EMPLOYMENT TRIBUNALS

Claimant: **Jodie Turner**

Respondent: **(1) North Yorkshire County Council**
(2) Interim Executive Board of Skipton Parish Voluntary Controlled Primary School

Heard at: **Leeds** **On: 18 and 19 March 2020**

Before: **Employment Judge Maidment**
Members: **Mr T Downes**
Mr IW Taylor

Representation
Claimant: **In person**
Respondent: **Mr G Price, Counsel**

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal fails and is dismissed.

2. The Claimant's complaints of disability discrimination alleging a failure to make reasonable adjustments and unfavourable treatment arising from disability fail and are dismissed.

REASONS

Issues

1. The Claimant was employed by the Second Respondent as a classroom teacher at the Skipton Parish Voluntary Controlled Primary School. Within these Reasons the term 'Respondent' and 'school' are used interchangeably as references to the Second Respondent. The First Respondent is a party to these proceedings on the basis that it may bear ultimate liability for any award made against the Second Respondent.

2. The Claimant complains of unfair dismissal in circumstances where the Respondent puts forward that her dismissal was by reason of capability, i.e. long-term sickness absence. The Claimant says that her dismissal was

unfair in circumstances where her absence was due to depression and anxiety caused by the removal of classroom support, unjustifiably placing her on a performance development plan and unreasonably deciding to allocate to her a class of children with challenging behaviour, which she had said she would find difficult to teach. The Claimant also maintains that the above actions attributed to the Respondent were taken because the Claimant had vocalised her opposition to the school becoming an academy and, as a result, its headteacher wanted her to leave.

3. In any event, ordinarily in cases of unfair dismissal where long-term ill-health is accepted as the reason, the Tribunal will be concerned with the degree of consultation with the Claimant, whether reasonable steps were taken to obtain medical evidence and the employer's attempts to look for alternative positions or adjust existing duties.

4. The Claimant also complaints of disability discrimination. She maintains that she was a disabled person within the meaning of Section 6 of the Equality Act 2010 from April 2018 by reason of her suffering from anxiety and depression. Disability status is not accepted by the Respondent.

5. The Claimant then alleges a failure on the Respondent's part to make reasonable adjustments, where it is said that there were two separate practices which put the Claimant at a disadvantage. Firstly, the requirement to teach the "Amethyst" class (referred to above as the class with challenging pupils) and, secondly, to comply with a personal development plan. As reasonable adjustments, the Claimant asserts that she should have had a different class allocated to her and the Respondent ought to have dropped the imposition of the personal development plan.

6. Finally, the Claimant also complaints of unfavourable treatment in her dismissal arising from disability. If the Claimant was dismissed for her sickness absence then, she says, this arose from her disabling condition and the Respondent cannot show that dismissal was a proportionate means of achieving a legitimate aim.

7. It was confirmed on behalf of the Respondent that there were no out of time issues which it is said go to the Tribunal's jurisdiction.

Evidence

8. The Tribunal had before it an agreed bundle of documents to which were added a small number of pages, with the agreement of the parties. These included a missing rota sheet showing the attendance of a teaching assistant said to have been allocated to the Claimant's class at the beginning of her work under a performance development plan.

9. Having briefly identified the issues with the parties, the Tribunal took some time to privately read into the relevant documents and witness statements exchanged between the parties. Therefore, when each witness came to give evidence, they could do so by simply confirming their witness statements and, subject to any brief supplementary questions, then be open to be cross-examined on them.

10. The Tribunal heard firstly from Mrs Maxine Barker, a former teacher colleague of the Claimant called on her behalf. The Claimant then gave her

own evidence, followed by her partner, Mr Craig Worrall. On behalf of the Respondent, the Tribunal then heard from the school's headteacher, Ms Lucy Peberdy, and finally the effective Chair of Governors, Mr David Portlock. The Claimant had no questions for Mr Portlock.

11. Having considered all the relevant evidence, the Tribunal made the following findings of fact.

Facts

12. The Claimant was employed at the Skipton Parish School as a class teacher from 1 September 2011. The school taught children from reception class level to year 6. Years 1 and 2 were typically taught Key Stage 1 material and years 3 – 6, Key Stage 2 material. Occasionally, some classes consisted of mixed age groups. Also, some children in years 3 and 4 might still be taught at Key Stage 1 level.

