) of the Respondent puts the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, under s.20(3) of the 2010 Act).

(iii) PCPs and their effect

23. Section 20(3) of the 2010 Act states that where a PCP of the employer



puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, the employer is required to take such steps as it is reasonable to have to take to avoid the disadvantage.

(iv) Reasonableness

24. Para 6.28 of the Equality and Human Rights Commission (“EHRC”) Employment Code (2011) sets out factors to take into account when considering reasonableness:
- whether taking any particular steps would be effective in preventing the substantial disadvantage;
  - the practicability of the step;
  - the financial and other costs of making the adjustment and the extent of any disruption caused;
  - the extent of the employer’s financial or other resources;
  - the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
  - the type and size of the employer.
25. The test of whether the employer has complied with its statutory duty is objective. One consequence is that any deficiency in consultation with the employee is not of itself a failure to make an adjustment. Hence, per Elias J in **Tarbuck v Sainsburys Supermarkets Ltd** [2006] IRLR 664 at para 71:
- “The only question is, objectively, whether the employer has complied with his obligations or not. That seems to us to be entirely in accordance with the decision of the House of Lords in *Archibald v Fife Council* [2004] IRLR 651. If he does what is required of him, then the fact that he failed to consult about it or did not know that the obligation existed is irrelevant. It may be an entirely fortuitous and unconsidered compliance: but that is enough. Conversely, if he fails to do what is reasonably required, it avails him nothing that he has consulted the employee.”
26. Further, there is no obligation on the employer to create a specific post which is not otherwise necessary, merely to create a job for a disabled person: **Tarbuck** above at para 49. This is consistent with Appendix 4 to the ACAS Guide (Long Term Absence) which states, inter alia, albeit not in the context of disability:
- “the employer is not expected to create a special job for the employee concerned..”
27. In deciding what is reasonable, the Tribunal should examine the issue not only from the perspective of the claimant but also take into account the operational objectives and needs of the employer: **Lincolnshire Police v Weaver** [2008] UKEAT/622/07 at paras 50-51.

*Effectiveness*

28. In **Griffiths v Secretary of State for Work and Pensions** [2017] ICR 160, Elias LJ said:  
“So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed. The uncertainty is one of the factors to weigh up when assessing the question of reasonableness.”
29. In **Smiths Detection v Berriman** [2005] UKEAT/0712/04/CK at para 88 HHJ Serota went further than simply saying that an analysis was needed of the extent to which the proposed adjustment would prevent the disadvantage, and stated: 'In our opinion, as a general rule, in cases where a claimant's disability relates to his mental health, some medical evidence is likely to be required as to the effectiveness of any proposed adjustments'.

(v) Interaction between unfair dismissal and disability discrimination

30. It would not necessarily follow from a finding of a failure to make a reasonable adjustment under the Equality Act claim, that the dismissal was unfair under s.98 of the 1996 Act. It depends on the circumstances and the application of the different statutory tests: see for example **Grosset v City of York** [2018] EWCA Civ 1105.

**Findings of Fact**

31. The Claimant was born in 1959. She spent her whole working career in education from about 1980, all of which was also within the London Borough of Southwark.
32. On 1 September 2009 she commenced employment with the school as a Reading Recovery Teacher. There was a generic copy of the contract of employment for a school teacher available in the bundle, not the one specifically signed by the Claimant. There was no reason, however, for the Tribunal to consider that the relevant terms did not apply to the Claimant. This confirmed that the employer was the local authority and that she was working at the school (p241).
33. The Claimant's job specification and job description were at pages 207-209.
34. The main purpose of the job was to work in support of the Reading Recovery Programme which was aimed at improving the standard of reading of primary school pupils (pp208-209). Although the job description did not specify any particular key stages at which the Claimant would be required to work, the person specification required

as essential, recent experience of teaching literacy successfully at key stage 1, at least three years' experience of teaching and recent experience of working in mainstream education. Similarly the qualifications and knowledge required for the position included degree level education and qualified teacher status, but also a good subject knowledge of literacy, including the National Curriculum Programmes of Study and the Framework for Teaching English in key stages 1 and 2, and supporting national strategy materials; excellent understanding of curriculum and pedagogical issues relating to English, including latest inspection and research findings; and knowledge of effective strategies to include and meet the needs of all pupils within literacy teaching, in particular pupils learning EAL and Pupils SEN. In short, she took up a role which required an experienced and senior teacher. The Claimant was an upper-threshold teacher.

35. A 'pre-employment health assessment' was done on 7 December 2009 in respect of the Claimant after she had already started working at the school (pp204 – 205). It was recorded then that the Claimant had disclosed to the Respondent that she had been certified as unfit for work for over nine months in her previous employment. She also explained that her ill-health had been caused by perceived difficulties in her previous employment. The assessment recorded that the Claimant was receiving on-going medical treatment and was also undergoing talking therapy. It was noted that she had reported a general improvement in her symptoms allowing her to take on the post at the school. It was further recorded that the Claimant had another underlying medical condition for which she was under the care of a specialist but that this placed no restriction on her activities of daily living. No functional capability restriction was reported. The occupational health advice was that her underlying medical conditions were reasonably well managed with medication and non-pharmacological treatment.
36. It was reported that the Claimant did not feel that she required any modifications at work at that time although occupational health ("OH") advice was that it was prudent to act as if this case was likely to come under the remit of the relevant disability legislation due to the nature and duration of the medical condition. OH advised that the Claimant was fit to work, in the following terms: -
- (i) Due to her medical history it was reasonable to assume that she may have a higher susceptibility to stress related ill-health compared to an able-bodied person without a similar medical diagnosis. It was recommended therefore that the Claimant was provided with adequate support and close monitoring of her workload, demands and the responsibilities placed on her.
  - (ii) Early referral to OH was also recommended, should the school have any concerns related to the Claimant's attendance/absences.

37. It was not in dispute that the Claimant successfully carried out her role as a Reading Recovery Teacher. The role, however, evolved over time reflecting the changing priorities in relation to literacy strategies. In addition, the Claimant took on another role alongside this as Acting Coordinator in about 2011 for a time (pp 201, 202A-202B). She stopped carrying out those additional responsibilities at the end of the Summer term in 2012. There was some dispute between the parties as to how it came about that the Claimant ended that extra responsibility. It was unnecessary for the purposes of this case to resolve that dispute. Suffice it to say that the Claimant's position was that she would have wanted to have continued carrying out the Acting Literacy Coordinator role alongside the Reading Recovery Teacher role.
38. Also in around September 2012, the Claimant experienced a period of ill-health due to the other underlying physical condition (p200).
39. Further, the Claimant underwent a medical procedure in relation to a physical ailment and in respect of which a further OH report was obtained dated 8 May 2015 (pp 197-199). It recorded that the role at Michael Faraday Primary School was part-time (p197) and that the Claimant had no underlying medical conditions apart from the physical issue being dealt with at about that time. She further reported to the OH physician who assessed her that she liked her work and did not feel stressed but that there was concern due to her on-going medical symptoms (p198).
40. The next OH report was provided on 6 November 2015 by Dr Yardley-Jones, Consultant in Occupational Medicine (pp192 – 196). By now the Claimant had been absent from work for nine months continuously. The Claimant had been referred to him due to her 'high percentage of sickness absence and the length of time she has been off work'.
41. He noted that 'understandably' her non-attendance had become problematic as her role in the support of children required consistency and that her absence was affecting their learning, but that the underlying problem, however, had not been specifically diagnosed. The doctor described the recent history of nearly one year of quite extensive and thorough medical investigations into the Claimant's symptoms and the failure to identify the cause. He commented that the symptoms appeared to have improved significantly over recent weeks and that this had further reassured the Claimant, the medical investigations also having indicated that she did not have some of the conditions that might well be the cause of the symptoms that she presented with. He advised the Respondent that the Claimant felt relatively well and well enough to return to work although she still had some residual symptoms such as fatigue and some muscular-skeletal symptoms at times. He evaluated her generally and reported that he

could find no evidence of any cognitive impairment and no evidence of any psychiatric disease.

42. In the opinion section of his report, he noted that the Claimant did not believe that the residual symptoms such as fatigue and occasional muscular skeletal symptoms would impair her whilst attempting to return to the material and substantive duties of the role, and that he agreed with her view of this (p194). He further indicated that he was unable to predict future levels of sickness absence and again, agreed with the Claimant's belief expressed to him that the residual symptoms would not affect the Claimant's ability to return to the 'material and substantive duties' of her job.
43. By this time the Claimant was employed as a Literacy Support Teacher ('LST') (p118). It did not appear to be disputed that this job description was given to the Claimant some time in 2013 and it was certainly agreed that this was the job description sent to OH before the report in November 2015.
44. Also in the November 2015 report, Dr Yardley-Jones responded to a specific question from the school about consideration of an alternative role as a redeployment strategy (p195). He saw no reason at that time why consideration should be given to that and stated that the Claimant appeared 'highly motivated to return to her current role that she has enjoyed over the years and continues to do so from what she tells me.'
45. In terms of adjustments, taking into account her absence for several months and the residual symptoms especially fatigue, he suggested that the Respondent should consider allowing a phased return to work by the Claimant working four rather than five days a week for the first two weeks. He stated that her return to work should be monitored and he encouraged a weekly review in order to monitor progress over the period of the rehabilitation to work. He made it clear, however, that his assumption was that there would be a successful rehabilitation back to work. At that stage, his opinion was that the Claimant was not likely to have a qualifying disability under the Equality Act 2010 as she did not have a physical or mental impairment which was long-term and 'substantive' on the evidence provided and which did not substantially adversely affect her activities on day to day living. He noted, however, that when the Claimant's symptoms were severe, it appeared that her symptoms were such that they may well have affected some day to day activities. He did not consider at that stage that the Claimant qualified for medical retirement.
46. Following that report, on 12 November 2015 the Claimant attended a Sickness Guidance Review Meeting attended by Mrs Fowler, the Headteacher, Ms Patel from Human Resources, Ms Joseph, the Claimant's Trade Union Representative, and Ms Dowle, probably the

note-taker. The Claimant had not yet returned to work and the purpose of this meeting was to plan further sickness monitoring in accordance with the school's procedure and the recommended phased return to work.

