EMPLOYMENT TRIBUNALS

Claimant: Mrs Susan Spencer

Respondent 1: The Governing Body of Merefield School
Respondent 2: Sefton MBC

HELD AT: Liverpool **ON:** 9, 10, 11 & 12 March 2020 (in chambers)

BEFORE: Employment Judge Shotter

Members: Mrs M Plimley
Mrs JC Fletcher

REPRESENTATION:

Claimant: Mr B Culshaw
Respondent: Mr T Kenward, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. All claims brought against the second respondent are dismissed upon withdrawal.

2. The respondent was not in breach of its duty to make reasonable adjustments, the claimant was not unlawfully discriminated against under sections 20 to 21 of the Equality Act 2010 and the claimant's claims of unlawful disability discrimination brought under sections 20 to 21 of the Equality Act 2010 are not well-founded and dismissed.

3. The respondent was not in breach of contract and the claimant was not unfairly dismissed; her claim for constructive unfair dismissal is not well-founded and is dismissed.

REASONS

Preamble

The claims

1. In two claim forms received 8 March 2019 and 4 April 2019 following ACAS Early Conciliation between 9 January and 9 February 2019 and on 18 March 2019 the claimant brings constructive claims of unfair dismissal and unlawful disability discrimination under sections 20-21 of the Equality Act 2010 ("EqA").

2. In a case management discussion held on 18 July 2018 the issues to be determined at the final hearing were agreed between the parties. At today's hearing the claimant withdrew two of her six reasonable adjustments and it was agreed that the issue to be determined by the Tribunal were as set out in the Minute of the 18 July 2019 preliminary hearing case management with deletion of 9(a) and (e).

Agreed issues

3. The parties agreed the issues as follows:

Constructive unfair dismissal

1. Did the claimant resign because of an act or omission (or series of acts or omissions) by the respondent? The claimant relies on the matters referred to in her resignation letter:
    i. Failing to address her formal grievance in line with the respondent's own policies and ACAS guidelines;
    ii. Failing to make reasonable adjustments to facilitate her return to work; and
    iii. Threatening dismissal without taking account of the recommendations of their own Occupational Health Specialist.

2. If so, did the respondent's conduct amount to a fundamental breach of contract? The claimant alleges a breach of the implied duty of mutual trust and confidence. Did the respondent, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties?

3. Did the claimant affirm the contract?

4. If the claimant was constructively dismissed, was the reason for a dismissal a potentially fair one?

5. If the dismissal was for a potentially fair reason, did the respondent act reasonably or unreasonably in all the circumstances in dismissing the claimant for that reason?

6. If the claimant succeeds in her claim, what compensation should be awarded? (To be determined at a separate hearing, if applicable).

Disability discrimination – failure to make reasonable adjustments

7. Did a PCP of the respondents put the claimant at a substantial disadvantage in comparison with the persons who are not disabled? The PCP relied upon is the condition to allow the claimant to return to work was to return to OAK SM class, undertaking prior to the commencement of her sick leave. The disadvantage alleged is that this PCP prevented the claimant from returning to work.

8. Could the respondent reasonably be expected to know that the claimant had a disability and was likely to be placed at the disadvantage?

9. If so, did the respondent fail to take such steps as it would have been reasonable to take to avoid that disadvantage? The claimant suggests the following would have been reasonable adjustments:

    a. Move the claimant to OAK HG class, where physical demands were less.

    b. Move the claimant to another class (other than OAK HG), ensuring she was not required to undertake tasks she was unable to undertake because of her disability.

    c. Allow the claimant to work in an administration position in the school.

Remedy for discrimination (to be determined at a separate remedy hearing, if applicable)

10. If the claimant is successful, what should the remedy be?

Against which respondent any award should be made

11. If the claimant succeeds in all or any claims, should the award be against the first and/or second respondent?

Disability

(16) The respondent conceded at this hearing that the claimant was disabled at the relevant times by reason of a prolapsed lumbar disc with radiculopathy.

Remedy

(17) The claimant seeks compensation.

Whether the Council should be removed as a respondent

(18) The Council applied to be removed as a respondent. The Council accepts that the claimant was their employee but states that, under the School Staffing (England) Regulations 2009, the functions of appointing staff, regulation of

conduct and discipline of staff fall on the first respondent. There is a service level agreement in place under which the Council provides Human Resource services to the first respondent.

Evidence

4. The Tribunal heard evidence from the claimant on her own behalf. On behalf of the respondent it heard evidence from Susan Clare (referred to as Sue Clare) headteacher now retired, Sharon Tipping, deputy head teacher, Kathryn Hadley, principal personnel officer employed by the second respondent and Paul Cunningham, personnel manager (pay, benefits and strategy) employed by the second respondent. There exist key conflicts in the evidence which were decided in favour of the Sue Clare, Sharon Tipping and Kathryn Hadley, the Tribunal taking the view that the claimant was at times, an inaccurate historian and less than credible witness. The evidence given on behalf of the respondents was to some extent supported by contemporaneous documentation including the notes taken by Sue Clare and Kathryn Hadley when litigation and/or protection of the respondents' interest was not contemplated. The claimant's evidence could not be relied upon when it came to the conflicting evidence, and the Tribunal has expanded upon its findings in this regard within the facts set out below, explaining how it has resolved those conflicts.

5. The claimant gave oral evidence on cross-examination that she had been "bullied" into making the application from ill-health retirement by Sharon Tipping in an aggressive telephone call. The Tribunal preferred the evidence of Sharon Tipping that this incident did not take place; the claimant had not included the allegation in her witness statement, pleadings or at the time and there was no mention of it in her grievance. The Tribunal concluded on the balance of probabilities the claimant activity sought ill-health retirement and presented herself as being permanently incapacitated even to the extent of not informing the independent doctor assessing her disability that she believed moving her to another class was a reasonable adjustment would facilitate a return to work. The claimant also claimed that Dr Krishna's conclusion that he did not believe long term the claimant "would not be able to carry out my duties" related to OAK SM only. On a straight-forward interpretation of the report Dr Kisnah's medical opinion was concerned with the claimant's teaching assistant role and not one classroom in which she had taught before the sickness absence and so the Tribunal found, the claimant having given earlier evidence that Dr Kisnah understood the claimant was a teacher in a main stream school until she put this right.

6. The Tribunal is grateful for the assistance it has had from both representatives in this case, with the result that we managed to get through a lot of evidence in the allotted timescale. It has considered the respondent's written submissions together with oral submissions made on behalf of both parties, which the Tribunal does not intend to repeat, it attempted to incorporate the points made by the parties within the body of this judgment with reasons, and has made the following findings of the relevant facts.

Facts

17 The first respondent is a community school with a delegated budget. The "ultimate" employer was the second respondent, however under the School

Staffing (England Regulations) 2009 the function of appointing and dismissing staff fell on the first respondent. There was an issue in these proceedings as to whether the second respondent should be a named respondent, the Response at paragraph 6 confirmed the claimant was an employee of the second respondent. In the application to dismiss the second respondent from the proceedings dated 7 August 2019 reference was made to Article 6 (2) of the Education (Modification of Enactments Relating to Employment) (England) Order 2003 making it clear that Employment Tribunal proceedings must be carried on against the governing body of the first respondent. It was agreed at the outset of this final hearing that all claims against the second respondent should be dismissed on this basis. It was also agreed that the second respondent had provided the first respondent with HR support under a service level agreement. The Tribunal acknowledges the complexity of the employment relationship, and it is understandable how individuals such as Sue Clare and the claimant were confused by it.

18 The first respondent specialises in providing an education for children and teenagers with “significant, severe and complex” learning and physical difficulties. A number of the children have mobility issues and required use of wheelchairs, hoists and general support such as linking arms.

19 The children (age ranges were from 4 to 19) were unable to function in mainstream schools or a special unit within a mainstream school, and required the care of highly specialised and motivated staff, such as the claimant, Sharon Tipping, deputy head and Sue Clare, the headmistress. A number of the children/young adults were non-verbal which brought with it possible behaviour problems that could be unpredictable and challenging due to their frustration of not being understood. Sue Clare described how some children’s social behaviour could be “highly volatile” and they failed to recognise social norms having difficulty in carrying out tasks, such as going into a shop without extra support. The goal was to build up the young adult’s independence by teaching and preparing them for life’s skills, and this necessitated taking them outside the school into society on a one-to-one supervision basis.