13. At the school, the Claimant had taught year 2 pupils for a year before a move to year 1 and then having to teach a mixed group of year 1 and year 2 pupils. From 2014 she had always taught at Key Stage 1 level.

14. An OFSTED inspection in February 2017 rated the school as inadequate. The Claimant was aware of the report and of the subsequent Order issued by the Secretary of State that, in view of its performance, the school be converted to academy status.

15. The Tribunal accepts that there was a significant amount of discussion amongst teachers as to what that would mean for the school. The Tribunal also accepts that the Claimant was vocal amongst the teaching group in explaining what, in her view, academy status would mean for the school and her opposition to it based upon her belief that education should never be run as a business.

16. Regardless of any move to academy status, there was an understanding among staff that the OFSTED report would have implications for them and that there was a possibility that some teachers would lose their jobs. The Tribunal accepts that the Claimant told the deputy headteacher, Gill Stinton, on more than one occasion after the Academy Order that if the school became an academy she would not remain in its employment. However, the Claimant was aware of situations elsewhere in the country where it had been possible to mobilise a campaign involving staff and parents to successfully oppose academisation. The Claimant still hoped that the school might never become an academy. However, the Claimant was not herself involved in organising any such campaign.

17. In September 2017 Lucy Peberdy joined the school as its new headteacher. Given the amount of conversation on the topic, the Tribunal can accept that Ms Peberdy became aware of the Claimant's view on the school becoming an academy. However, the Tribunal considers that, when the Claimant had an initial one-to-one meeting with Ms Peberdy in July 2017, the Claimant wanted to present herself in a positive light. She did not raise her views on academisation at that meeting – the Claimant in evidence was unable to specifically say that she had. Ms Peberdy recorded the main points she gained from the meeting as the Claimant expressing a willingness to work anywhere except reception, noting her to have a positive outlook. The

Claimant's evidence before the Tribunal was that she told Ms Peberdy that, if she had a choice, she was most happy with a year 1 class. She knew, however, that the school was in trouble and she would move to a different class if she had to, albeit she had had a difficult year with the combined year 1 and 2 cohort she had just taught and, if she had to teach them again, she would find that very difficult. The Claimant, in evidence, suggested that she gave Ms Peberdy pretty much an ultimatum regarding her having to consider her position if she had to work with those pupils again, but Ms Peberdy, it is noted, does not reflect that this in the message she took from the meeting. In cross examination, the Claimant agreed that the note of the meeting did not reflect what she thought she had said. When put to her that it was possible that she never referred to not wanting to continue with her existing pupils, she said that she couldn't understand why she wouldn't have done. She was sure that she would have said that the previous year had been very difficult. That is as much as the Tribunal can accept her as having said.

18. The school had a close relationship with another local school, Eastwood, with which it was partnered to help raise standards. Another school, Greatwood, acted as a local hub for the referral of difficult children as a last resort to maintaining them in mainstream education. Some of the school's pupils with particular social and emotional problems might be transferred to Greatwood on either a temporary or permanent basis and Greatwood school provided additional teaching resources within the school at times to assist in the development of those pupils.

19. As a result of the negative OFSTED assessment, a Specialist Leader in Education, Ms Rizwana Saleem, was allocated from Eastwood school to work with the Claimant and assist in her development. She attended the school to work with the Claimant on two or three occasions in the school year commencing September 2017 and maintained email contact with her in between times. A similar resource was provided to at least 3 other teachers at the school.

20. The Claimant again during this year taught a mixed year 1 and 2 class. In the morning she would teach the year 1 pupils English and maths, whilst her year 2 pupils were taught elsewhere. Additional year 1 pupils will join her from another class. In the afternoon, the class would all come back together. When put to the Claimant that she was content with teaching that class she said: *"reasonably so"*, but said that she had some difficulty because she often had the support of a teaching assistant taken away from her and she had some children to teach who had English as a second language. She had, however, taught such pupils previously.