47. The Tribunal accepted the Respondent's evidence (Karen Fowler, para 10) to the effect that during this ten-month absence by the Claimant from the school ending in November 2015, the school had taken steps to introduce other means of supporting the children's literacy.
48. It was proposed by the Respondent that there would be weekly meetings with the Claimant, her line-manager, human resources and the trade union representative to monitor the Claimant's return to work. The notes of that meeting (pp 190-191) record that the Claimant told the meeting that it had been very difficult to explain her symptoms/condition to the doctor and that he had suggested stress but that the Claimant did not feel that they were caused by stress. The Claimant indicated that she did not require to go back to her GP to be signed off sick at this stage.
49. The Claimant confirmed to the meeting that she had nothing else to add to the report. Moreover, the doctor had recorded that the Claimant had seen the report prior to it being sent out to the Respondent. The return to work date was confirmed as Monday, 16 November 2015 with some changes to be advised. The school was referring there to the fact that matters had changed in the Claimant's absence and that some arrangements, such as the space to be used by the Claimant, would need to be reorganised. The Claimant expressed a desire to 'do what she did in year 2'. Mrs Fowler responded that the school may 'explore and expand into KS2'.
50. While discussing with the Headteacher the possible effects of the symptoms of fatigue on the return to work, the Claimant stated that if she started with something she used to do, she would be used to it and could generate more energy. The representative of HR, Ms Patel, indicated that the school could not guarantee that it would be 'what it used to be'.
51. The Tribunal considered that the notes of the discussion in this meeting reflect the balancing exercise which the Tribunal also had to undertake in terms of the employer acting to secure the needs of the school and particularly the children, and taking into account what the Claimant could do.
52. The monitoring of the Claimant's return to work was carried out in accordance with the school's procedures. Thus, there was a record of a meeting which took place on 7 December 2015 between the Claimant and Mrs Fowler (p189A) in which the Claimant reported that she was

feeling tired when she got home but that she did her exercises and that these helped her. She said that since she had started working five mornings, she was coping and taking lots of rest. There was no further reference to any problems at work and none related to any particular aspects of her role.

53. The Claimant then worked apparently without incident in the role between 16 November 2015 until she went off sick again at the beginning of June 2016. The role that she undertook when she resumed her duties from November 2015 involved the part-time provision of literacy support to individual children and small groups of children in years 1 to 6, i.e., both key stages. As an adjustment Mrs Fowler relieved the Claimant of many of the usual duties of a senior teacher and in this time the Claimant supported only those children with literacy difficulties.
54. The sick note presented in respect of the period 3 to 17 June 2016 was stated to be because the Claimant had 'anxiety with depression' (p189). The school then received further fit notes covering the periods 20 June to 8 July 2016, and up to 12 August 2016. The reason for the Claimant not being fit for work in all those fit notes was identical, i.e., 'anxiety with depression' (p187). The Claimant then indicated in a note to the school (p185) dated 18 August 2016 when she enclosed the medical certificate which covered her to 12 August 2016 which was during the school holidays, that although she would not be in school at the beginning of term, she was hoping to return in September. This note accompanied a fit note covering the period 9 August – 16 September 2016 (p186).
55. Mrs Fowler wrote to the Claimant on 13 September 2016 indicating that due to her on-going sickness absence, she was being referred for an OH assessment (p184). The Tribunal considered that this prompt referral to OH was consistent with the OH advice previously received from Dr Yardley-Jones.
56. Ms Hanafin then had a return to work interview with Mrs Fowler on 19 September 2016 (p183) in which she reported that her latest absence had been due to a crisis within the family which had triggered depression and that the issue had been resolved. Mrs Fowler asked the Claimant to undergo the OH assessment in any event. The Claimant reported that she was fit to return to work.
57. The Claimant also reported to Mrs Fowler at the meeting on 19 September that medication was helping to keep her on an even keel and that she would gradually reduce it.
58. Unfortunately, the Claimant then felt unable to return to work from 3 October 2016. The statement of fitness for work which was dated 11 October 2016 following an assessment of Mrs Hanafin on that date

(p182) covered the period from 3 October to 11 November 2016 and indicated that the relevant condition was anxiety with depression.

59. The Claimant had a meeting with OH on 7 October 2016 and they issued a report (pp 176-178) dated 19 October 2016. The assessment was by Dr Remington, Consultant Occupational Physician. He reported that the Claimant suffered 'intermittent' depression and that the first major episode was in 2008. The recent episode resulting in the Claimant's absence from June 2016 to September 2016 had been triggered by a family problem which had now been resolved. He noted also that the Claimant had experienced, during the last year, a severe episode characterised by physical symptoms. He was referring back to the medical issues set out above. He reported that the Claimant's attempt to return to work was not successful due to her loss of confidence and the continuing 'undermining of her state of mind'. It was reported that her GP had maintained her on anti-depressant medication as had been the case for some time. He further reported that the Claimant had been referred for counselling but was still waiting for the appointment to come through and that she had not had a more formal psychiatric assessment of whether she was on the most appropriate therapy since she continued to have problems despite taking the medication on a regular basis. He suggested that this should take place.
60. He elaborated later in his report that the Claimant believed that she had lost confidence in her ability to perform in the workplace on a consistent and reliable basis. He also made it clear during his discussion of this issue (p177) that he was thinking about the Claimant discussing with her GP whether the therapy she was receiving was appropriate and also about the referral for psychiatric assessment to consider alteration to her medication and some way of speeding up some targeted counselling.
61. He repeated the view expressed in an earlier report that the Claimant 'enjoys her role'.
62. In the section of his report in which he dealt with recommendations and with the specific questions posed in the referral, he expressed the view that it was likely that the Claimant would be considered to be suffering from a disability under the Equality Act 2010 at that point. He was not able to give a prognosis in terms of a return to work date as that depended on the Claimant receiving appropriate help. He suggested that a telephone consultation was organised for six-weeks' time at which point it would be possible to establish with the Claimant whether she had seen her GP and received any adjustment to her therapy, whether the targeted counselling sessions had been organised and how the Claimant was progressing.



63. Also, in answer to the question about any reasonable adjustments or restrictions that the school should be making to support the Claimant, Dr Remington stated that his understanding from the Claimant was that “the difficulty in working relates to her state of mind and ability to deliver. Since the improvements, it now depends on the medical intervention at the present time. Any adjustments should be discussed to the point at which she has improved sufficiently for a return to the work place”.
64. Finally, in relation to the question about whether the Claimant was likely to have further absence relating to anxiety with depression, he stated: - “If she responds well to adjustments to her therapy and any further counselling, she should return to a more robust state. However, it is more likely that she will continue to be vulnerable to having further episodes of anxiety and depression.” (p178).
65. The follow-up telephone consultation took place on 23 November 2016. Dr Remington’s report was dated 30 November 2016 (pp 170-172). He recorded his regret that the consultation with the Claimant’s general practitioner had not resulted in further therapy. She had been re-referred for assessment via the NHS with no time scale being clear at that time. The availability of such therapy through the NHS and the way in which it was arranged had apparently changed, he noted. He recorded that the Claimant reported that there had been no improvement to her state of mind thus the Claimant could not return to the workplace with confidence. She continued therefore to be unable to perform her role due to continuing depressive condition she was suffering from at the time of the previous consultation at the beginning of October 2016. He reiterated that he considered it likely that the Claimant met the statutory definition of being a disabled person.
66. His view was that Mrs Hanafin was unlikely to be fit to return to her duties within the next three months and would need to be reassessed to establish whether her fitness had improved at that time sufficiently to attempt a further phased return to her role (p171).
67. In the context of what reasonable adjustments might be advised, he stated: - “At the present time, having failed the previous phased return to work, she is not a suitable candidate for an attempt at a return at this time. Therefore, there are no adjustments which are likely to be effective at this time and the situation should be reassessed in 3 months’ time. By that time, it is to be hoped that she will have received some further talking therapy and her state of mind would have improved.”
68. In his view, future absence due to depression was likely. He also confirmed that the Claimant was fit to attend meetings especially if these were held outside of the school.

69. Towards the end of his report not in answer to a specific question, he indicated that he believed it would be helpful, "if there was any facility via the school", to direct the Claimant to some further targeted therapy at this time in light of the delay in the NHS. He also noted that he had drafted a letter to the Claimant's GP requesting a report and that on the receipt of such a report he would update the Respondent accordingly.
70. In the meantime, following the receipt of the fourth OH report dated 19 October 2016, Mrs Fowler wrote to the Claimant on 4 November 2016 (pp 174-175) inviting her to a Sickness Guidance Meeting on 18 November at 10.00am. She explained that the Claimant's absence had triggered this meeting in line with the Absence Management Procedures. She enclosed a copy of those procedures. The meeting was to take place on 18 November at Mrs Fowler's office at the school. Mrs Fowler complied with the appropriate processes by way of sending a copy of the OH report to the Claimant in advance of the meeting and telling her that she was welcome to be accompanied by her union representative or a work colleague. Further, the tone of the letter appeared to the Tribunal to be appropriate, with Mrs Fowler expressly telling the Claimant that the Respondent did not want her to feel anxious about this meeting as it was not a formal hearing but was within the sickness procedure and was entirely supportive.
71. She then outlined in full but short bullet-points the plan for that meeting namely: -
- (i) To discuss reasons for the absence and understand if there were any underlying problems contributing to the absence, either at home or at work;
  - (ii) To discuss ways of resolving or overcoming this concern and how the school could support the Claimant;
  - (iii) To discuss the effect that the Claimant's absence was having on the rest of the school; and
  - (iv) To understand how the Claimant was feeling and whether ongoing treatment was planned (if appropriate).
72. She further told the Claimant that if she was concerned by the letter and had any concerns or difficulties, she should telephone Mrs Fowler so that they could discuss any such worries. She reiterated that the meeting was entirely supportive and was not a punitive measure. She explained there were ways in which having such a meeting could be of assistance, for example, ensuring that the Respondent was making appropriate adjustments if needed and also assisting the Claimant in providing a forum for her to communicate any difficulties that she may

be experiencing and to communicate any difficulties with her health and get appropriate support.