20 In oral evidence on cross-examination the claimant explained how some of the children were mobile enough to become rangers, work in the community farm and attend specialist colleges giving the Tribunal the impression that some of the young adults can carry out paid employment and attend college. In oral evidence on cross-examination of the claimant it was put to her that the evidence she gave was misleading; the pupils had severe and complex needs for whose benefit a work placement would be arranged with one-to-one supervision provided by the first respondent and it was not paid employment, to which the claimant responded, “I don’t understand the difference between being paid and supportive.” The Tribunal found the claimant’s evidence was misleading, she fully understood the difference and the reality was that the young adults were accompanied at all times and were not working as paid rangers or paid to work in the community farm.

21 It is not disputed that one of the pupils was a known absconder, which meant he would leave the class and go into the corridor, often in search of food. When he did this the pupil did not have any cognitive awareness of anybody in his way, as

he "on a mission" with no social understanding, and this behaviour could pose a risk to anyone who was unsteady on their feet.

22 The second respondent provided the first respondent with draft proforma policies which it could decide to use or not, and the first page was left blank in order for the first respondent's details to be inserted. The second respondent's policies and procedures were used by the first respondent, but blanked out in respect of the name. The Tribunal suggests that this is something the first respondent should look at, if it has not done so already, as it is imperative employees understand what procedures are applicable to their employment.

Attendance Policy

23 The first respondent had adopted the second respondent's "Your Guide to School Attendance Policy" supplied to it under the service level agreement. The Attendance Policy provided the mechanism for managing absences including review meetings, formal interviews, caution and dismissal. The Tribunal is exclusively concerned with the review meetings, as the respondent did not proceed beyond these when managing the claimant absence, despite its length and the fact that there was no foreseeable return to work.

24 There is a reference to the headteacher or line manager arranging a review period if there were concerns over attendance, and this was not applicable to the claimant as her absence was never managed in this way. There was the facility to refer the claimant to occupational health and "explore adjustments to your workplace/duties. Provide support/training etc or a combination of these actions depending upon the particular circumstances of your case."

25 The respondent issued a "Comprehensive Equalities Policy" that referenced reasonable adjustments for disabled employees.

26 The applicable Grievance Policy is dated 2018 coded V.04 and provided the head teacher had responsibility for managing and resolving grievances "promptly and sensitively as possible" with an investigating officer carrying out an investigation, followed by a hearing and an appeal to the governors. The procedure provided "employees must first discuss a grievance…with their line manager…no later than 2-months of the event giving rise to the grievance…" If the employee was not satisfied with the line manager's response he/she "must within five working days" take up the matter with the line manager. If still aggrieved, a written grievance must be submitted to the head within 5-working days. A grievance procedure report must be issued by the employee. The head has 5-days to respond and meeting must take place within 10-working days." As can be seem below, neither party followed this process when it came to the claimant's grievance, including the claimant herself.

The claimant's employment

27 The claimant was employed as a teaching assistant supporting children with special needs from 1 September 2013 until her resignation given on 14 March

2019, the effective date of termination being 14 April 2019. The claimant had many years' experience as a special needs assistant teacher.

28 The claimant was issued with a contract of employment and Staff Handbook. A number of Policies and Procedures were available to staff, including the claimant, on the website and in the staffroom. The claimant took part in an induction and was made aware of the procedures, including the one dealing with grievances. The contract at paragraph 11 dealt with grievances, and 11(vii) provided "if at any stage (except the Committee) the matter has not been dealt with within the stated time frames, you will be entitled to continue to the next stage." The claimant did not continue to the next stage when it came to her grievance as set out below.

29 As a result of a diagnosis of Hashimotos Disease in November 2015, Sue Clare the claimant's request agreed reasonable adjustments reducing her hours from full-time to 19 hours per week over 3-days.

30 In November 2016 the claimant injured her knee and had subsequent difficulties working with younger pupils at floor level and on low level furniture. The claimant was absent for a short period, an occupational health report obtained in January 2017 and it was agreed by Sue Clare as a reasonable adjustment when she was well enough to return to work she would be moved to a class named Foxes and then Hazel (14-16year olds) with older pupils where she would no longer be working at floor or low furniture level.

31 In February 2017 the claimant moved to work in OAK HG a classroom of ten 16-19-year olds, and in September 2017 OAK MS a classroom of six 16-19-year olds, two of whom used wheelchairs, two had mobility problems and risked falling, and two had severe challenging behaviours. In oral evidence the claimant indicated she had not received training for using specialist equipment i.e. hoists. It became apparent to the Tribunal that the claimant had successfully undergone manual training a number of times in the past; as a matter of good practice the respondent carried out this training annually. As a result of the class transfer the claimant missed out on her 2017 manual training update, she was instructed not to use the equipment alone and was limited to helping other teaching assistants set the equipment up. The impression given to the Tribunal by the claimant was that she had not had manual handling training when in fact she had, and this coupled with the less than credible evidence given on other matters, undermined the claimant's credibility. The claimant had 6-years' continuous employment with the respondent who trained her annually, and it was not credible the claimant was not proficient in manual handling without the refresher training, including the competency training given as a result of the claimant missing the 2017 training update.

Disability

32 The respondent accepts the claimant is disabled for the purpose of section 6 of the EqA. Including the conditions sited above, the claimant in disabled with lumbar disk prolapse with radiculopathy which affects her mobility; she used a stick and occasionally a wheelchair. The claimant was on sick leave from 20 November 2017 from which she did not return.

First MED 3: 20 November to 27 November 2017

33 The claimant was signed off without adjustments not fit for work because of the condition Piriformis syndrome.

Second MED 3: 27 November to 11 December 2017

34 The claimant was signed off without adjustments not fit for work because of the condition Piriformis syndrome.

Third MED 3: 11 December to 22 December 2017

35 The claimant was signed off without adjustments not fit for work because of the condition Piriformis syndrome.

Fourth MED 3: 21 December to 30 January 2018 (6-weeks)

36 The claimant was signed off without adjustments not fit for work because of the condition Piriformis syndrome.

37 On the 29 January 2018 Sharon Tipping referred the claimant to occupational health to advise on the Piriformis syndrome.

Fifth MED 3: 30 January to 27 February 2018 (4-weeks)

38 The claimant was signed off without adjustments not fit for work because of the condition Piriformis syndrome.

Sickness Absence Review ("SAR") 6 February 2018

39 A sickness absence review took place with Sharon Tipping, who was accompanied by Kathryn Hadley, from the second respondent providing HR support under the service level agreement. Kathryn Hadley was the only person who took notes. These were not verbatim and consisted of a combination of action notes and update information provided by the claimant about her health condition. The Tribunal preferred to rely on the contemporaneous notes compared to the claimant's recollection, and it is clear that she was not suggesting any imminent return to work, having been medically advised her recovery "is weeks and months" information she provided to the respondent. It is notable the notes record the claimant stating "went to use the pool for lunchtime and walk – not good idea – re; insurance. Feel out of sorts…no-one has contacted me."

40 The claimant was not given a copy of the notes until much later in the process; and she did not raise an issue with the content.

41 In oral evidence on cross-examination the claimant indicated she had requested a reasonable adjustment for a move to a different class at the SAR, which was not recorded in the notes of the meeting. The claimant asserted Sharon Tipping had told her she would be going back to OAK SM class, evidence which the Tribunal did not find credible given the medical advice and treatment the claimant was given, coupled with her contradictory evidence on cross-examination. When

it was pointed out by Mr Kenward to the claimant that the respondent had not suggested the claimant was expected to go back to the OAK SM class, the claimant in cross-examination accepted this was the case but it was "the feeling I got, the impression I got." Later in cross-examination the claimant contradicted herself stating Sharon Tipping had "made it clear I was going back into OAK SM." The Tribunal concluded (a) that the claimant had not been told she would have to go back to OAK SM, and (b) there was no PCP to the effect that to allow the claimant to return to work was to return to OAK SM class, and the Tribunal found this was the case up until the effective date of termination of employment.

42 When it was put to the claimant by Mr Kenward that her GP had advised it was unlikely she would return to the classroom, the claimant's response was that the GP was referencing OAK SM only when he provided the MED 3's. The Tribunal found the claimant was a less than accurate historian, the medical GP records do not refer to OAK SM and the Tribunal concluded that the medical opinion was the claimant would not be returning to any classroom during the relevant period. The respondent is entitled to take the contents of the MED3 at face value and not read into them that the claimant was unable to work in a certain type of classroom only; had that been the case the adjustment section on the sickness certificate would presumably not have been struck out.