21. On 26 September 2017, Ms Peberdy conducted a 'learning walk' to familiarise herself with the quality of teaching and learning throughout the school. This involved some observation of the Claimant's class during various times of the day She was accompanied by Andrea Hayes, the school's Improvement Adviser employed by the local authority. In a monitoring record, Ms Peberdy recorded that the children were unsure what they were to do when creating a poem and as a result were not engaged, with no progress being made. She considered that children were not *"on task"* again impacting on progress and that there was some disruptive behaviour. The Claimant was noted as having a calm demeanour. Whilst

the Claimant could not specifically recall the discussion before the Tribunal, she was not saying that she had not had some feedback. Ms Peberdy recorded that the Claimant had been told to think about how she could ensure the children had a clear understanding of the task and her expectations regarding their behaviour.

22. A further observation was noted of the Claimant's class following a 'learning walk' on 24 November during which the Ms Peberdy was again accompanied by Ms Hayes. Again, the Claimant could not recall if the record then produced been discussed with her. The record of the 'learning walk' noted that children were engaged in viewing a phonics video, but that there was a confused message. Some children were not behaving appropriately which disrupted learning and limited progress. Children were not clear as to what they had to do, as the Claimant was having to talk over them whilst they were talking. The learning environment was not supported learning and was having no impact on children's learning. Ms Peberdy recorded that the Claimant was to ensure that children were clear on what they were learning.

23. The Claimant was observed further on a 'learning walk' on 8 December where Ms Peberdy was accompanied by Ms Carter, headteacher of Eastwood school. The record then produced recorded a lack of challenge and clarity provided to children, 50% of whom were said not to be making progress. The Claimant was to ensure the children were clear on what they were learning and to ensure an element of challenge and differentiation between them. The Claimant's evidence was that she recalled feeling angry about the feedback as it resulted from Ms Peberdy popping in and out of the classroom rather than observing a full lesson and, during the first two observations just described, the Claimant had no teaching assistant in place. She felt that the visits were in themselves disruptive to young children.

24. On 25 January 2018, Ms Saleem met with a number of the teachers individually including the Claimant to put together joint action plans. These were then reviewed with her on 15 March 2018. They included actions the Claimant was to take to ensure that there was for each lesson a clear learning intention and actions taken to achieve it. The Claimant accepted that there was still a need for her to make further progress, but that as far as she was aware Ms Saleem was happy with the progress she had made thus far and was not expecting her to be doing more.

25. From the documentation, the Tribunal is satisfied that further monitoring of the Claimant's class took place, albeit not specifically recalled by the Claimant, where some advice was given to the Claimant regarding improvements which could be made, but where also a lack of general engagement of pupils was recorded. This included an assessment undertaken by Ms Andrea Hayes on 23 March 2018.

26. The Claimant, it is accepted, did not always have the benefit of a teaching assistant with her class or any consistent individual providing such assistance. Ms Crossley was one individual available as a teaching assistant, but she had to cover for teacher absences and was sometimes asked to work elsewhere to look after particular children. The allocation of teaching assistant staff was often determined on the day with changes made at the last minute which might affect the Claimant's lesson planning.

The Claimant was of the view that it always seemed to be her class that the teaching assistants were taken from, albeit she told the Tribunal that she took that as a compliment as she thought it meant that the senior leadership team thought she could cope without one. When asked whether she felt that teaching assistants had been taken away from her to deliberately impair her ability to teach, she said that she did not know it was done deliberately and she accepted that Ms Barker, who was involved in the allocation of teaching assistants, had not been told to take people away from her specifically. Again, she felt that the senior leadership team must have thought that the Claimant could cope without a teaching assistant. She herself did not feel she was struggling and did not think it terrible when a teaching assistant was taken away from her.

27. As the school was in special measures, regular reviews were undertaken with the Senior School Improvement Adviser, Simon Ashby. At one such review on 27 March 2018, attended also by Ms Peberdy, Ms Stinton, Mr Portlock, Chair of Governors, Ms Carter, Ms Hayes and Ms Gill Fisher of the Northern Star Academies trust, Ms Peberdy was asked to provide an update on progress made as a result of the work carried out with the Specialist Leaders in Education. She was advised by Mr Ashby that those staff who were not making the necessary progress should now receive additional support through a Developing Performance Plan ('DPP'). Ms Peberdy acted upon that and determined to put such plans in place for a number of the school's teachers, including the Claimant.

28. Ms Peberdy spoke to the Claimant on 16 April 2018 to tell her that she was to be put on a DPP and that its content would be discussed at a meeting. The Claimant was sent a letter of that date inviting her to a meeting on 23 April, the purpose of which was to discuss measures needed to be put in place to assist her achieve a sustained satisfactory standard of performance. The Claimant was given the right to be accompanied by a union representative or colleague.