73. Another statement of fitness for work dated 15 November 2016 covering the period of 14 November to 16 December 2016 was submitted by the Claimant (p168).
74. The telephone consultation with Dr Remington then took place as described above on 23 November 2016.
75. Following receipt of the OH report from Dr Remington in which, among other matters, he advised that the meeting should not take place at the school, the meeting was rearranged to take place at local authority premises on 15 December 2016 at 11.00am (p169).
76. In the event the Claimant's husband rang the Respondent to inform them that the Claimant was not fit enough to attend. The Claimant then obtained a statement of fitness for work dated 20 December 2016 following an assessment on the same date signing the Claimant off from work from 12 December 2016 to 31 January 2017 with 'anxiety with depression'.
77. Mrs Fowler then wrote to the Claimant again on 12 January 2017 (pp 164-165). She noted the recent history of seeking to hold a Sickness Guidance Meeting with the Claimant but that the Claimant had not attended due to ill-health. She noted that the Claimant was still absent from work and that the Respondent had received a further medical fit note which covered the period up to 31 January 2017. She noted that high levels of absence were of concern and a Sickness Absence Guidance Meeting should be conducted in accordance with the school's Absence Management Procedures and this would help the school to support the Claimant and to ensure they were exercising their duty of care towards her. She made reference to the anticipated receipt of a GP report in accordance with OH advice. She informed the Claimant that the Respondent would be referring her back to OH for further clarification and an update on her medical condition. She asked the Claimant to make every effort to attend the OH appointment.
78. Further, she informed the Claimant that after consideration of the awaited OH advice, the school may also in the light of the length of the Claimant's sickness absence, decide to pursue formal capability action in accordance with the school's Absence Management Procedures. She informed the Claimant that a formal hearing would be held before a panel of governors, the result of which could affect her continued employment at the school (p165).
79. Finally, she reminded the Claimant that the school was part of a well-being programme which included an employee assistance helpline and

gave the Claimant the relevant number. She explained to the Claimant that the service offered confidential and personal access to counsellors and advisors, and support with any other difficulties, e.g., legal or financial advice.

80. Mrs Fowler wrote again to the Claimant on 17 January 2017 (p162) confirming that the report from OH after the consultation on 23 November 2016 suggested that a medical report be obtained from the Claimant's GP. She asked the Claimant to give her consent and to return the completed consent form to the school as soon as possible.
81. The OH referral form was dated 18 January 2017 (pp160-161). By now, apart from the two to three-week period in September/October 2016 when the Claimant had attempted to return to work, she had been absent continuously since 6 June 2016. The Claimant was informed by the OH Service (Medigold) of an appointment on 8 February 2017 with Dr Remington (pp158-159).
82. At about this time the Claimant submitted a further statement of fitness for work dated 31 January 2017 covering the period 31 January 2017 to 3 March 2017 (p157). Her condition continued to be reported as anxiety with depression.
83. The Claimant attended the Medigold consultation on a date in February 2017 which was unspecified in the report, but which appears to have been on 22 February, based on Mrs Fowler's letter to the Claimant of 24 February (p152). Dr Remington sent a report to the Respondent dated 28 February 2017 (pp149-151).
84. Before this was received by the Respondent, the Claimant wrote to Mrs Fowler on 22 February 2017 (p153) in the following terms: -

"I am sorry I have been unable to teach due to my ill-health. I have been waiting a long time for therapy and have recently started, in January 2017.

Through my discussion and activities with the therapist I have pinpointed that my unhappiness began after returning to work from ill-health in November 2015 to a change of role within the school.

As you know I was appointed as a Reading Recovery Teacher in September 2009 to teach individuals at key stage 1. After a few years, this role was expanded to teach groups under-achieving in reading at key stage 1 in order to make it more cost effective for the school. Although I was upset that my reading recovery role had changed, I grew to enjoy working with groups at key stage 1.

After returning to work in November 2015 I was dismayed to find that my teaching role had been changed and I was to spend the majority of my time teaching key stage 2 pupils who are underachieving in literacy. At the time, I did not feel confident to discuss my misgivings about the new role because of the length of time I had been away from work.

Although I am not a specialist in dyslexia, my skills and expertise did enable me to work effectively with these pupils. However, over time I grew increasingly unhappy in this new role. For the past twenty years I have worked exclusively with younger pupils focusing on building a robust reading process and felt confident and effective in this role.

I feel that the change in my role has markedly contributed to my depression and anxiety. When I returned to work in mid September 2016 I told you that an event had happened in the summer that had triggered my depression and this was now resolved. Although this was correct I could not discuss fully with you about my unhappiness in my changed role.

I would like to return to my original role of teaching reading to individuals and groups at Key Stage 1. I feel very strongly that this would help my return to work.”

85. Apart from the greeting and the signing off that was the total content of the letter (p153).
86. Having received that letter by email on 24 February 2017, Mrs Fowler responded immediately to the Claimant (p152). She noted that the present long-term sickness absence was certified until 3 March 2017 at that point. She indicated that because of the issues raised in the letter she would like to arrange a meeting with the Claimant. She explained that the meeting would provide the opportunity to discuss the issues in relation to the Claimant's health, attendance and the occupational health report received by the school. Additionally, she indicated that as the Claimant had now attended the rearranged OH appointment on 22 February 2017, they would also need to discuss and consider the latest OH report.
87. Mrs Fowler again explained that the steps that were being taken were in line with the school's sickness procedure and would ensure that the school complied with its duty of care to the Claimant. She invited the Claimant to attend a meeting on Monday, 6 March 2017 at the local authority's premises. She further explained that the Claimant was welcome to bring a union representative or a work colleague and that she would be accompanied by Ms Patel, the school's HR business partner, and Ms Dowle, Office Manager.
88. Mrs Fowler referred the Claimant back to the letter dated 12 January

2017 in which Mrs Fowler had stated that in light of the length of the sickness absence the governors may pursue formal capability action in accordance with the school's absence management procedure and that the result of this could affect the Claimant's continued employment at the school.

89. She finally referred the Claimant to the Wellbeing Programme and again explained the assistance that could be given.

90. This OH consultation was a face to face meeting. Dr Remington reported that the Claimant continued to suffer from severe undermining of self-confidence and a high level of anxiety. By this time the Claimant was reported to be receiving weekly counselling therapy and also to be on regular medication but had not as yet achieved the degree of improvement which she would have hoped for. He reported that the Claimant was nervous about many aspects of her life and the problems at school 'sufficient to prevent her feeling confident enough to take part in the dialogue with the school referred to in the occupational referral'. He reported Ms Hanafin's view that she had recognised that she did not feel comfortable with the current responsibilities and referred to the letter of 22 February 2017 that the Claimant had sent to the school about this. He reported the Claimant's view that it would be helpful to know whether the Claimant could return to the previous responsibilities prior to any attempted return to the work place.

91. He also recorded that the Claimant was still awaiting a date for the appointment with a psychiatrist, following her referral. He also reported that the Claimant was experiencing increased tiredness and that he had recommended that she would benefit from further investigations into her general fitness and other relevant physical issues. He noted that the Claimant acknowledged that she had improved in some areas of her ability to have social interaction and this had been encouraging to her. In relation to his recommendations/answers to specific questions (p150), he stated that the Claimant was not fit to teach at that time.

92. In answer to the question about potential adjustments, he recommended that a discussion take place with the school in response to the letter that the Claimant had written, addressing her concerns over the nature of her job description. He continued:

"Once a response has been received, I would recommend that an informal meeting should once again be arranged between Ms Hanafin and the school.

It is my view that in a supportive environment, she would be fit to take part in a meeting to consider her future relationship with the school."

93. The meeting then took place on 17 March 2017 not on 2 March 2017 as

had originally been offered. Before that the Claimant submitted to the Respondent a fit note dated 7 March 2017 to cover the period from 4 March to 7 April 2017 confirming her unfitness for work due to anxiety with depression. It was received by the Respondent in the week prior to 17 March (pp147-148).