Sixth MED 3: 27 February to 27 March 2018 (4-weeks)

43 The claimant was signed off without adjustments not fit for work because of the condition Piriformis syndrome.

First Occupational Health Report ("OHR") dated 2 March 2018

44 The Tribunal was taken to one part of the report by Mr Culshaw. It took the view that the OHR report can only be understood by reading the document in full and not part. It is clear the occupational health ("OH") doctor found the claimant was not fit to resume work as a part-time teaching assistant and she had another medical condition that was likely to be covered under the EqA, being the Hashimotos Disease. The claimant's unfitness was not limited to OAK SM, and had OH doctor been of the view that medically the claimant was only unfit to work in OAK SM as suggested by the claimant, the report would have said so.

45 The OH doctor dealt with the Piriformis syndrome, it was found "there is no consistent recovery at present, the claimant was unfit for work, no return date can be confirmed and "it is unlikely Susan will be able to carry out any manual handling duties in her current upper school class…a less demanding, more independently mobile Upper School class may be preferable, if this request could be explored..." In oral evidence on cross-examination the claimant indicated that the medical report was concerned with her duties at OAK SM and not whether she could work as a teaching assistant in other classes, and the GP MED3 also referred to Oak SM only. Giving the report its clear and common sense meaning the OH doctor was not advising the respondent should in March 2018 when the claimant's return to work could not be confirmed and she remained unfit, offer the claimant less demanding duties in another class. Such a request would be explored only when the claimant had an imminent return to work date.

Seventh MED 3: 26 March to 28 April 2018 (4-weeks)

46 The claimant was signed off without adjustments not fit for work because of the condition lumber disk prolapse with radiculopathy, her diagnosis had changed from Piriformis syndrome.

Second and final Occupational Health Report 6 April 2018

47 The report confirmed the claimant did not have Piriformis syndrome, but a diagnosis of lumber disk prolapses with radiculopathy and the claimant remained physically unfit "to return to work at present…. **recovery period unknown** at present. No date will be confirmed and will be dependent on a significant improvement in her symptoms. Susan remains symptomatic and **remains physically unable at present to undertake any of her duties**". When the claimant returned to work OH suggested "a task analysis should identify any aspects of the job which are going exarate her condition, **once she returns to work**. For example, playground duties" [the Tribunal's emphasis]. The OH doctor confirmed when fit enough to return to work a phased return would be recommended, and there was "no improvement in her symptoms to date."

48 The report concluded that the next appointment date was to be arranged by the claimant for the end of May, which the claimant did not do and this was one of the reasons why a third referral did not take place in May 2018 and was finally arranged by the respondent for April 2019. The Tribunal accepted the respondent's evidence that once the claimant had been referred to occupational health follow reviews and dates would be arranged directly between the employee and OH. No evidence was given by the claimant as to why she had not arranged a date for a follow up in May 2018.

49 The Tribunal found that as at the 6 April 2018 the medical evidence before the respondent, provided by the claimant, her GP and occupational health, was that the claimant could not undertake her duties, she was not well enough to return to work in any capacity and there was no date for a return in the foreseeable future, with the result that a discussion on reasonable adjustments and moving the claimant to another class would have been futile and it would not have resulted in a return to work. The report concluded the longer-term effect on the claimant's continuing state of health and fitness for work was "difficult to predict at present."

SAR meeting 9 April 2018

50 A sickness absence meeting took place in 9 April 2018. The claimant's evidence was that the OHR dated 6 April 2018 was not discussed in direct contrast to the evidence given by Sharon Tipping and Cathryn Hadley, who both said it was discussed as recorded in the notes taken of the meeting when both reports were considered and the 6 April 2018 report referred to by date, Sharon Tipping having contacted OH before the meeting. Their interpretation of the OH report was that a task analysis should be carried out immediately and not wait until the claimant was fit to return to work. Accordingly, the claimant was provided with a job description relating to the position of teaching position and the HSE, which the claimant completed.

51 The first occupational health report referred to manual handling and at the SAR the claimant suggested there were other classes with not so much manual handling. The new diagnosis was discussed as referenced in the second report with the claimant explaining her medical condition further. Sharon Tipping made it clear that all classes had the potential for manual handling, and the Tribunal found the second report was discussed and this comment reflected the reality of working with the children/young adults given the particular concerns of the first respondent for students in its care.

52 When she was asked if there was improvement in her condition the claimant's response was as before, that "no one will commit themselves…I will recover but I don't know if weeks or months."

53 In oral evidence on cross-examination the claimant maintained she had asked at the 9 April SAR for reasonable adjustments by being moved to Robin or Juniper classes, including working in the office, which was refused by Sharon Tipping who she alleged, informed her that "she couldn't see reasonable adjustments and it would be better if I applied for ill-health retirement." This evidence was disputed by Sharon Tipping, whose evidence the Tribunal preferred on balance to that given by the claimant. It was put to the claimant on cross-examination that there had been no improvement in her condition, to which the claimant responded that "I could still have had a discussion." The Tribunal took the view that this was this was the nub of the claimant's case, and there was confusion as to whether the conversation about ill-health retirement took place in the April SAR meeting or a later telephone conversation. The conversation was not recorded in the notes taken, it was an important matter and would have been recorded albeit in short form but nothing hangs on this because it is undisputable there was a discussion soon after.

54 Immediately following the SAR there was an incident involving a 15-year old child at the school in the corridor. There is an issue as to whether an incident took place, the claimant stating that it had not, denying it had prompted any discussion about the safety implications of being in the school for her. What is agreed is that a student was present with his teaching assistant, it is disputed that Sharon Tipping and another member of staff stepped in to protect the claimant, who was "slightly taken aback" from any unintended harm. It is not disputed that at the SAR a discussion had taken place about all classes having the potential for manual handling, and the Tribunal found on the balance of probabilities the incident had occurred as described by the first respondent and Sharon Tipping had used it to emphasis and discuss with the claimant such unintended incidents could happen at any time and it would be difficult for the school to have procedures in place to remove the risk. Sharon Tipping was in the position to make this assessment, and to determine that the risk could not be eliminated for the claimant. Contrary to the claimant's evidence, there was no indication the respondent accepted she was well-enough to return to work with or without adjustments, and the Tribunal concluded on the evidence before it, the first respondent was entitled to conclude that she was not.

Eighth MED3 26 March 2018 to 28 April 2018 (4-weeks)

55 The fit note recorded lumbar disk prolapse with radiculopathy and no adjustments were suggested.

Administrative officer recruitment for maternity cover

56 The second respondent advertised on the intranet for administrative officer maternity cover from some date in mid-April 2018 until 21 December 2018. The role was to provide "whole school administrative support including reception and telephone duties…the successful candidate must have experience of working in a school office and a working knowledge of the SIMS and FMS systems would be an advantage…" The person specification listed the attributes required which included an NVQ level 3 in administration or equivalent qualification or experience as essential as financial experience was necessary and a key factor.

57 The claimant had before working as a teaching assistant, carried out an administrative role but not in a school. She had no experience of SIMS and FMS and was not NVQ3 qualified. The claimant did not apply for the role and nor was it offered to her; Sharon Tipping took the view that during this period the claimant was not fit for work undergoing medical treatment, and due to the nature of the school it was not possible to isolate the claimant from contact with the children which posed a risk to her. At the time the claimant, who could have accessed the advertisement, did not express any interest in the post and the Tribunal accepted that had she done so, as it was for a short finite period covering maternity leave, it was not appropriate to offer the claimant training in order that she met the essential qualifications. It did not cross Sharon Tipping's mind that the claimant was well enough to undertake administrative duties, she was presenting unfit for work at that time and for the foreseeable future.

Eighth MED 3: 27 April to 2 June 2018 (6-weeks)

58 The claimant was signed off without adjustments not fit for work because of the condition lumber disk prolapse with radiculopathy reference was made to "continued liaison with OH as planned."