29. The Claimant indeed attended that meeting accompanied by Mr Bircumshaw of her union. The Claimant described herself as already upset and shocked prior to this meeting. She was also concerned that she did not receive the draft performance plan until around 4pm on Friday 20 April and, as a result, had little time to discuss it in advance with Mr Bircumshaw.

30. At the meeting the DPP was discussed and it was said that it would run for 6 weeks with a review part way through. The Claimant agreed that she was told that she would have a teaching assistant allocated to her during this period. The Claimant's understanding at the end of the meeting was that the plan would start from 30 April. The Claimant was concerned at a lack of detail in terms of dates and names of people providing support and that this would not be in place in time for the commencement of the DPP. The Claimant described herself as distressed at the meeting on 23 April.

31. The plan developed was to address the key issues of lesson planning, behaviour management and assessing pupil progress. Under the heading of additional support, it was noted that the Claimant would have an opportunity to observe others teaching her class, would get an additional half day per week of support from Ms Saleem and additional help and time

for lesson planning. The Claimant agreed that Ms Nazir was to be a teaching assistant allocated to her.

32. The Claimant attended work on 30 April and agreed that Ms Nazir was present on that and the subsequent day she worked under the DPP. The Claimant, however, recalled that there was a change regarding the additional time and support for lesson planning, the times during which she would observe her peers had been changed and she was told on the morning that other people would cover her class or that she would have to go to other classrooms. She felt insecure because she had not been given all the information previously. Also, she thought that the times of a weekly moderation which was to take place had been changed and felt generally distressed at the changes being made.

33. The Claimant worked full days on 30 April and 1 May with Ms Nazir working as her teaching assistant until early afternoon each day. However, the Claimant left work at 10:40am on 2 May in a distressed state, saw her doctor that day and thereafter was absent due to sickness and did not ever return to the workplace.

34. The Claimant was diagnosed as suffering from work-related stress, with her GP recording that she was struggling with work and having been put on a development plan. She was noted as reporting no support or time off to do things, but that she had union support which was viewed by the Claimant as helpful. The Claimant was recorded as being tearful. A fit note was submitted certifying the Claimant as unfit to work from 2 May to 4 June 2018 due to work-related stress.

35. The Claimant was referred to occupational health who reported on 23 May that the Claimant had informed them of experiencing a deterioration in her emotional well-being reactive to perceived work-related stress. The Claimant had referred to the DPP having continually changing timelines, which the Claimant confirmed to the Tribunal was a reference to what had happened on 30 April. The Claimant symptoms were consistent with moderately severe depression and anxiety and the Claimant was unfit for work. Completion of an individual stress risk assessment was recommended and accessing psychological support had been discussed with the Claimant. The Respondent sent to the Claimant an individual stress risk assessment form for her to complete. The Claimant did not complete the form. She considered that subsequent email correspondence sent to the Respondent set out her situation and stressors in more detail than would be provided by the completion of the form.

36. On 12 June Ms Peberdy emailed the Claimant stating that for the following school year: *"due to the numbers, you will have a mixed class of year 3 and 4 of approximately 17 students."* She said that she was writing to the Claimant as a matter of courtesy and to ensure that she remained in the loop. The Claimant did not respond - she said that she felt unable to do so. She said that she was very distressed about the content of the email as the year groups allocated and class size indicated to her the likely children who she would be required to teach. This was a smaller class the normal, but of children she would have taught previously and she had a good idea that it would be those with significant needs. She was already aware from other

staff that this class had been specially created in circumstances where there were already stand-alone year 3 and 4 classes arranged.

37. A meeting had already been scheduled to review the Claimant's DPP for 21 June. This was attended by Mr Bircumshaw, but not the Claimant who was too unwell to attend a meeting. A revised performance plan was agreed between Ms Peberdy and Mr Bircumshaw, who did nevertheless voice concerns on the Claimant's behalf at the class she had been allocated. Ms Peberdy explained that this was a small class of approximately 12 pupils who were working at Key Stage I level. She confirmed that an updated support plan would be shared with the Claimant. Before the Tribunal, the Claimant had no specific recollection of that meeting taking place.