94. The details of the meeting on 17 March 2017 where relevant are set out in the findings and consideration below. This was the meeting about which the failure to make reasonable adjustments complaints at paragraph 16.2 of the List of Issues were made.
95. In summary, the Claimant reported that she had had six out of a course of twelve sessions of therapy and that she had been referred for psychiatric assessment. This was the 'targeted counselling' which Dr Remington had advised. Ms Patel took the meeting through all three reports and comments were made during the meeting on their contents. In addition, reference was made to the letter dated 22 February 2017 which the Claimant had sent to Mrs Fowler.
96. Before that was discussed, Ms Patel sought to clarify whether the Claimant had chased up the psychological assessment with her GP since November 2016. The Claimant responded that she had mentioned it in January but not in her last visit. She expressed the view that the counselling sessions would be more helpful than a one-off psychological assessment. In relation to any other investigations she reported that her GP was reluctant to do anything further. The Claimant confirmed that she agreed with the contents of the report dated 28 February 2017, which was the most recent OH report. Following questioning from Ms Patel, the Claimant suggested that there might be a review of the anti-depressant medication that she was on with her GP but that she had not made an appointment to discuss this, having last seen her GP some two weeks previously.
97. When the discussion moved to the request to work in a particular role and away from the OH reports, Mrs Fowler explained that there was pressure from the governing body to resolve the issue of the Claimant's long-term absence and she reviewed the history which by then amounted to over 400 days of sickness absence since joining the school. The Chair of Governors had apparently expressed the view that this was untenable and must change. There was reference during the discussion to the Claimant believing that she was employed as a Reading Recovery Teacher but that she realised that she was expensive and Ms Patel saying that it was also about the use of resources where children were under achieving. Mrs Fowler commented that she did not know of any other school using the reading Recovery Programme and that this was originally funded from outside agencies. This latter contention was not in dispute. The funding for the Reading Recovery Programme had by now come to an end.

98. There was then discussion about how it had come about that the Claimant was working with key stage 2 and Mrs Fowler disputed the contention that it had happened suddenly. She asserted that they had had a meeting in her office to discuss this beforehand. This was a reference to the meeting in November 2016 described above. The point was made by Ms Patel that changes had taken place in the school and these were discussed but that no changes had been made to the Claimant's working times or pattern. The Claimant said that she was working exclusively with key stage 1. Ms Patel said that the Claimant had been working with key stage 2 before she originally went off sick due to her ankle issue in 2015. This was disputed by the Claimant who indicated that she had assessed key stage 2 but had not worked with them. During the discussion, Mrs Fowler raised a question about the fact that the Claimant had returned to work thereafter for a year and nine months before raising that sort of concern in the 22 February 2017 letter. The Claimant attributed this to her nervousness about raising the issue.
99. There was then a discussion about the differences between working with key stage 1 and key stage 2 pupils. The Claimant's point was that key stage 2 pupils had different problems and could read but some had dyslexia and her contention was it was more challenging to work with them. There was also mention of the fact that the Claimant was not being asked to do duties that other teachers had to do, i.e., that there were already adjustments being made and that she was not being asked to take on tasks at her level (UP3). Ms Patel said that adjustments had been made but no further changes could be made. Mrs Fowler also stated that the school could not go back and create an exclusive role. The Claimant said that she could do the job, it was how it made her feel. She was also noted as acknowledging that it was hard to explain, even to her trade union representative.
100. In short, the Tribunal considered that the Claimant was unable to clearly articulate to the school as she partly acknowledged what the difficulty was in terms of teaching key stage 2 as opposed to key stage 1. The Tribunal was not satisfied that the teaching of key stage 2 fell outside of her job description or indeed her capabilities in principle.
101. Among the matters noted was that the Respondent did not have a predicted return to work date at that stage and that the GP was still reviewing the Claimant's health. Also, it was stated that after this meeting, with no outcomes in place, the Respondent would be looking to take this to the governors. The Claimant's trade union representative asked if the Claimant's skills could be used for training and the Claimant confirmed that she had done that. Mrs Fowler pointed out that the Claimant had had so much time off that other training had been put in place for staff.



102. It was confirmed towards the end of the meeting that the matter would be moving to the formal stage before the governors. Mrs Fowler expressed that the school had not been in this situation before but that it could not be sustained.
103. The Claimant then obtained a further statement of fitness for work dated 11 April 2017 covering the period from 8 April to 12 May 2017. Once again, she was certified as not fit for work in any way and that she was suffering with anxiety with depression (p146).
104. As stated above, a letter dated 11 May 2017 was sent to the Claimant confirming the discussion and outcomes of the meeting of 17 March 2017 (pp 141-143).
105. The Claimant then obtained a further statement of fitness for work dated 16 May 2017 in similar terms to the previous ones covering the period 15 May to 30 June 2017.
106. There then followed a further statement of fitness for work in similar terms dated 4 July 2017 relating to an assessment on that day and covering the period 3 July to 31 August 2017.
107. The Claimant was then written to by Mrs Fowler giving her notice of the capability hearing to take place at the school on 22 September 2017. The letter was dated 5 September 2017 and was sent by recorded delivery and first-class post. All the appropriate information was given to the Claimant in this letter about representation and the purpose of the hearing. She was also informed that one possible outcome may be that her employment with the local authority at the school may be terminated as a result. The letter also referred to the fact that there had been some delay in the process because of without prejudice discussions over the Summer term at the Claimant's request. That was referred to in order to explain the fact that the school would be making a further referral to the OH advisor for an updated opinion on the Claimant's fitness for work.
108. The Claimant was informed that the action of referring her case to the panel of governors was in response to the Claimant being unable to sustain a regular or acceptable level of attendance and to her continued sickness absence since 3 October 2016.
109. Finally, the letter also enclosed all the documentation that the school was relying on. The Claimant was also informed how the committee would be formed and who else would be present, i.e., Mrs Fowler and the Human Resources Business Partner advising her.

110. Mrs Fowler had prepared a report to be placed before the panel which was referred to as the 'capability report', which accompanied the letter (pp 109-112). It outlined all the history of the Claimant's absence and her most recent sickness absence. It listed the absence as 155 days up to 12 May 2017.

111. The report also helpfully listed the twenty-one appendices attached to the report, and attributed a page number to each.

- Appendix 1 Job Description
- Appendix 2 Letter notifying of Occupational Health Referral dated 13.9.2016]
- Appendix 3 Letter from Bridget Hanafin dated 18 August 2016 received with fit note dated 16.8.2016
- Appendix 4 Return to Work interview dated 19.9.2016
- Appendix 5 Occupational Health Referral dated 14.9.2016
- Appendix 6 Occupational Health Report dated 19.10.2016
- Appendix 7 Letter of invitation to sickness guidance meeting on 17.11.2016
- Appendix 8 Occupational Health Appointment Notification for appointment 23.11.2016
- Appendix 9 Occupational Health Report dated 30.11.2016
- Appendix 10 Letter of Invitation to sickness guidance meeting on 6.12.2016
- Appendix 11 Letter informing Bridget Hanafin of review arranged at Occupational Health dated 12.1.2017
- Appendix 12 Letter informing Bridget Hanafin of GP report dated 17.1.2017
- Appendix 13 Occupational Health Referral dated 18.1.2017
- Appendix 14 Occupational Health Appointment Notification for appointment 8.2.2017
- Appendix 15 Occupational Health Appointment Notification for appointment 15.2.2017
- Appendix 16 Occupational Health Report dated 28.2.2017
- Appendix 17 Letter from Bridget Hanafin dated 22.2.2017
- Appendix 18 Letter of Invitation to sickness guidance meeting for 6.3.2017
- Appendix 19 Letter of outcome of sickness guidance meeting held on 17.3.2017
- Appendix 20 Details of Medical Fit notes
- Appendix 21 School Capability Procedure

112. The Tribunal considered that the report gave a fair and comprehensive account of the background and provided the relevant supporting documentation.

113. Mrs Fowler referred to the Claimant's letter of 22 February 2017 and also explained in the report why she had taken the view that the request could not be accommodated.

114. The Claimant submitted a further statement of fitness for work dated 8 September 2017 to cover the period from 1 September to 6 October 2017 in the same terms as before.

115. Appendix 19 to the report was the letter from Mrs Fowler to the Claimant about the meeting on 17 March 2017 dated 11 May 2017.

116. The Claimant was by now represented by Henry Fowler, a Regional Officer of the Claimant's trade union.
117. In an email sent to the Respondent by Mr Fowler on 11 September 2017 (p132) he confirmed that he had had time to look over and read the bundle, and that he was writing to raise concerns regarding the process to date and how this impacted on the authority's ability to dismiss at the hearing on 22 September 2017. He expressed concern about whether the first and second stages of the policy had been followed and also about whether there had been copies of warning letters placed in the teacher's record. He indicated that they were not in receipt of these warnings and therefore believed the policy had not been followed. He also referred to the exhortation in the relevant policy that 'all reasonable measures have been explored which could lead to improvement in attendance and performance standards required'. He then referred to the Claimant's letter in February 2017 in which he had suggested the adjustment of continuing at her post as 'KS1 Reading and Recovery Teacher' and that this would facilitate her return. He continued 'we believe that this has not been considered strongly enough in the process to date.'
118. He concluded by asking that his email and any reply from the school be included as part of the Claimant's submission to the meeting which was due to take place on 22 September. The Tribunal accepted that this was done by the Respondent and the email was appendix 22. The addressee of that email was Ms Chow who occupied the position of Head of Schools Human Resources within Southwark.
119. Although Mr Fowler did not give evidence the Tribunal noted that there was no suggestion at that point that the Claimant had not received the letter from Mrs Fowler at appendix 19, the 17 May letter which was included in the appendices to the report, at the relevant time.
120. He also discussed with Ms Chow the timing of the hearing relative to any OH appointment.
121. In a further email sent on 12 September 2017 (p128) Mr Fowler referred again to the OH assessment and the advisability of that being carried out before a hearing. He also referred to his other email sent on 11 September 2017 and expressed the hope that he and Ms Hanafin could receive responses before the hearing. He noted that there was no correspondence in the bundle attached to the capability report in relation to the meeting that took place on 12 November 2015, a return to work meeting. He asked for the minutes and outcome of this meeting that was sent to the Claimant, to be sent to all. He also referred to not having any of the OH reports from 2014 or 2015 although the capability report detailed absence over these periods. He asked for all these to be provided for the panel.