59 The claimant gave evidence that in or around Mid-May 2018 telephone conversation between Sharon Tipping and the claimant concerning early ill-health retirement. There is no reference to this conversation in the claimant's statement or that of Sharon tipping, and there is confusion as to when the conversation took place, and what was said. A conversation must have taken place at some stage before the 5 June given that was the date when the claimant applied for ill-health retirement. In her witness statement she said; "I applied for ill-health retirement" giving the reasons as no action taken to make any changes to help her return to work and Sharon Tipping had pressed her for a decision as to whether she was returning to work in September. The claimant made no reference to being "bullied" by Sharon Tipping to make the application and her evidence that on the one hand she was seeking reasonable adjustments to return to work and on the other she was being pressed to return to work, was contradictory. The Tribunal concluded on the balance of probabilities that had the medical evidence confirmed the

claimant was well enough to return with adjustments, which it did not, Sharon Tipping would have considered and accommodated the claimant as she wanted her to return to work, the claimant being a valued and dependable employee who clearly got on well with the children

60 On the balance of probabilities, the Tribunal found as a matter of logic that at some point in May 2018 a discussion about early ill-health retirement took place between the claimant and Sharon Tipping, and by 14 May 2018 when the claimant attended school and spoke with Sharon Tipping, she confirmed her intention to apply. The respondent's understanding was that the claimant believed she was permanently unfit to work as a teaching assistant and this was on the basis that the application for ill-health early retirement was made. Against this background exploring reasonable adjustments would not have resulted in the claimant returning to work.

Ninth MED3: 2 June to 29 July 2018

61 The fit note recorded lumbar disk prolapse with radiculopathy. In contrast the earlier MED3's the note confirmed "you may be fit to return to work…you may benefit from a phased return to work and amended duties…please ensure is assessed by occupational health to facilitate return to work. Currently uses a walking aid is not fit to partake in any situation which might involve restraint of a third party." By this stage some 2-weeks had passed since the claimant confirmed her intention to seek ill health retirement.

62 The respondent did not action the MED 3 and nor did it instruct OH to advice, on the basis that Sharon Tipping did not want to prejudice the claimant's application for ill-health retirement and therefore no further SAR's were convened until the unsuccessful outcome of the claimant's application was known in September 2018. Sharon Tipping was aware that as part of the process the claimant would be independently medically assessed and she would go through OH.

63 In the GP record dated 4 June 2018 it was noted "advised OH assessment before management **preferable Capability assessment may be that unless get significant improvement, is not fit to be in a class room**" [Tribunal's emphasis]. This GP record was not known to the respondent at the time; however, it appears to confirm the claimant was not well-enough to work and the MED3 issued made little sense in the light of that comment. Had the claimant not given the clear indication to Sharon Tipping that she intended to apply for ill-health retirement, the respondent may have been criticised for not referring the claimant to occupational health at this stage, ignoring the fact that the onus was on the claimant to arrange her own appointments as previously agreed with OH. The 2 June 2018 MED3 required clarification, and only OH or another medical expert, such as the GP, were in the position to assist the responded and the claimant who were not medical experts.

64 The claimant attended the respondent school on 4 June 2018 and met with Sharon Tipping and again confirmed her decision to proceed with the early ill-health retirement. There is no satisfactory evidence the claimant was "pushed into

it" by Sharon Tipping and the Tribunal found on the balance of probabilities that she was not.

<u>5 June 2018 ill-health retirement application</u>

65 In oral evidence on cross-examination the claimant stated she did not make an application for ill-health retirement, instead it was suggested by Sharon Tipping. The claimant alleged in oral evidence she was "bullied" by Sharon Tipping during the mid-May 2018 telephone conversation when early ill health retirement was discussed, the form was filled in by Sharon Tipping and the doctor was "shocked" when he saw it. The Tribunal did not find the claimant's evidence in this regard credible, and it preferred that of Sharon Tipping that she had not completed a form on the claimant's behalf and nor was there any requirement for her to do so. In oral evidence on cross-examination the claimant accepted she had provided the information for completion of the ill-health retirement application form.

66 Once the claimant had indicated she wished to apply for early ill-health retirement Sharon Tipping informed occupational health who in turn contacted the claimant. The claimant voluntarily completed a medical consent form. Once an employee applies for ill-health retirement the attendance management process is suspended until a decision is made on the application which can take up to 3-months. The Tribunal concluded that the claimant, in making the application, was confirming to the respondent (and occupational health) that in her view she was permanently physically unable to carry out the job of teaching assistant.

67 By 6 June the claimant's entitlement to half pay plus SSP ended, and the claimant was in receipt of Employment Support allowance from this date to 30 October 2018.

<u>Tenth MED3: 26 July to 27 September 2018 (2 months)</u>

68 The fit note recorded lumbar disk prolapse with radiculopathy and no adjustments were suggested.

<u>Eleventh MED3: 27 September to 22 December 2018 (3 months)</u>

69 The fit note recorded lumbar disk prolapse with radiculopathy and no adjustments were suggested. From the increasing length of the fit notes it understandably appeared to the respondent the claimant's medical condition was deteriorating.

<u>19 September 2018 ill-health retirement application failed</u>

70 The claimant was sent a copy of Dr Kisnah's report on 25 September 2018. By an email sent to the first respondent on 28 September 2018 by the second respondent it was confirmed Dr Kisnah's opinion was the claimant had not met the criteria for ill-health retirement.

71 Dr Kisnah recorded the claimant was "still having difficulty and required to stabilise herself with the use of an elbow crutch. Though her symptoms have improved since November last year she continues to experience debilitating pain…which has an impact on her activities of daily living and limits the amount of time she can

spend sitting down…Mrs Spencer is currently unfit for her duties as a teaching assistant…in my opinion there are further modalities of treatment and further investigations that need to be implemented to identify the root cause of her continuing disability." Reference was made to her undergoing an MRI scan and being further assessed. He concluded "having carefully reviewed the medical evidence available…it is my opinion that whilst Mrs Spencer is currently unfit for her duties as a teaching assistant there is not the medical evidence that would support the fact that she is permanently disabled from effectively discharging her duties."

72 In oral evidence the claimant indicated that Dr Kisnah did not understand her duties, and his report was based exclusively on OAK SM and not OAK HG, the classroom she believed the respondent should transfer her to as a reasonable adjustment. The claimant confirmed she did not raise the possibility of OAK HG with Dr Kisnah, and she was unable to give a reason why. The Tribunal took the view that as a matter of logic, the claimant would not bring up any possible reasonable adjustments because contrary to her evidence and protestations before this Tribunal, she actively sought ill-health retirement.

Health & safety issue raised October 2018

73 Sue Clare had been absent off work due to ill-health and she returned on the 1 October aware of the claimant's position and treated her absence as a priority to be addressed at a SAR which was convened for 15 October 2018.

SAR Meeting 15 October 2018

74 Notes of the meeting were taken by Sue Clare who was supported by Catheryn Hadley which records the claimant, who did not take notes, updating the respondent on her health conditions including the prolapsed disk, the stress risk assessment form and task analysis she had completed and a discussion took place around the claimant returning to work at OAK HG instead of OAK SM. Sue Clare took the view that it was "difficult" and reference was made to the claimant not being able to "get away" from using the corridors. The process of "going to governors "was discussed, which was essentially Cathryn Hadley explaining the respondent's attendance policy. The claimant alleges she was threatened with dismissal at this meeting, the Tribunal found there was no satisfactory evidence of this and it took the view that bringing the claimant's attention to the relevant policies was not a threatening act, but one which a reasonable employer would be obliged to mention. It is notable that the respondent had not proceeded down the capability route, despite the claimant's lengthy absence, and there was no suggestion that it was going to do so in the future.

75 The meeting was left with Sue Clare and the claimant agreeing a further review would take place after she had undertaken the MRI scan as suggested by Dr Kisnah. The contemporaneous handwritten notes of Sue Clare record "next steps…SS to report outcomes of m/skeleton meeting 30 October 2018 further SAR/MRI scan date???...Date TBC…" the Tribunal concludes, in short, the claimant remained unwell and no reasonable adjustments would have facilitated her return to work at that stage. Her medical condition was still being explored,

and it would have been pointless referring her to occupational health until it had crystallised either through the tests or treatment. The Tribunal was left in no doubt that Sue Clare intended to refer the claimant to occupational health when the medical position was clearer, and there was no reason for her not do so as she wanted the claimant back in work and at no stage did she indicate the claimant could only return to her previous classroom OAKSM.