38. She did certainly receive on 12 July an email from Ms Peberdy enclosing the revised DPP. This referred to the meeting with Mr Bircumshaw and the addition of a timetable which it was hoped would make things clearer. The school's new assistant headteacher was named as the Claimant's mentor. Ms Peberdy went on that it looked like the class would be of around 12 children initially, all of whom were working within the year 1/year 2 curriculum. The very vulnerable pupils who were currently accessing nurture provision (i.e. were at Greatwood School) would only be reintegrated back into the class once they were ready. The Claimant was asked to let Ms Peberdy know if there was anything else she needed.

39. The Claimant told the Tribunal that her concerns were not alleviated by this communication and the DPP being timed to start on the second week back after the summer break was incredibly daunting. The Claimant referred to her doctor already having recommended an 8 week phased return with no teaching responsibility. When it was pointed out to the Claimant that the school had not been told of this by July 2018, the Claimant maintained that it was common sense that she would need more time.

40. By this stage the Claimant had returned to her doctor on 11 May where symptoms of anxiety and panic attacks were recorded as happening 2 – 3 times a day. On 4 June a new fit note was issued again recording work-related stress. The Claimant had described to the doctor ongoing issues with anxiety and that she was struggling to go out and enjoy things and could panic easily. She was doing group work with the body known as Mind Matters and reference was made to a friend, who was a herbalist and had made up some forms of herbal medication for the Claimant to use. The Claimant returned to her doctor then on 25 July during which the Claimant confirmed that she had been sent another DPP, but with no plan for a phased return. The Claimant described herself as having more good days but that this had set things back. The GP advised her that there should be occupational health assessment prior to her return and a phased return over a minimum of 8 weeks when she did return.

41. The Claimant confirmed that she had told Mr Bircumshaw on 11 July that she felt the DPP had been *"designed to cause her to fail"*. She said that whilst the more recent correspondence indicated that some troublesome children would not be in a class, she felt she would still be responsible for them and that she had been given the more needy children. She agreed that, before she had become ill, this was a class she would have managed with perfectly. The Claimant confirmed that the DPP had been designed to

meet important objectives with the aim of providing quality teaching. She accepted that this was more important in the light of the recent OFSTED report, but said that she felt that there was no need for her to be on such a plan.

42. On 18 July Ms Peberdy emailed the Claimant expressing worry that she hadn't heard back from her and reattaching the DPP. She thought that it would be helpful if the Claimant could complete the stress risk assessment so that the school could further support her on her return.

43. The Claimant responded by email on 23 July apologising for the lack of response and saying that she hadn't been in the best frame of mind. She said that the email of 12 June had caused her additional stress, saying that she could only surmise that the pupils she will be teaching would have significant additional educational needs. She said that she appreciated that she was not specifically employed to teach any particular year group, but that she had always made it clear that she was more comfortable with Key Stage I and in particular year 1. She said that if she was allocated a different key stage, particularly if this included teaching older children for the second time, she would probably feel the need to reconsider her future with the school. The Claimant described the hard work and effort she had displayed to assist the school and the positive feedback she had received from Ms Saleem. She went on that as a result of her illness which she was fighting hard to overcome on a daily basis, she found the thought of returning in September *"challenging to say the least*". She said that this was made more daunting by a lack of consideration of a phased return to work.

44. The Claimant's evidence before the Tribunal was that she felt the Respondent ought to have considered allocating her a different class. She said that if the DPP had been removed it might have been easier to return teaching this new class. Alternatively, teaching a different class but subject to a DPP might have been easier for her. The combination of the two certainly prevented her return to work.

45. Ms Peberdy, in her evidence, maintained that the class she sought to allocate to the Claimant was not of children with challenging behaviour - the 12 children did not have behavioural issues, but had become disengaged. Effectively, they were the quiet children who were not contributing in class which in turn had hampered their development. She felt that allocating this class to the Claimant would give a reduced workload including in terms of marking and would play to her strengths as the Claimant had a positive demeanour and would be a person who could provide a more nurturing environment where children could grow in confidence. She saw nothing inconsistent in the Claimant having been previously criticised in the lesson observations for pupils not being engaged and the Claimant now being asked to teach a group of children who had previously become disengaged. The context of that disengagement had been in larger classes where the children had effectively faded into the background. She said that she had considered allocating different classes to the Claimant, but the year 1 class had not performed well at the early years foundation stage and had to make accelerated progress. This class was allocated to the school's assistant headteacher. The year 2 class would have had the additional pressure of having to undertake the SATs exams where the results from the previous year had been in the bottom 10% nationally and there was an urgent need

to raise standards. The Key Stage 2 classes were not considered suitable as the year 3 class had also performed in the bottom 10% nationally and needed accelerated progress, the standalone year 4 class had very high levels of challenging behaviour, the Claimant would have been to unfamiliar with teaching at year 5 level and year 6 was highly pressurised due to the Key Stage 2 SATs.