122. The Tribunal has referred to the various queries raised by Mr Fowler to set in context the factual dispute about whether the Claimant had received the letter setting out the outcome of the 17 March 2017 Sickness Guidance Review Meeting at the relevant time, i.e., shortly after it was sent in May 2017. That issue was not raised in either of the two emails which Mr Fowler sent despite his obviously having raised a number other relevant points to do with documentation.
123. The Tribunal has cited all the occupational health reports which were produced in relation to the Claimant, and the sickness in 2015 was dealt with in the relevant OH report referred to above. There were no OH reports from 2014.
124. The Claimant was assessed again by the OH service on 13 September 2017 by Dr Remington at a face to face meeting. The report in relation to that meeting was dated 19 September 2017 (pp 125-127) but appears not to have been received by the Respondent until 25 September 2017. It ended up being the final and seventh OH report in relation to the Claimant and approximately the fourth from Dr Remington.
125. In the report, Dr Remington confirmed that the Claimant had had twelve sessions of talking therapy which he had found helpful and that she continued to be on anti-depressant therapy. He noted that she was still awaiting a further psychiatric assessment. He expressed regret that she was unfortunately still absent from work. He noted his understanding that a meeting had taken place with the management and that the previous role that the Claimant felt comfortable functioning in was no longer available and that there had been discussions for settlement which had not borne fruit. In the context of what at that point was the forthcoming capability hearing, he noted that at the meeting with him, Ms Hanafin remained convinced that she was fit to carry out some form of teaching function but not to fulfil the role that she found difficult before becoming unwell and commencing her period of absence from work. He noted that she recognised her loss of confidence and anxiety with regard to the possibility of returning to a similar role and that the Claimant was open to the suggestion of consideration of what sort of hybrid role might be appropriate for her and possibly acceptable to the school.
126. He then stated: 'In many ways she continues to be in a similar situation as on the previous occasion I met with her with manifest anxiety and acknowledged difficulty in deciding whether or not to pursue an agreed separation from the school, as manifested in your account of her having raised the issue and then retreated from it.'

127. In the section dealing with recommendations and responses to specific questions, he stated that his opinion about Ms Hanafin remained the same as in his last report although he noted that Ms Hanafin had accepted his observation that it would be worth considering what modified role might be comfortable for her to attempt a phased return and which might be a reasonable and practical option for the school. In answer to the question whether the Claimant was currently fit for work, he stated that she would be fit to attempt a phased return to a role focused on the type of teaching she was successful in in the past. He continued: 'she does report that she feels the problems stemmed from a return from sickness absence to a post which she had doubts over but was willing to attempt, but which proved difficult for her to deliver. Her level of anxiety over a return to any other type of substantive role is such that it is not likely to be something that she feels able to attempt or would be successful in delivering.'
128. In relation to the question about ill-health retirement, he said that the Claimant would not be eligible because that was not consistent with his recommendation that a phased return to some role would be appropriate. He continued that if it were possible to attempt a phased return to an alternative role, and the Claimant failed, then it would be appropriate to seek guidance from her GP and psychologist with regard to her fitness for any teaching role and for consideration for ill-health retirement to be carried out at that time.
129. In a similar vein in answer to the question about possible reasonable adjustments, he repeated his view that it would be helpful if consideration could be given to any role for the Claimant to attempt a phased return which had a combination of responsibilities allowing her to have a significant part of the role focused on the type of teaching 'which she feels that she was successful in delivering, and would be more comfortable for her to attempt a return to.'
130. Finally, in the context of answering the question whether the Claimant was currently fit for work among other matters Dr Remington stated that the Claimant was currently receiving medication and talking therapy which should continue to improve her state of mind.
131. In the event the capability hearing was postponed to 5 October 2017 and it was chaired by Mr Norman, assisted by Mr Dainton, another governor.
132. Some further documents relating to the capability hearing were produced in the Tribunal bundle.
133. It was not clear when the document headed 'Hearing 22 September 22' was produced by the Claimant and whether it was presented to the original capability hearing or at a later stage or whether it was read out

by the Claimant to that panel. It was clearly drafted in advance of the meeting at a time when it was anticipated that the meeting would take place on 22 September. Dr Remington referred to it (p126) when he stated: 'I understand from her that she is putting together a written submission for the meeting on 22 September 2017'.

134. The Claimant's document addressed paragraph 22 of the capability report in which Mrs Fowler stated: 'additionally it was clarified to her at a meeting [a reference to the meeting in November 2015] that, as a teacher employed by the school, her duties have changed along with the needs of the children at the school since she commenced her employment as a Reading Recovery Teacher at Michael Faraday School in 2009'.
135. Mr Fowler also submitted by email on 25 September 2017, all the medical certificates covering the period up to 6 October 2017 starting from May 2017 to Ms Chow prior to the hearing (pp123-124). Additionally, he sent an email to Mrs Fowler dated 25 September 2017 in which he made submissions on behalf of the Claimant in relation to her fitness to teach and reasonable adjustments. He also set out proposals on her behalf.
136. Under the heading 'fitness to teach' Mr Fowler referred to Dr Remington's advice about a phased return to work to a role focused on the type of teaching at which the Claimant had been successful in the past. He also referred to the text quoted above about whether the Claimant would be eligible for ill-health retirement.
137. Under the heading 'reasonable adjustments' he quoted the text of the report as cited in these reasons above.
138. He then submitted that it was clear that reasonable adjustments focused on a combination of responsibilities could facilitate a return to work. He therefore proposed on behalf of the Claimant that she should teach individual and group reading at key stage 1 on four mornings and one morning at key stage 2. In support of this proposal he referred back to the Claimant's letter of 22 February 2017 and the statement that she felt a change in her role had markedly contributed to her depression and anxiety. He then referred to the school's responsibility under the Equality Act 2010.
139. Also on 25 September 2017 Mr Fowler requested a postponement of the hearing due to the unavailability of an appropriate representative now that the OH report had been received. By letter dated 28 September 2017 sent by recorded delivery and first-class post, Mrs Fowler confirmed to the Claimant that the hearing had now been put back to 5 October 2017 (p117). It appears as if the meeting originally

scheduled for the 22nd was first postponed to the 28 September and then to the 5 October 2017.

140. She also confirmed that the school had received the OH report following the appointment on 13 September along with further documentation from Mr Fowler on the Claimant's behalf. She indicated that the additional documents had had page numbers added running consecutively from the original document bundle - appendices 22-25 – and that they had been provided to the governors and to Mr Fowler.
141. It appeared likely, and we found, given that the note headed 'hearing 22 September 22' was marked page numbers 75-78 which was consistent with the numbering of the additional pages referred to by Mrs Fowler, that this document was indeed placed before the capability panel on 5 October 2017.
142. Mrs Fowler had also prepared a note as a prompt to herself in terms of points that she wanted to make at the beginning of the hearing (pp 107-108). It was a summary of the school's position and the chronology in outline.
143. In addition, there was a two-page statement headed 'statement 5 October 2017' which had been prepared by the Claimant for the capability hearing (pp 105-106).
144. It is convenient to summarise the Claimant's position as set out in that note and as continued to be her case at the Tribunal hearing. Her position was that her role suddenly changed when she attended the return to work meeting on 12 November 2015 after having been on long-term sick leave. She noted however, that when she explained that her role was with key stage 1 pupils, she was told that she needed to be flexible and that the need was in key stage 2.
145. The Tribunal has already set out above its findings as to the job description and the nature of the role. The Claimant's case was that she felt compelled to go along with the new role but she felt vulnerable and guilty about her long absence and therefore did not challenge the change. She described that her role had changed from an early intervention teaching programme to a specialist dyslexic teaching role. The Respondent strongly disputed this. There was no firm evidence before the Tribunal as to the detail of the pupils taught. However, the Tribunal was not satisfied on the balance of probabilities that the Claimant was asked to carry out the role of a specialist dyslexic teacher. There was provision for that elsewhere within the teaching staff within the school.
146. The Claimant described that between November 2015 and the half-term break in the Summer term 2016, she had taught individuals, pairs

and groups of children in years 3/6, (key stage 2). She indicated that some of these children had full statements which included teaching pupils with autism, severe verbal dyspraxia and significant global delay in spelling and writing. She also talked about having been assigned five pupils from year 6 who had been receiving specialist dyslexic teaching from a visiting teacher but which had now been reduced. She indicated that the school, through their Special Needs Coordinator, had informed her that the school had plans to appoint a specialist dyslexic teacher in the future to take up the reduction in the hours from a local centre but that no such appointment was made whilst the Claimant was at the school. The Claimant further made the point in the submission that she felt she should have been able to manage as she was an experienced literacy teacher. However, she indicated that for twenty years this was in the role of an early intervention teacher of literacy not a dyslexic teacher.

147. The Tribunal did not consider that the Claimant had explained to the school or was able to explain to the Tribunal what was the essential difference between teaching the young children at key stage 1 or key stage 2, who had the same problems, and why one fell outside her capabilities.
148. At the meeting on 5 October 2017, all appropriate processes were complied with in terms of confirming the documentation and explaining the process to the Claimant and her representative. It appeared from the notes, and there was no suggestion to the contrary, that the Claimant was given a fair opportunity to explain her position and all the points that had been raised by her in terms of her role going forward and in terms of her contention that there had been a change to her role in November 2015, were discussed and Mrs Fowler was questioned about these matters also.
149. The notes of the meeting were at pages 91-104 of the Tribunal's bundle.
150. Towards the end of the meeting Mr Dainton, the other governor on the panel, asked the Claimant in terms what it was that made her uncomfortable about the role that she had been asked to take after November 2015. Here also, she stated that she found it hard to articulate, that it was difficult to explain but it impacted on her and she had lost confidence. She went on to say that she was functioning but not feeling as useful. Mr Dainton also confirmed with her that she had described that she was successful at the role. This was a reference to the letter from the Claimant of February 2017. Her representative Mr Fowler indicated that this was simply the Claimant coping and that it was clear that her anxiety grew over time. Mr Dainton queried why she believed that working successfully would make her unhappy.