76 The claimant was assessed for Employment and Support Allowance (ESA) which was refused.

<u>Personal Independence Payment ("PIP")</u>

77 In or around November 2018 the claimant applied for PIP granted at the standard rate to assist the claimant with "daily living needs…preparing food, washing and bathing, managing your toilet needs, dressing and undressing." In short, the claimant was found to have many difficulties including food preparation, washing a bathing, dressing and undressing, managing toilet needs "…you were observed walking slowly with some pain and discomfort using a stick…I have considered what your needs are on most of days." In oral evidence the claimant disputed this finding, stating she had informed the doctor her problems occurred on exceptional days only; the Tribunal did not view this evidence as credible. Had she said that then the PIP may not have been awarded from 5 November 2018 to 6 August 2020, a three-year period and the doctor would not have made reference to assessing what the claimant's needs are on "most days."

<u>SAR Meeting 6 December 2018</u>

78 At this meeting the claimant updated the respondent about her medical condition confirming she had undertaken the MRI scan and been re-referred to the muscular/skeletal clinic. The claimant stated the MRI scan confirmed she had a prolapsed lumber disk with two options; an operation or to see a consultant regarding pain blocking injections which the claimant wanted to try and was waiting for the appointment.

79 The claimant had previously on a number of occasions requested a copy of the notes taken at the SAR meeting, which had yet to be provided. The claimant repeated her request and when she was told by Kathryn Hadley, whose responsibility it was to have produced the notes, that she did not have them and apologised, the claimant's response was that she had taken advice and the claimant walked out of the meeting before it had finished.

80 An exchange of emails followed between the claimant and Sue Spencer about the missing SAR notes and the claimant's medical appointment due to take place on 5 January 2019. The understanding between the parties was that the claimant would update Sue Clare after the appointment with a view to a further SAR being convened.

<u>Formal grievance 17 December 2018</u>

81 The claimant raised a written formal grievance sent to Sue Clare raising two issues, the first the SAR notes that had yet to be provided, and the second, that

the lumber disk prolapse with radiculopathy be classed as a disability under the EqA as "…Sefton Council may be discriminating against me for failing to consider reasonable adjustment to allow me to return to my existing role or a new role…"

82 Sue Clare forwarded the grievance to Paul Cunningham, personnel manager at the second respondent and told the claimant that she was doing so in an email sent on 18 December.

<u>Twelfth MED3 20 December 2018 to 9 March 2019 (3-months).</u>

83 The fit note recorded lumbar disk prolapse with radiculopathy and no adjustments were suggested.

84 Paul Cunningham responded to the claimant's grievance without delay, in a letter dated 20 December 2018, 3-days after the grievance had been lodged dealing with the two points raised as follows:

83.1 Kathryn Hadley was absent due to family illness and notes relating to meetings were attached., which resolved that part of the grievance, the claimant having indicated in her grievance letter "to resolve the grievance I require that before any review meetings are scheduled that the minutes or notes of all review meetings…are produced."

83.2 In the respects of the second issue Paul Cunningham wrote "I have to admit to being slightly confused. An occupational health report dated 2 March and further report dated 6 April both clearly indicate that you are covered by the Equality Act…since this recent point is directly related to your employment then Merefield school will need to respond to this issue. An initial observation…the latest medical report suggests that you remain physically unable at present o undertaken any of your duties. The report also indicates that currently there are no modifications that would alleviate the condition or facilitate rehabilitation. The suggestion being that when you are fit enough to return to work a substantive discussion can take place regarding reasonable adjustments."

85 The letter was copied to Sue Clare who took no immediate action and did not deal with grievance under the first respondent's grievance procedure in the belief that Paul Cunningham had dealt with it and she was satisfied with the way he had addressed the grievance. Despite Paul Cunningham making it clear that the first respondent would need to deal with the disability issue, Sue Clare was unable to do so without the claimant's medical position becoming clearer. The claimant was seeking clarification that she was accepted as disabled as a result of the prolapsed disk position, and the Tribunal found it was not unreasonable for Sue Clare to wait until after the claimant's medical appointments bearing in mind Dr Kisnah's opinion that the claimant was not permanently disabled and the change in diagnosis earlier in the claimant's absence.

86 Paul Cunningham's observations on the claimant's reference to the failure to make reasonable adjustments should not have taken the claimant by surprise; the claimant was not fit enough to return to work with or without adjustments as borne out by the medical evidence and what the claimant was saying at the SAR's for

example, that she could not get any medical professional to confirm the date for her return to work, “they wouldn’t commit themselves…it was difficult to predict.”

87 Turning to Paul Cunningham’s indication to the claimant in his letter of 20 December 2018 that she as not employed by the second respondent but employed by the first and the grievance would need to be raised with the latter, this caused the claimant to understandably raise the issue and Paul Cunningham confirmed in an email send 21 December 2018; “I have double checked the record and you are definitely employed by Merefield School and not Sefton Council. Merefield is a fully delegated school and therefore responsible for all employment matters.” Paul Cunningham was incorrect in the advice he gave to the claimant, and he was aware at the time the second respondent was the ultimate employer the first respondent responsible for all employment matters including managing the claimant’s ill-health. Paul Cunningham’s incorrect response would have resulted in the Tribunal drawing adverse inferences had proceedings against the second respondent not been dismissed on withdrawal.

88 The claimant raised the issue with Sue Clare. It was apparent Sue Clare was confused, and indicated as much to the claimant in an email of the same date. She wrote with reference to the second issue set out in the grievance, namely whether the claimant was disabled or not “obviously this will need further discussion as/when you receive further advice concerning your injury” which was not, in the Tribunal’s view, an unreasonable position to take given the requirement a disability is long-term and the claimant’s medical diagnosis had changed. Until the claimant’s medical condition became clearer, the respondent was not able to concede disability. Had the claimant been well enough to return to work with adjustments (which she was not) the fact that disability status may have an issue would not prevent the respondent from carrying out reasonable adjustment in any event.

89 By the 21 December 2018 Sue Clare took the view the grievance had gone as far as it could, pending further medical investigations into the claimant’s condition, reference was made to the January 2019 medical appointment and it is notable the claimant did not raise the grievance again, and nor did she refer it to the board of governors under the Grievance Procedure she was in possession of.

90 The claimant emailed Sue Clare on 8 January 2019 about the spinal injection and how the consultant “could not guarantee any improvement in my symptoms…it was agreed to see if things have improved naturally in 3-months’ time…” in response to an email requesting an update sent to the claimant by Sue Clare as previously agreed.

91 During this period Sue Clare was taking HR advice from Kathryn Hadley about the next SAR, the claimant’s medical position and whether OH should be asked to examine the claimant. Kathryn Hadley emailed on 18 January that she had consulted with OH who “looked over the file again and the IHR decline and also the fact that Susan had agreed with her consultant…to see if things have improved naturally in 3-months…has advised that she doesn’t feel there is any need for OH to see Susan in the 3 months, however she advised that it would be OK for us to

continue with the SAR and perhaps have a meeting with Susan at the half-way point of her current fit note".

SAR Meeting 13 February 2019

92 As before, notes were taken. The claimant updated Susan Spencer with the medical condition indicating that her appointment at the pain clinic had been "a shock" because she was presented with a consent to go to surgery for an injection in to the spine, and it was agreed the claimant would see the consultant in 3-months' time "**after a month now there has been no improvement to my condition since the 5.1.19. It's very disappointing 16-months and still not better**" [the Tribunal's emphasis]. She described that she had a category 2 bulge which "could take 24-months to improve. I am sorry that there has been no improvement." This was stated in the mid-point of a 3-month Med3 and the Tribunal found there were no reasonable adjustments the respondent could have carried out that would have resulted in the claimant returning to work as a teaching assistant in any class.

93 Sue Clare discussed the fact that the claimant had been last seen by OH in April 2018, and she had applied for ill health retirement. The application by September 2018 which was unsuccessful and Sue Clare stated; "**we have been led by your appointments with consultants** but now feel that you should be referred to occi health for their advice. Are you ok with this" [the Tribunal's emphasis] and the claimant agreed that it was "OK." By this stage the claimant had been absent from work for 16-months with no foreseeable return to work date, and the respondent had not commenced capability proceedings in the hope that she would return to work; she was a valuable experienced member of staff who had a good relationship with Sue Clare, and reasonable adjustments had been made in the past to facilitate the claimant at work.

94 With the claimant's agreement Sue Clare completed a medical referral on the 13 February 2019 the same day as the SAR, requesting advice on a number of matters including reasonable adjustments. In oral evidence the claimant confirmed that once she had been provided with the notes of the SAR she knew a further SAR would be arranged when the medical evidence about her back condition was available and the issues raised by her grievance had been addressed pending another SAR taking place in the future.