46. Ms Peberdy replied to the Claimant on 26 July stating that she could not send her the names of the children in the class due to data protection issues. She said, however, that there were currently 11 children expected to be in the class in September with a further 2 joining in October if they were ready to do so. All of them were working within the year 1/year 2 skills. There are also two teaching assistants timetabled in the class during each morning. The children would be following the years 3/4 curriculum but at the lower level. She said that Mr Bircumshaw had said at the previous meeting that a 1 week phased return would be all that the Claimant would require as it was at the start of the new school year. She said that if the Claimant felt she would like more, the school could look into how that could be facilitated.

47. The Claimant responded saying that she had been deemed unfit to return until 3 September. She went on that her doctor had said that a prolonged phased return to work of a minimum of 8 weeks was anticipated. The Claimant's position before the Tribunal was that she had never told Mr Bircumshaw that 1 week would be sufficient.

48. The Claimant had a telephone consultation with her GP on 3 September where her condition was recorded as having worsened with the pending return to work. The doctor noted that it was said that the development plan appeared more draconian and that the Claimant's union rep was not supportive. The Claimant was recorded as being in tears on the phone. At a further meeting with the Claimant's GP it was recorded that her mood had been up and down, mostly feeling brighter, but low when there was pressure from her employer. It was recorded that she did not feel she could go back to work. It was noted that the Claimant had been asked to go to an attendance meeting the next week and would send her representative in her place. The Claimant symptoms were said to appear situational rather than depressive but a review was needed.

49. The Claimant also on 3 September spoke to Mr Bircumshaw telling him that she was being forced out and suggesting that she might be being constructively dismissed. The Claimant told the Tribunal that she did not feel she could return to work because her concerns would not be addressed. She could not see any possibility that she could return. Mr Bircumshaw had spoken to the Council's human resource department and been advised that an attendance review meeting would be arranged for the Claimant.

50. Ms Peberdy emailed the Claimant a letter and the Respondent's attendance management policy inviting her to a meeting to discuss how they could offer support to reduce her current level of sickness absence and agree an appropriate way forward. This was to take place on 20 September.

51. The Claimant underwent a telephone occupational health assessment on 10 September where her mental health was said to remain the same. Evidence-based psychological assessments were recorded as having been

undertaken, which indicated that the Claimant continued to suffer from moderate to severe anxiety and symptoms of depression. The Claimant was recommended to consider practising daily mindfulness.

52. Mr Bircumshaw contacted the Respondent on 19 September advising that the Claimant would not be in a position to attend the meeting the following day. The Claimant could not face a meeting with either Ms Peberdy or her deputy Ms Stinton. The meeting was therefore postponed and a further referral made to occupational health. They reported on 12 October that the Claimant remained unfit for work in any capacity due to the described symptoms and substantial limitations in activities.

53. Before that occupational health report, Mr Bircumshaw had explored with the Respondent the possibility of a settlement agreement involving the Claimant leaving the Respondent's employment, but the Respondent was not interested in progressing that.

54. On 29 October the Claimant was signed off work for a further 6 weeks. Ms Peberdy sent a further letter of 30 November 2018 inviting the Claimant to an attendance management meeting on 7 December. The Claimant did not contact the Respondent and did not attend that meeting. She said that she was not well enough to do so. On 10 December, the Claimant was signed off work for a further 10 weeks. Further occupational health advice was received on 9 January 2019 following their receipt of further information from the Claimant's GP. The Respondent did not see the GP report itself. The conclusion was that the Claimant was still unwell for work and to attend meetings in person. The source of stress was work-related and unfortunately key personnel had been identified as triggers. It was noted that the Claimant's GP could not give any indication of a return to work date and said that the levels of stress would need to be significantly reduced. It was his opinion that he doubted this could be achieved in the current environment. It was advised that any return to work would need to be conducted over an extended period of no teaching, initially aimed at supporting the Claimant to build up her confidence.