151. Mrs Fowler maintained during the meeting that the meeting in November 2015 was a return to work meeting and that it was not about a change of role. The Respondent had explained several times during the Claimant's employment and during the hearing to the Tribunal that the reference to change was about matters such as physical location but not a change of the essential role that the Claimant was employed to do. Thus, for example, the fact that she may have been dealing more with key stage 2 than key stage 1 pupils was not seen by the Respondent as being a change of role, but rather was a change of work within the role (p103). The Tribunal accepted as accurate this analysis from Mrs Fowler.
152. Both parties had an opportunity to sum up at the end of the meeting and then the panel adjourned to consider its decision. The panel unanimously decided that the Claimant's attendance was not at an acceptable level and that she was not capable of sustaining a good level of attendance in the future. It rejected the recommendation in the most recent OH report of a phased return because this was not possible because it focused on the previous role. The panel decided that the reasonable adjustments proposed did not meet the needs of the school or the children and were essentially therefore not reasonable. Thus, the request to return to working only with key stage 1 pupils was not sustainable and did not meet the needs of the school.
153. The panel concluded also that the change of role was in 2013 and that in 2015 there was not a change in the role but the Claimant's job then included key stage 2 children.
154. The Respondent therefore decided to terminate the Claimant's employment with notice. The Claimant was informed that this decision would be confirmed to her in writing including the right to appeal. As promised, a letter to this effect was sent to the Claimant dated 6 October 2017 by recorded delivery and first-class post (pp 88-90). It was sent in the name of Nina Dohel, Director of Education Children's and Adult Services and was copied to Mrs Fowler.
155. The Tribunal considered that the dismissal letter was a considered and coherent statement of the school's position.
156. The Claimant exercised her right of appeal by letter drafted by Mr Fowler dated 12 October 2017 (pp 86-87). The grounds were that there had been a failure to follow the relevant procedure prior to or at the capability hearing which materially affected the result of the hearing to the detriment of the Claimant. This was a reference back to the point that Mr Fowler had made about warnings not being given to the Claimant at the appropriate times during the process.

157. The second substantive point was that the dismissal was disproportionate in light of all the circumstances including any mitigation. Here Mr Fowler relied on the letter he had sent on 25 September 2017 quoting the medical advice in the Claimant's most recent OH report dated 19 September 2017. He also relied on his letter dated 25 September to the Headteacher in which he proposed, on the Claimant's behalf, the role of teaching individuals and group reading at key stage 1 four mornings and one morning at key stage 2 (the "hybrid" role suggestion).
158. An appeal hearing took place on 18 December 2017. Additional documentation was provided by the Claimant namely a letter dated 14 December 2017 from her GP surgery addressed to Mrs Fowler. It confirmed that the Claimant had been issued sickness certificates from 3 June 2016 because of anxiety and depression. It also reported that the Claimant had explained that her symptoms were caused by a change from teaching KS1 children to teaching KS2 children in November 2015. It concluded by saying that the Claimant reported that she had been comfortable teaching KS1 children for seven years prior to this.
159. The Tribunal considered that this was essentially her GP repeating the Claimant's case. These were not matters about which the GP had direct knowledge.
160. The appeal was heard by a panel of two school governors and a third governor from outside the school. Mr Norman, the chair of the capability panel presented and the Headteacher was also present. No issue was raised about the composition of the panel. The notes of the appeal hearing were at pages 74-84 of the Tribunal's bundle.
161. At the conclusion of the hearing, the panel withdrew and then returned and announced that it upheld the decision of the capability panel in relation to the appeal ground about due process and that due process had been followed. The second appeal ground was also rejected. The panel did not agree that the action of dismissal was disproportionate and it upheld the decision made at the capability hearing. The Claimant was informed that a letter would be sent out confirming the outcome. In the event, the letter was dated 5 January 2018 (pp 72-73) and was signed by Mrs Wilson.

#### Equality Act 2010 Time Points

162. The claim was presented on 27 February 2018. The Claimant had notified ACAS of a dispute on 20 December 2017 under the early conciliation procedure and the certificate was issued on 2 February 2018. These dates were not disputed and were set out in the Respondent's submissions.

163. The dates were relevant for the paragraph 16.2 complaint about the failure to make reasonable adjustments following a letter sent by the Claimant to the Respondent on 22 February 2017 in which she asked for her old role back. The complaint was in two parts. The first part related to the adjustment of the Claimant reverting to the role she had done prior to November 2015, and the second part was about changing her role to a hybrid role encompassing both her original role and the adapted role.
164. Section 123(3)(a) which provided that conduct extending over a period was to be treated as done at the end of the period did not in the Tribunal's view apply in the current circumstances, where the complaints were about omissions.
165. The Tribunal considered that sections 123(b) and (4) of the 2010 Act which concern the determination of the relevant date when there has been an omission or failure to act were the relevant sections. Having provided in section 123(1) that a complaint alleging unlawful discrimination under the 2010 Act may not be brought after the end of the period of three months starting with the date of the act to which the complaint related; or such other period as the employment tribunal thought was just and equitable, section 123(3)(b) continues that a failure to do something is to be treated as occurring when the person in question decided on it. Section 123(4) then provides that: 'In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –
- (a) when P does an act consistent with doing it, or
  - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it'.
166. There was no dispute that the Claimant sent the letter on 22 February 2017 to the Respondent seeking adjustments. As set out above, in the letter (p153) the Claimant informed Mrs Fowler that she had started therapy in January 2017; that her unhappiness had started in November 2015 with a change of role and that she requested a return to her old role.
167. It was further not in dispute that a meeting took place on 17 March 2017 attended by the Claimant, Ms Patel, a member of the Respondent's Human Resources Team, Mrs Fowler, the Head Teacher, and Miss Joseph, the Claimant's Trade Union representative at the time. It was also not in dispute that the Claimant's continued absence from work was discussed.
168. The issue therefore was when, given the terms of section 123 cited

above, the 'clock started to tick' in relation to the adjustment requested in the letter of 22 February 2017.

169. The Tribunal was presented with competing arguments about when time ran from in relation to these allegations. The Respondent submitted that the Respondent's failure to agree to the adjustments requested in the 22 February 2017 letter was 'completed' on 11 May 2017, the date of the letter confirming the outcome of the meeting with the Claimant in March 2017 to discuss it, and Mrs Fowler's decision not to accede to the Claimant's requests. On the other hand, the Claimant's main case on this in summary, was that there was not a final position reached on this by the Respondent until the dismissal, because the letter to the Claimant dated 11 May 2017 told her that the issue of her continued employment by the school was to be referred to the governors. As that issue – her continued employment/return to work - was inextricably bound up with a decision about the adjustments sought, finality was not achieved until the decision by the governors to dismiss: paras 4 – 5 of Claimant's replies to Respondent's submissions by Mr Temme dated 19 July 2019.
170. The Respondent submitted that its construction of events reflected the contents of the Claimant's letter of 22 February 2017 in that the Claimant did not state in terms that the adjustment that she sought would allow her to return to work. She stated: 'I would like to return to my original role ...' and 'I feel strongly that this would help my return to work'.
171. Further, the Respondent argued, by the date of the meeting on 17 March 2017, the Respondent had received another OH report dated 28 February 2017 (pp149-151) from Dr Remington, Consultant Occupational Physician. Dr Remington did not state in that report that if the adjustment was made the Claimant would be able to return to work nor did it specify the adjustment that was needed. The report simply stated:
- 'It is her view that it would be helpful to know whether she could return to the previous responsibilities prior to any attempted return to the work place.'
- ' ... her lack of confidence would make it difficult for her to return to her substantive post at this point. Therefore, in my view she is not fit to teach at this moment.'
172. Dr Remington then recommended in his report that a discussion should take place followed by an informal meeting in relation to the letter that the Claimant had written.
173. The Tribunal considered that the meeting on 17 March 2017 fulfilled

this recommendation.

174. However, it did not appear to the Tribunal that in the sickness guidance meeting of 17 March 2017 the Claimant asked the Respondent to consider the hybrid role. Also, the latest OH report had referred only to a 'return to the previous responsibilities'. There was no suggestion of a mixed or hybrid role in the OH report at that stage.
175. The alternative option of whether the Claimant's skills could be used for training was discussed at the meeting of 17 March (p146C). The Head Teacher pointed out that the Claimant had had so much time off that other arrangements for training had been put in place for staff.
176. There was also a reference in the notes to the Claimant having asked towards the end of the meeting, 'if she would work with KS2 and KS1'. Having considered the context of the notes and the discussion around this in the last paragraph of p146C and the Respondent's submission that this was an enquiry from the Claimant as to whether it was proposed that she would be working with key stage 2 and key stage 1 as opposed to a request by the Claimant to work with both key stages 1 and 2, the Tribunal found that this was not a proposal by the Claimant at this stage for joint working or a hybrid role covering both key stages 2 and 1.
177. The Tribunal then considered whether this complaint in relation to the request for the adjustment of changing the Claimant's role back to what it had been prior to November 2015 was out of time.
178. The Claimant argued that it was a continuing act and she relied on the discussions which followed this in relation to this option and others.
179. The Tribunal found the following discussion in Harvey on Industrial Relations and Employment Law at para 829.02 helpful:

The date on which the duty to make a reasonable adjustment arises may not be the same as the date on which the failure to comply with the duty can be said to have begun. This was noted by the Court of Appeal in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, [2018] IRLR 1050. Leggatt LJ held that time would begin to run at the point in time when it had, or ought to have, become clear to the claimant that her employer was not complying with its duty to make reasonable adjustments. This may be later than the date on which the employer's duty had first arisen, but if time had begun to run on the earlier date, a claimant might be unfairly prejudiced, for example if they reasonably believe that the employer was taking steps to seek to address the relevant disadvantage, when in fact the employer was doing nothing at all. This was said to be the 'mischief' being addressed by s 123(4) which required the examination of the period in which an employer might reasonably have been expected to comply with its duty to be assessed from the claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the claimant at the relevant time. Such an approach was, it was held, supported by the judgment in *Kingston upon Hull City Council v Matuszowicz* [2009] EWCA Civ 22, [2009] IRLR 288.