95 In contrast with the claimant's oral evidence, the Tribunal found there was no information before the respondent to suggest she had "improved dramatically." The reality was the claimant had been signed off with no adjustments suggested, for a further 3-months and was waiting a medical appointment in April, Sue Clare was not expecting any imminent return to work in the foreseeable future and the claimant, despite her protestations when giving evidence, was fully aware the respondent was "being led" by her medical appointments in order that it could get clarification from the claimant's treating medical team. In oral evidence the claimant confirmed she was aware of the reason for the occupational health referral.

96 The claimant was sent a letter dated 4 March 2019 inviting her to an occupational health appointment set for 23 April 2019 "so that your current fitness can be reviewed. We want you to know…it will do all it can to help you recover." The claimant relies on this occupational health referral as her "last straw" arguing it took so long for the referral to come through as she had requested a referral repeatedly in 2018. This was not an issue referred to in the letter of resignation, and the Tribunal concluded the claimant's evidence in this regard could not be relied upon. The claimant was in receipt of advice during this period and it is also not credible that she was waiting for a grievance outcome given the Tribunal's findings set out above. The claimant was aware what the respondent's position had been from the outset; she was not fit to return to work and medical clarification was needed as to what the future could bring without any underlying threat of capability proceedings despite the considerable length of absence.

Resignation on 14 March 2019

97 The claimant sent her resignation letter to Sue Clare and Paul Cunningham, and it was clear to the Tribunal that the issue relating to who her employer was had not been live for some time, and the claimant had not chased this up.

98 The claimant resigned claiming a fundamental breach of contract, she was not relying upon an express breach of contract but breach of the implied term of trust and confidence, relying on three breaches;

101.1 You failed to address my formal grievance in line with your own policies and ACAS guidelines.

101.2 You failed to make reasonable adjustments to facilitate my return to work.

101.3 You threatened dismissal without taking account of the recommendations of your own occupational health specialist.

99 In the first claim form received before the claimant's resignation, the claimant confirmed her employment was continuing and in the same breath, that she had been constructively dismissed. She had undergone ACAS EC between the 9 January and 9 February 2019, proceedings were issued on the 8 March 2019 although confusingly the claimant dates the ET1 19 March 2019 which at paragraph 22 refers to a constructive unfair dismissal despite the fact she resigned 5-days after.

100 In the second ET1 claim form received 4 April 2019 the claimant pleaded that "she was told her job was currently under review by Governors. An option under consideration was to terminate her employment through capacity. The claimant was still waiting this decision up to the date of her resignation." The Tribunal found the claimant to be an inaccurate historian; the claimant was not informed her job was currently under review by Governors, she was not told an option under consideration was to terminate her employment through incapacity and she was not waiting for a decision on this up to the date of her resignation. The claimant had not been subject to any capability procedures, the respondent content to wait until her medical condition had clarified to see when and/or if she would well

enough to return to work anticipating that the occupational health doctor who was due to examine the claimant in April would advise on the position. The claimant may have felt she was in danger of being dismissed due to incapacity as a result of her lengthy absence and inability to provide a return to work date in the foreseeable future and this fear may well have factored into her decision to resign and make a claim; however, this was all of the claimant's own making and throughout her absence she was not threatened with dismissal as a result of capability.

101 The claimant resigned giving the respondent notice and following the resignation of 14 March 2019 on notice, the effective date of termination was 14 April 2019.

Law Disability discrimination – failure to make reasonable adjustments

102 The duty to make reasonable adjustments is set out in S 20 of the Equality Act 2010 ("EqA"). Section 20(3) sets out the first requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. Section 21(1) provides that a failure to comply with the first, second or third requirement is a failure to comply with the duty to make reasonable adjustments. Schedule 8 of the EqA 2010 applies where there is a duty to make reasonable adjustments in the context of 'work' and the Statutory Code of Practice on Employment is to be read alongside the EqA. The Code states that a PCP should be construed widely so as to include, for example, informal policies, rules, practices, arrangements, criteria, conditions and so on.

103 In the well-known case Secretary of State for Work and Pensions (Job Centre Plus) v Higgins [2013] UKEAT/0579/12 the EAT held at paragraphs 29 and 31 of the HHJ David Richardson's judgment that the Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage.

104 Mr Kenward referred the Tribunal to the EAT decision in Environment Agency v. Rowan [2008] ICR 218, IRLR 20, EAT "*In our opinion an employment tribunal … must identify: (a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer, (c) the identity of non-disabled comparators (where appropriate) and (d) the nature and extent of the substantial disadvantage suffered by the claimant…. Unless the employment tribunal has identified the four matters we have set out above it cannot go on to judge if any proposed adjustment is reasonable. It is simply unable to say what adjustments were reasonable to prevent the provision, criterion or practice, or feature, placing the disabled person concerned at a substantial disadvantage*".

105 The Tribunal was also referred to the EAT decision in Project Management Institute v Latif [2007[IRLR 579, EAT "*The … claimant must not only establish*

that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not" (Elias P).

106 In <u>Royal Bank of Scotland v Ashton [2011[ICR 632, </u>the EAT held the duty to make reasonable adjustments is cast in terms of 'steps' that would have an efficacious practical benefit in terms of relieving the substantial disadvantage to which the claimant is subjected by the PCP. "*It is not — and it is an error — for the focus to be upon the process of reasoning by which a possible adjustment was considered… [I]t is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment.' This essentially brings us back to the fact that the duty to make reasonable adjustments is cast in terms of 'steps' that would have an efficacious practical benefit in terms of relieving the substantial disadvantage to which the claimant is subjected by the PCP*".

<u>Burden of proof</u>

107 Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the contravention of this Act. (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

108 In determining whether the respondent discriminated the guidelines set out in <u>Barton v Investec Henderson Crossthwaite Securities Limited</u> [2003] IRLR 332 and <u>Igen Limited and others v Wong</u> [2005] IRLR 258 apply. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that he did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondents and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

Constructive unfair dismissal

109 Section 95(1)(c) of the Employment Rights Act 1996, as amended ("the ERA") states that there is a dismissal when an employee terminated his or her contract, with or without notice, in circumstances that he or she is entitled to terminate it without notice by reason of the employer's conduct.

110 The law as set out by Mr Kenward in written submissions was not in dispute. Reference was made to the conditions are outlined in "Harvey on Industrial Relations and Employment Law" at paragraph DI [403]. "*In order for the employee to be able to claim constructive dismissal, four conditions must be met:(1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach. (2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law. (3) He must leave in response to the breach and not for some other, unconnected reason. (4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.*"

111 The Tribunal's starting point was the test laid down by the Court of Appeal in Western Excavating (ECC) Ltd –v- Sharp [1978] ICR 221 whether the employer was guilty of conduct which is a repudiatory/significant breach going to the root of the contract. The issues to be decided upon in this respect were: Was there a fundamental breach on the part of the employer? Did the claimant terminate the contract by resigning? Did the claimant prove that the effective cause of her resignation was the respondent's fundamental breach of contract? In other words, what was the effective cause of the employee's resignation? Did the claimant delay and therefore act in such a way that is inconsistent with an intention to treat the contract as an end? Mr Kenward reminded the Tribunal that The Court of Appeal "*made it clear that questions of constructive dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of 'reasonable conduct by the employer'*" (see Harvey DI [411]).

112 The Tribunal was referred to the Court of Appeal decision in Spafax Ltd v. Harison [1980] IRLR 442, CA. The Court of Appeal reaffirmed "*that lawful conduct is not capable of constituting a repudiation even though it may be unwise or unreasonable in industrial relation terms*" (see Harvey DI [412] – [419]), and Courtaulds Northern Spinning Ltd v. Sibson [1987] ICR 329 EAT in which the EAT held "*Reasonable behaviour on the part of the employer can point evidentially to an absence of a significant breach of a fundamental term of the contract; conversely wholly unreasonable behaviour may be strong evidence of a significant repudiatory breach. Nevertheless, it remains true that conduct however reprehensible, may not necessarily result in a breach of a fundamental term of the contract*" (see Harvey DI [422]).