And at para 829.04 as follows:

Care must, however, be taken, because the duty to make an adjustment which is reasonable may amount to a continuing duty, and in the words of Langstaff P, 'if there is such a duty it requires to be fulfilled on each day that it remains a duty' (at para 25 of *Secretary of State for Work and Pensions (Jobcentre Plus) v Jamil* [UKEAT/0097/13](#) (26 November 2013, unreported). In that case the claimant wanted a reasonable adjustment of working from a jobcentre nearer to her home; there had not been a refusal of a transfer in the three months prior to presenting her ET1, but the EAT upheld the finding of the ET that the duty to make a reasonable adjustment continued and it was the respondent's obligation to consider throughout the remaining period how it should be discharged. Arguments that any ongoing policy—to keep the transfer question under review—was non discriminatory such that it could not amount to a discriminatory act extending over a period, were rejected.

180. It did not appear from the Respondent's notes of the meeting (p146C), that there was going to be any on-going consideration. It appeared clear that a decision had been made by then.
181. The school was then chased by and on behalf of the Claimant for confirmation of the outcome to be sent to her in writing. The Respondent relied on the letter dated 11 May 2017 written by Mrs Fowler to the Claimant in which Mrs Fowler confirmed and reiterated the discussion at the sickness guidance meeting on 17 March 2017.
182. There was an issue raised by the Claimant at some point during the hearing about whether she had received that letter from Mrs Fowler at about the time it was sent, or at a much later time. In her closing submissions she questioned why the letter had been sent by courier although she did not elaborate on why this was an unsuitable method of communicating with her. In any event the Tribunal did not consider that her evidence about not receiving the letter of 11 May 2017 within a reasonable period after it was sent after 11 May 2017 was convincing or consistent. However, the Tribunal also took into account that in the letter there was no new decision made. The letter simply confirmed the decisions and discussions which had taken place nearly two months earlier. The Tribunal also took into account that the Claimant was represented at the meeting by her Trade Union representative.
183. In paragraph 4 of the Claimant's response to the Respondent's submissions, in relation to paragraph 54 of the Respondent's submissions on the subject of time limits, Mr Temme cited the following text from the letter of 11 May 2017 (p143):

'In line with the school's Absence Management Procedures you will now be referred to a Governor's panel under the School's Capability Procedures to discuss your continued employment at the school'.
184. He continued (in the next paragraph) by submitting that the panel sat on 5 October 2017, and considered whether reasonable adjustments could be made and dismissed the Claimant. The Tribunal took this to be intended to support the Claimant's contention that there was a continuing failure to act up to the dismissal decision on 5 October 2017, and that therefore the complaint that the Respondent had failed to

change the Claimant's role back to what it had been prior to November 2015 was in time.

185. The failure to make reasonable adjustments related to an adjustment which was requested on 22 February 2017. The Tribunal found that it was unambiguously refused on 17 March 2017 at the meeting with the Claimant and that this decision was confirmed to the Claimant in the letter of 11 May. We also found that the Claimant received that letter within a week at most of the date it bore. The Tribunal considers that this was a discrete matter and that time ran out in relation to that discrete failure within three months of 17 March or at the latest, within three months and one week of 11 May 2017.
186. In all the circumstances therefore, the Tribunal considered that it was clear that a negative decision had been made in March 2017 in relation to the request for the adjustment of going back to the old role.
187. The Tribunal then had to decide how long, if at all, it was appropriate to extend time for. The Tribunal considered that given this was the issue under consideration through to the end of the Claimant's employment the first part of the failure to make reasonable adjustments was said in the issues to be a complaint about the meeting of 17 March and consideration of the letter of 22 February 2017. The issue remained under consideration until the termination of the employment and the presentation of the appeal. The Claimant was notified of the outcome of the appeal by letter dated 5 January 2018.
188. In all the circumstances, the Tribunal extended time for the bringing of the first complaint about failure to make reasonable adjustments to the date on which the claim was presented namely 27 February 2018.
189. It was therefore convenient and appropriate to consider the merits of that complaint along with consideration of whether the Respondent had failed to make reasonable adjustments in respect of the hybrid role (the second limb of 16.2). Given the Tribunal's findings about this adjustment not having been sought in February or March 2017, and the extension of time in relation to the earlier March 2017 decision, the complaint in the second limb of para 16.2 was either brought in time, or if brought out of time, time for presentation of a complaint about it was extended to the date of presentation of the claim.

#### Consideration of substantive Complaints

190. The issue of the adjustment of allowing the Claimant to do a hybrid role was first raised on behalf of the Claimant in the OH report dated 19 September 2017 (pp125-127) from Dr Remington but which was received by the Respondent on 25 September 2017. On the same date by email the Respondent received a letter addressed to Mrs Fowler

which had been sent by Mr Henry Fowler, Regional Officer of the NUT, the Claimant's Union in which he proposed on the Claimant's behalf that reasonable adjustments focussed on a combination of responsibilities could facilitate a return to work. The specific proposal put forward was that the Claimant should:

- (a) teach four mornings individual and group reading at key stage 1 and one morning at key stage 2.

191. He referred back to the Claimant's letter of 22 February 2017 in which he expressed the view that the change in her role had markedly contributed to her depression and anxiety, and made the point to Mrs Fowler that from this it was clear that this re-defined role had led to her recent sickness absence and contributed to a worsening of her mental health.

192. It was necessary to consider the material which was placed before the Respondent at the time.

193. The further submissions on the Claimant's behalf and the OH report of 19 September were considered by the Respondent at the formal capability hearing in front of Mr Norman. In addition, the Claimant prepared a statement or points that she wanted to put before the panel in a letter headed 'hearing 22 September 22'. This appeared at pages 113-116 of the bundle. However, the hearing fixed for 22 September did not proceed until 5 October 2017. In her oral evidence the Claimant clarified that after her Trade Union representative had had a look at it, he suggested that she tidy up the submissions somewhat so she produced the document at pages 105-106 in the bundle which is headed 'statement 5 October 2017'. The Tribunal also accepted this evidence because it was consistent with the evidence of Miss Wilson in which she described that at the appeal the Claimant read out the statement at page 105 at the start of the hearing.

194. It mattered not whether the Tribunal was wrong in finding that this document was read out to the panel in relation to the consideration of this point because the point had been made on the Claimant's behalf very clearly in the letter from Mr Fowler already referred to above.

195. The Tribunal considered that the capability report and its appendices was comprehensive and included all the relevant documents generated at that point.

196. The 11 May 2017 letter was included in the bundle which was given to the Claimant prior to the initial date of 22 September 2017. The Tribunal was satisfied therefore that by that date at the latest she had received the letter.



197. The notes of the capability hearing were at pages 91-104. It appeared to the Tribunal that at the meeting when the Claimant was asked to elaborate on what her proposals were, she said that she ideally wanted to carry out a teaching role dealing predominantly with key stage 1 children. Ms Forest, the HR panel advisor asked her to clarify if she meant that she wanted to do this on a permanent basis and she was noted as responding in the affirmative (p101). The Respondent, through the members of the panel, asked for further clarification about the proposal. The response from or on behalf of the Claimant when asked how quickly it was anticipated that there would be a return to work, included a comment by Mr Fowler that after a long period of absence it was more likely that the school would want to assess the employee again (p102). The panel sought to clarify the source of the Claimant's unhappiness at working in the 'changed role'. It appeared to the Tribunal that the Respondent had sought to engage in some detail with the Claimant and her representative to clarify what was being proposed. However, the issue ultimately for the panel at the capability hearing was to balance the prospects of success of a return to work whether it be phased or not against the needs of the school and the needs of the children.
198. The first question for the panel was whether the adjustments being sought were reasonable and the Tribunal considered that they were entitled to strike the balance that they did and to find that it was not reasonable given the needs of the school and the needs of the children.
199. The second element was that in assessing whether adjustments are reasonable for an employer to make, the Tribunal also has to take into account whether the evidence points to the likelihood that the adjustment will reduce the adverse effects of the PCP on the Claimant. There was scant basis in this case for concluding that the adjustment that the Claimant sought was likely to reduce the adverse effects of her disability on her. The OH reports repeated the Claimant's contentions to the various advisors but the Tribunal did not consider that this was an independent assessment by the OH Advisor. In particular, just as the panel explored with the Claimant the reason why she had believed that there would be a difference in terms of performing her work if it was restricted or predominantly related to working with key stage 1 young people, this was also a matter that was investigated in the Tribunal hearing. It did not appear to the Tribunal that there was any cogent evidence which sufficiently distinguished the work that the Claimant would do with either of the groups. She indicated that she had not had experience of teaching that age group for quite some considerable time. The Tribunal considered that given her qualifications and experience, and the role that she had taken in training other teachers to teach both key stage 1 and key stage 2 teachers, the Respondent was entitled not to consider that to be a valid reason for not being able to take on a role which included some teaching or even predominantly

teaching of key stage 2 students.

200. When questioned by Mr Dainton, one of the Governors, at the capability hearing, (p100 at the bottom of the page) the Claimant was asked to explain how it was that she had enjoyed working with children in key stage 1 but could not work with them in key stage 2. The Claimant's response was noted as follows:

' ... it was a different way of working. It was a specific intervention role. These are children with specific problems and gave some examples of these children.

She said she managed well but it was a different way of working. (emphasis added).

There were other notes particularly at page 102 which demonstrated that the Claimant was unable to articulate what it was about the role including teaching key stage 2 children which made her 'uncomfortable'. She herself said that she found it hard to articulate and that it was difficult to explain but that it impacted on her and she lost her confidence. She stated: 'she was functioning but not feeling as useful'. The Tribunal considered that this was a further basis for concluding that even if the Claimant had been allowed to take up either the hybrid or the reversion to the previous role, there was no rational basis for expecting that the Claimant would be able to continue with her role and that it would not adversely affect her mental health.

201. The panel took its decision to terminate the employment at the end of the hearing. This was after an adjournment and reflected a unanimous decision (p104). By a letter dated 6 October 2017 the Claimant was written to by Ms Dohel, Director of Education Children's and Adults Services, confirming the outcome of the capability hearing (pp88 – 90).

202. In relation to both failure to make reasonable adjustment limbs of issue 16.2, the Tribunal rejected the contention that the Respondent had failed to make reasonable adjustments. The Tribunal considered that either it would not have been reasonable for the Respondent to have adjusted for the Claimant to return either to the hybrid role or to her original role having regard to the circumstances, the Claimant's continued absence and the failure to articulate the issues which were likely to lead to that adjustment having a more positive or beneficial effect on her attendance.

Issue 16.3 - That the Respondent should have followed the recommendations of the Occupational health to amend the Claimant's role

203. No date was attached to this complaint in the list of issues but it became apparent that the Claimant was relying on the seventh OH

report dated 19 September 2017. This was the last Occupational health report which was available when the issue of the Claimant's dismissal and her appeal were being considered. The Claimant referred to this adjustment in paragraph 7 of her closing submission very briefly. The Tribunal considered that this adjustment is ancillary to the complaint in 16.2 in that the Claimant was effectively relying on the recommendation of OH to support her contention that the Respondent should have made the adjustment of either returning her to her original role or allowing her to return on a hybrid role. In the part of the OH report that is quoted the Doctor stated the following:

*'on the basis of the consultation and discussions, I am of the opinion that she would be fit to attend a phased return to a role focussed on the type of teaching that she was successful in in the past. She does report that she feels that the problems stemmed from a return from sickness absence to a post which she had doubts over but was willing to attempt, but which provide difficult for her to deliver. Her level of anxiety over a return to any other type of substantive role is such that it is not likely to be something that she feels able to attempt or would be successful in delivering.'*

204. Further, at sub-paragraph g also on page 126 in the same report in answer to the question whether there were any reasonable adjustments the school might consider, to facilitate the Claimant's return to work and satisfactory future attendance and attendance at a hearing, Dr Remington stated:

*'it would be helpful if consideration could be given to any role for her to attempt a phased return which had a combination of responsibilities allowing her to have a significant part of the role focussed on the type of teaching which she feels she was successful in delivering, and would be more comfortable for her to attempt a return to. If no such role were available, it would be appropriate in my view, to revisit if possible the issue of a mutually agreed separation to allow her to seek such a role elsewhere if that was still available.'*

205. The Tribunal considered that Dr Remington was simply asking that consideration be given by the school to the options of return to the previous role or the hybrid role. He was not positively recommending that either of these courses should be followed.

206. In summary the Tribunal adopted the submissions of Mr Linstead as set out in nine sub-paragraphs of paragraph 43 of his initial closing submissions. On the grounds of proportionality, they are not repeated here.

207. The Tribunal considered the submission by Mr Temme in paragraph 3 of his replies to the Respondent's submissions to the effect that it was

not the Tribunal's task to adjudicate whether the Claimant's 'pleaded' adjustments were reasonably practicable (or not) according to the submissions of the parties. The Tribunal agrees with that submission. Mr Temme continued that the Tribunal's role was to decide on the evidence available to it whether the Claimant's role could have been adjusted such as to alleviate the disadvantage she faced in the adapted role and allowed her to return. The Tribunal had regard especially to paragraph 6.2(8) of The HRC Employment Code which sets out factors to be taken into account when considering reasonableness. We were also assisted by Mr Linstead's reference to the case of **Chief Constable of Lincolnshire Police v Weaver** [2008] UKEAT/622/07.

208. The failure to make reasonable adjustment complaints therefore in paragraph 16.2 and 16.3 were not well founded and were dismissed.
209. The Tribunal considered that the unfair dismissal complaint depended essentially on the same submissions.
210. The fact of the dismissal was not in dispute. The next question was whether the Respondent had established that dismissal had been for a potentially fair reason, especially in the context of the disability discrimination complaints having been dismissed. The reason relied on was capability, a potentially fair reason for dismissal under section 98 of the 1996 Act.
211. No alternative reason for dismissal was argued for. On the balance of probabilities, given the facts found above, the Tribunal was satisfied that the reason for the dismissal was the Respondent's genuine belief that the Claimant was not capable of continuing to perform her duties.
212. The next question was whether dismissal for that reason was fair in all the circumstances: section 98(4) of the 1996 Act.
213. There was no breach alleged or found of the applicable procedure namely the teacher ill-health procedure in this case. Further, the Tribunal was satisfied that there had been sufficient resort to Occupational Health for advice along the way but that quite properly the school had reached its own decision weighing up the advice from Occupational Health and the results of their enquiries and discussions with the Claimant.
214. The Claimant was informed in writing of the outcome of the decisions at each stage and was also given warning in writing with a reference to the documents to be taken into account also prior to the capability hearing in early October 2017. Further, the appeal was held in accordance with the procedure and then the Claimant was informed of the outcome of the appeal at the conclusion of the appeal hearing (p84). The Respondent then confirmed the outcome to Mrs Hanafin

within a reasonable time of that hearing by letter dated 5 January 2018.

215. In the issues the Tribunal identified that one of the points made on behalf of the Claimant was that she had not been given warning of the possibility of her dismissal other than in two sickness guidance letters sent on 12 January and 24 February 2017 and that, other than an initial guidance meeting held on 17 March 2017, there were no further meetings with her prior to the formal capability meeting on 5 October 2017. In relation to the latter point the Tribunal considered that it was not detrimental to the Claimant to have given her a longer period before holding the formal capability meeting on 5 October 2017. This clearly could have given her a greater opportunity to recover her health.
216. There were also warnings about the potential outcome of dismissal in the 11 May 2017 albeit as we found above it was received by the Claimant sometime after May 2017. Further, in the letter inviting the Claimant to the capability meeting which was dated 5 September 2017 (p137) the Claimant was informed that one possible outcome may be that her employment would be terminated. As we found above there were no breaches of the procedure in this respect.
217. The further point was made on the Claimant's behalf was recorded in the issues at 5.5 that the capability hearing was premature because the Claimant's union representative, Henry Fowler, had sent a letter dated 25 September 2017 raising the possibility of adjustments being made to the Claimant's role following the OH report and that no substantive response was received to this letter. The Tribunal took the reference to the Occupational Health report to be the Occupational Health report dated 19 September 2017.
218. The Tribunal was satisfied that it was appropriate for the school to have dealt with the issue of the proposals in Mr Fowler's letter of 25 September 2017 at the capability hearing. Under paragraph 12.1 of the ill-health procedure (P230), it is provided that:
- 'if after a specified period of support, monitoring and evaluation, the teacher has still not met the standards of capability required and/or any targets required, the investigator may decide to proceed with the formal capability procedure.'*
219. By 12 May 2017 (p109) the Claimant had had 155 days of absence in the academic year 2016/2017. Prior to that in the academic year 2015/2016 she had had 82 days absence and in the year before that the academic year 2014/2015 she had been absent for 120 days. Further, apart from a two-week period of attendance between 16 September and 3 October 2016, the Claimant had been absent continuously. Further, in the period from 2014 onwards the Respondent had obtained five Occupational Health reports dated:

2 May 2015 (p197);  
6 November 2015 (p192);  
19 October 2016 (p176);  
30 November 2016 (p170); and  
28 February 2017 (p149).

220. The sixth report in that time-frame (but seventh overall) was obtained in September 2017. After the final period of sick leave started on 3 October 2016, the Respondent obtained the two Occupational Health reports referred to above in October and November 2016 and then invited the Claimant to a sickness guidance meeting on 6 December 2016 (p169). That meeting did not take place due to the Claimant's husband contacting the school to say that the Claimant was not well enough to attend the meeting. This led to the letter from the school referred to above of 12 January 2017 in which Mrs Fowler warned that the school may decide to pursue formal capability action. The sickness guidance meeting that took place on 17 March 2017 followed an invitation by Mrs Fowler to the Claimant to attend the sickness guidance meeting on 24 February 2017, i.e., that was the date of the invitation.
221. In the last Occupational Health report (p125) Dr Remington who had seen the Claimant on the previous three or four occasions reported:
- 'in many ways she continues to be in a similar situation as on the previous occasion I met with her, with manifest anxiety and acknowledged difficulty in deciding whether or not to pursue an agreed separation from the school has manifested in your account of her having raised the issue and the retreated from it.'*
222. The only material difference was that in the second report by September 2017, the Claimant was putting forward the modified proposal of the hybrid role. However, the Tribunal considers that it cannot be said that the decision the school reached was outside the band of responses of a reasonable employer. They clearly weighed up the respective interests of the Claimant and the needs of the school and it was reasonable for them to have reached the decision that they did especially given the period of time that they had already not had the benefit of the Claimant's expertise and services.
223. In all the circumstances, the Tribunal considered that the unfair dismissal complaint was not well founded and was dismissed.

Employment Judge Hyde

Date and Place of Reserved Judgment:  
6 April 2020  
London South