The implied term of trust and confidence

113 There is an implied term in every contract of employment to the effect that the employer will not without reasonable and proper cause, conduct itself in a manner likely to destroy, or seriously damage the relationship of confidence and trust between employer and employee. In order to constitute a breach of the implied term it is not necessary for the employee to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it; or put another way, the vital question is whether the impact of the employer's conduct on the employee was such that, viewed objectively, the employee could properly conclude that the employers were repudiating the contract. The correct test of repudiatory conduct by an employer is set out in the Court of Appeal judgment in the case of Paul Buckland V Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, and this is an objective test.

114 The House of Lords in Malik v Bank of Credit; Mahmud v Bank of Credit [1997] UKHL 23, held that the breach occurs when the proscribed conduct takes place. The employee may take the conduct as a repudiatory breach, entitling him to leave without notice. If the employee stays, the extent to which staying would be a waiver of the breach depends on the circumstances. Lord Steyn referred to the implied obligation covering a diversity of situations in which "a balance has to be stuck between an employer's interests in managing his business as he sees fit, and the employee's interest in not being unfairly and improperly exploited," and to the impact of the employer's conduct being objectively assessed to ascertain whether objectively considered, it is likely to destroy or cause serious damage to the relationship between employer and employee. If it is found to be so, then a breach of the implied obligation may arise.

The "last straw."

115 A course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a "last straw" incident. The last straw itself does not need to amount to a breach – Lewis v Motorworld Garages Limited [1986] ICR 157 CA. Glidewell LJ said at para 169F "The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, although each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?"

116 In Omilaju v Waltham Forest London Borough Council [2005] ICR 481 the Court of Appeal held that the act constituting the last straw need not be the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final last straw,

even if the employee genuinely but mistakenly interprets the act as hurtful and destructive on his or her own trust and confidence in the employer.

117 The Tribunal was referred to paragraphs 20, 21 and 22); "*20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred. 21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.22. Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective …*".

Employee must resign in response to repudiatory breach

118 "*The employee must leave in response to a breach committed by the employer. This breach may be an actual breach or an anticipatory breach … it is not enough that the employee expects the employer to repudiate the contract and leaves in anticipation …*" (see Harvey paragraph DI [508]).

119 Walker v. Josiah Wedgwood & Sons Ltd [1978] ICR 744, IRLR 105, EAT "… *it is at least requisite that the employee should leave because of the breach of the employer's relevant duty to him, and that this should demonstrably be the case. It is not sufficient, we think, if he merely leaves … And secondly, we think, it is not sufficient if he leaves in circumstances which indicate some ground for his leaving other than the breach of the employer's obligation to him*" (per Arnold J).

Waiver of breach

120 Weston Excavating cited above; The employee "*must make up his mind soon after the conduct of which he complains; for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged*".

121 W.E. Cox Toner (International) Ltd v. Crook [1981] ICR 823 IRLR 443, EAT Employee censured by employer in July 1980 for taking leave without previously advising the employer. He demanded the withdrawal of the censure letter. He was informed on 6 February 1981 that the letter would not be withdrawn. He left four weeks later. The EAT held that he was precluded from claiming for unfair dismissal because he had remained for four weeks after it had become clear that his grievance would not be remedied and consequently must be taken to have affirmed the contract (see Harvey DI [523]).

Unfair Dismissal

122 Employment Rights Act 1996 s.98(1) provides that it is for the employer to show the reason for the dismissal, and that it is a reason falling within ERA 1996 s.98(2), which includes "*some other substantial reason*" as being a potentially fair reason for dismissal.

123 Employment Rights Act 1996 s. 98(4) *"…where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*

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

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

Conclusion – applying the law to the facts

Constructive dismissal

124 With reference to the first issue, namely, did the claimant resign because of an act or omission (or series of acts or omissions) by the respondent, the Tribunal finds that she did not and the respondent was not in fundamental breach of contract. In respect of the matters the claimant relies on in her resignation letter the Tribunal found as follows: The first respondent had not failed to address the grievance, it had however failed to deal with it in line with the respondent's own policies and ACAS guidelines; for example, the claimant was not offered the right to an appeal. The first respondent had not failed in its duty to make reasonable adjustments to facilitate the claimant's return to work; and it had not threatened dismissal. The earlier recommendations of the Occupational Health Specialist were taken into account.

125 Mr Kenward submitted the School's primary defence was that the claimant was unfit to return to work with or without reasonable adjustments, and the Tribunal agreed. It took the view the respondent's behaviour over the entire period the claimant was absent from work was not such that its effect, judged reasonably and sensibly, was that the claimant could not have been expected to put up with it. Viewed objectively, the claimant could not have properly concluded that the

respondent was repudiating the contract. In dealing with the claimant's absence and her grievance considered during that absence, it did not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties.

126 Mr Kenward also submitted that the test was not met, demonstrated by the fact that the claimant resigned shortly after she had been informed of a third occupational health assessment. In oral evidence the claimant was clear that she had requested an occupational health assessment for some time (which was disputed by the respondent) and yet when her request was finally acceded to the claimant resigned. The claimant's actions made no logical sense to the Tribunal, who inferred that her resignation prevented a third occupational health assessment against a backdrop of the claimant's continuing absences, MED3's issued by her GP for increasingly longer periods of time which suggests deterioration and not improvement and the medical professionals involved in managing her health refusing to quantify the continuing length of absence and her return to work going into the foreseeable future. The claimant had undertaken early conciliation and issued proceedings before she resigned, claiming constructive unfair dismissal when she had not resigned and a future occupational health report was unlikely to conclude she would be well enough to return to work in the respondent school in the foreseeable future and this would damage the prospects of her case.

127 Turning to the first respondent's failure to address the grievance dated 17 December 2018 in line with its own policies as set out above, and the ACAS Guidelines, the Tribunal concluded the claimant's desired solution in relation to her grievance was provide her with meeting notes and arrange an occupational health appointment, both outcomes were met before she had resigned, and therefore there can be no causal link between the resignation and this part of the grievance. The provision of the meeting notes was immediate, the appointment with occupational health delayed with the claimant's full knowledge pending medical investigations. The claimant accepted the respondent was guided by the medical investigation and it does not behove her to criticise the respondent alleging it had breached the implied term of trust and confidence when it failed to arrange an occupational health appointment earlier than it did.

128 The final occupational health appointment arranged for the claimant was not objectively assessed, a breach of the implied term in her contract of employment. The first respondent had not without reasonable and proper cause, conducted itself in a manner likely to destroy, or seriously damage the relationship of confidence and trust between it and the claimant who understood she was guiding it on the medical position and medical appointments

129 In assessing whether the respondent was in fundamental breach of contract as alleged, the Tribunal has looked at the first and second respondent's conduct to determine whether it is such that its effect, judged reasonably and sensibly, is such that the claimant cannot be expected to put up with it. Sue Clare and Paul Cunningham, who wrote the detailed letter dated 20 December 2018 replying to all the claimant's points, did not viewed objectively, repudiate the contract: <u>Buckland</u> cited above. In arriving at this conclusion, the Tribunal considered the

surprising way Paul Cunningham dealt with the fact that the first respondent through its governors, was mandated to deal with the grievance, maintain the claimant was not an employee of the second respondent when she was. In different circumstance Paul Cunningham's advice to the claimant could have objectively given rise to a fundamental breach of contract; unlike Sue Claire he was not confused with the legal complexities of the statutory employment powers exercised by the first respondent. It is a key condition to any contract of employment that the contracting parties are known, and for Paul Cunningham to deny the second respondent was the claimant's "ultimate" employer without reasonable and proper cause, was conduct likely to destroy, or seriously damage the relationship of confidence and trust.

130 The House of Lords in Malik cited above, held that the breach occurs when the proscribed conduct takes place. The employee may take the conduct as a repudiatory breach, entitling him to leave without notice. If the employee stays, the extent to which staying would be a waiver of the breach depends on the circumstances. In the claimant's case she was in communication with Sue Clare about her employment status, and when she entered ACAS Early Conciliation on the 9 January 2019 it was with Sefton Council and Merefield School. Up until the morning of the liability hearing confusion existed as to whether the second respondent was the employer for purpose of Employment Tribunal proceedings, until this was finally resolved by agreement between the parties that all proceedings should be dismissed against the second responded.

131 Mr Kenward submitted that the "trail" regarding the claimant's grievance came to an end on 21 December 2018, almost three months before her resignation and the issues raised by her were not mentioned again. The Tribunal agreed, concluding on the evidence before it and the fact that the claimant did not raise her employment status in 2019 and nor was it mentioned in her resignation letter, the ET1 having been issued against both respondent's, the claimant had affirmed the contract after Paul Cunningham's 20 December 2018 letter following which she made no "meaningful criticisms" of the first or second respondent from early 2019 until she resigned. In oral closing submissions Mr Culshaw described the claimant as being "too patient" allowing time to the respondent, including who her employer was, to be addressed, and it was not. The Tribunal had some sympathy with this view; the claimant was given confusing information about which of the two respondents was her employer that was never clarified until the outset of these proceedings when the statutory responsibility held by the first respondent was accepted; however, it does not necessary follow that the second respondent (against whom all claims were discontinued and dismissed by consent) was in fundamental breach of the implied term of trust and confidence and the claimant constructively dismissed, the claimant having resigned for three different reasons not including employment status.

132 For the avoidance of doubt, throughout this period the impact of the first respondent's conduct objectively assessed was not likely to destroy or cause serious damage to the relationship between it and the claimant and no breach of the implied obligation arose: Omilaju cited above. Arranging the occupational health appointment did not contribute, however slightly, to the breach of the implied term of trust and confidence. It was an entirely innocuous act on the part

of the first respondent and cannot be a final last straw. The claimant was aware that further medical investigation was necessary before the first respondent could confirm if her back condition was a disability under the EqA, and the onus was on her to provide it as and when the medical appointments and investigations took place. The Tribunal on the balance of probabilities took the view the claimant had not genuinely but mistakenly interpreted the act as hurtful and destructive on her own trust and confidence in the school; she had actively sought the referral and was aware that the respondent would wait upon her exploring further treatment options and once she was well enough to return to work a discussion would take place about reasonable adjustments.

133 Finally, with reference to the threat of dismissal; as indicated earlier this did not take place as described by the claimant. Mr Culshaw in oral submissions argued that the respondent had not disputed the claimant was informed sometime in the future her employment may come to an end, and she interpreted this as a threat and "felt" it contributed to a breach of trust. The Tribunal found that the respondent was merely pointing out the existence of the absence policy, no capability proceedings were afoot and nor were they threatened and the claimant's "feeling" that she was being threatened had no objective basis. She was aware the respondent was waiting on up-to-date medical information and this was in her hands, and immediately prior to her dismissal, a report had been commissioned from occupational health in April, which does not suggest imminent dismissal.

Disability discrimination – failure to make reasonable adjustments

134 With reference to the first issue, namely, did a PCP of the respondents put the claimant at a substantial disadvantage in comparison with the persons who are not disabled, the Tribunal found it did not. There was no PCP to the effect that the claimant's return to work was conditional on her returning to OAK SM class, where she had worked prior to the commencement of her sick leave. The Tribunal found that the disadvantage alleged, namely, that this PCP prevented the claimant from returning to work, did not exist and was a fabrication. There was only one matter preventing the claimant returning to work and that was her ill-health.

135 The duty to comply with the reasonable adjustments requirement under S.20 is relevant when the respondent can take reasonable steps to avoid the relevant disadvantage. In the claimant's case she had not indicated when she was wishing or intending to return to work and there was no return to work date. Had there been the respondent should at that point have discussed reasonable adjustments with the claimant, carried out the necessary investigations to ensure that the adjustments sought by her were medically appropriate via occupational health or another medical expert and undertaken an updated HSE questionnaire completed by the claimant during the period she was absent.

136 The Tribunal noted that had the claimant given any indication of a return to work date the respondent would, at that stage, have discussed the job description and HSE questionnaire with her, updating the answers so as to ensure the up-to-date information was before them and occupational health on the basis for example, that there was little point in agreeing to an adjustment that could exacerbate the claimant's back condition. Contrary to the claimant's belief and submissions made

on her behalf by Mr Culshaw, it was not unreasonable for the respondent to wait for updated medical evidence and some sign that the claimant could return to work in the future, but this was not forthcoming the claimant admitting in oral evidence that during her period of absence she could not get any medical professional to confirm the date for her return to work, “they wouldn’t commit themselves…it was difficult to predict.”

137 It is notable with the exception of one MED3 issued when the claimant was seeking ill health retirement on the grounds that she was permanently incapable of carrying out her assistant teacher duties as a result of the prolapsed disk, all other Med3’s confirmed the claimant was unfit to return to work with no adjustments suggested, and the duration of the MED3’s increased as time went by from one week at the outset to 3 months later on in the process, emphasising the fact that the claimant’s condition was not getting better, in direct contrast to what was suggested by the claimant in oral evidence.

138 Had the respondent been in any doubt as to the claimant’s continued incapacity for any work, this would have been laid to rest by the independent report provided by Dr Kisnah in September 2018. He recorded the difficulty the claimant had in stabilising herself with the use of an elbow crutch, “the debilitating pain…which has an impact on her activities of daily living and limits the amount of time she can spend sitting down. His medical opinion was that she was “currently unfit for her duties as a teaching assistant…in my opinion there are further modalities of treatment and further investigations that need to be implemented to identify the root cause of her continuing disability.” As a result of this report the claimant underwent a MRI scan and further assessments during a period where she remained signed off over an increasing number of weeks with no adjustments suggested. It is notable that Dr Kisnah gave no timeframe for recovery; this was vital information that was never put before the respondent during the claimant’s sickness absence. Given the position, the Tribunal concluded that the duty had not been triggered and during the relevant period from the time her absence commenced through to resignation there were no adjustments that would result in the claimant’s return to work.

139 It is notable during the claimant’s lengthy sickness absence the respondent did not express any concerns over the length of the absence and no steps were taken with regards to absence management other than absence review meetings taking place to clarify the claimant’s health condition at various states of her absence, and this state of affairs undermined the claimant’s evidence that she was threatened with dismissal. The claimant got on well with her colleagues, including Sue Clare, and the absence review meetings were concerned with the claimant’s health. The respondent sought the claimant’s return to work, and the Tribunal was left in no doubt that had the claimant’s health improved sufficiently for her to return to the workplace, reasonable adjustments would have been made and the claimant’s wishes accommodated as they had been on two occasions in the past.

140 With reference to the second issue, namely, could the respondent reasonably be expected to know that the claimant had a disability and was likely to be placed at the disadvantage, the Tribunal found the respondent could reasonably be

expected to know the claimant had a disability but not that she was likely to be placed at a disadvantage as one did not exist.

141 With reference to the third issue, namely the reasonable adjustments relied upon, the Tribunal found there were no reasonable adjustments that would have facilitated the claimant's return to work prior to her resignation including had she been allowed to move the claimant to OAK HG class, where physical demands were less or moved to another class (other than OAK HG), ensuring she was not required to undertake tasks she was unable to undertake because of her disability.

142 With reference to the administrative position, it was not a reasonable adjustment to allow the claimant to work in an administration role in the school when the vacancy arose, the medical evidence confirmed the claimant was not fit enough to work. Where she fit enough, which she was not, the claimant was not suitably qualified and since the vacancy spanned a relatively short period it was not a reasonable step to facilitate any training in order that the claimant could obtain the necessary qualifications and satisfy the essential criteria of possessing an NVQ3 and experience of carrying out school administration work and school accounts. Mr Culshaw in oral submissions argued that the claimant would have met the "essential requirements " for the role, she had experience albeit a "considerable time ago" but not in an administrative school environment and the temporary vacancy should have been communicated to her at the time. On the balance of probabilities the Tribunal did not find this to be the case; the claimant may well have had some past experience but her basics skill level which required an NVQ3 qualification was not met, and more importantly, there was no evidence before the respondent either from the claimant or the medical profession, that she was in any physical position to carry out the duties of an administrator which entailed periods of sitting and walking around the school, including the corridors, the claimant having been signed off with no adjustments suggested.

143 In conclusion, all claims brought against the second respondent are dismissed upon withdrawal. The respondent was not in breach of its duty to make reasonable adjustments, the claimant was not unlawfully discriminated against under sections 20 to 21 of the Equality Act 2010 and the claimant's claims of unlawful disability discrimination brought under sections 20 to 21 of the Equality Act 2010 are not well-founded and dismissed. The respondent was not in breach of contract and the claimant was not unfairly dismissed; her claim for constructive unfair dismissal is not well-founded and is dismissed.

23.3.2020

Employment Judge Shotter

JUDGMENT AND REASONS SENT TO THE PARTIES ON
26 March 2020

FOR THE SECRETARY OF THE TRIBUNALS