55. Ms Peberdy met with Mr Bircumshaw again on 11 January at which he informed the Respondent that the Claimant did not wish to return to work. Mr Bircumshaw had been told that the Respondent intended to arrange a meeting to consider the termination of the Claimant's employment on the grounds of ill-health. Alternatively, a "simple" agreed departure following a period of notice might be an option. Mr Bircumshaw said that the Claimant wished to continue outside of ordinary process.

56. A meeting was arranged for 25 January attended by Mr Bircumshaw, Ms Peberdy, a human resource's representative and a notetaker. At the outset Ms Peberdy confirmed that the Claimant had been given an opportunity to accompanied and Mr Bircumshaw confirmed that she understood and also that the meeting might result in dismissal. He confirmed that the Claimant did not wish to put forward a case against dismissal. There was then a review of the Claimant's period of absence and the occupational health referrals. There was a discussion around any further support, with Mr Bircumshaw agreeing that nothing more could be put in place. He was asked whether the Claimant had anything further she wished to put forward and Mr Bircumshaw stated that she felt she could not return to work *"in this*

establishment, it's time for her to move on". Ms Peberdy then confirmed that the Claimant's employment would be terminated due to her continuing ill-health. She would be given written notice of termination effective on 30 April 2019 and a right of appeal.

57. Before the Tribunal, the Claimant said that she was aware of the meeting and Mr Bircumshaw's attendance on her behalf. She could not recall what she had told Mr Bircumshaw to say. She had, however, told him that it felt almost impossible for her to return.

58. Ms Peberdy wrote to the Claimant confirming that decision by letter of 30 January and enclosing notes of the meeting. This included a paragraph saying that it had been confirmed by Mr Bircumshaw that she did not wish to put forward a case against dismissal and agreeing that she was not fit for redeployment. The Claimant had little memory of the content of this letter and how she viewed it at the time given her continuing ill-health.

59. However, the Claimant emailed Ms Peberdy on 11 February saying that she wished to appeal, stating that in her view she had been unfairly dismissed and discriminated against. She, as Ms Peberdy knew, had started suffering from stress, anxiety and depression in April 2018 and had emailed her on 23 July 2018 explaining her concerns about the class of children allocated to her. She did not feel that her concerns had been adequately addressed and considered herself to be a disabled person within the meaning of the Equality Act 2010. She referred to having received legal advice.

60. Ms Peberdy considered that, in the light of the fact the Claimant now said she felt she had been neglected and unsupported during her absence with no reasonable adjustments made to facilitate a return to work, she now had a different understanding of the Claimant's circumstances than that following discussions with Mr Bircumshaw on her behalf. Therefore, she felt it more appropriate that the notice of termination of employment be withdrawn and that further discussions be held with the Claimant with a view to supporting a return to work. She therefore wrote to the Claimant to that effect and asking if she would like to attend a meeting on 22 March. She said that, should the Claimant not wish to attend a meeting or fail to respond, the school might decide not to withdraw the notice of termination. In that case an appeal would be arranged in due course.

61. The Claimant responded by email of 18 March saying that she did not wish to attend a meeting. She said that following the neglect and lack of support she had suffered she felt that the relationship between herself and school had broken down to such extent that she found a return to work impossible. In the circumstances, she was expecting an appeal to be arranged.

62. The Respondent wrote to the Claimant by letter of 22 March inviting her to attend an appeal hearing therefore on 9 April. However, upon the request of a member of the community mental health team this was postponed and rearranged for 9 May. The Claimant was informed of this change of arrangement by letter of 11 April.

63. The Claimant emailed Ms Peberdy on 7 May acknowledging receipt of the documents to be placed before the appeal panel. She raised a concern that these had been hand-delivered to her home address by a member of the

school staff. The Claimant further contacted the Respondent on 8 May advising that she had been working towards attending the hearing, but the delivery of the documents had affected her quite badly and as a result she felt completely unable to attend.

64. In cross-examination the Claimant was asked why she had appealed and responded that she had felt she had been treated unfairly. She said that she just needed some recognition of what had happened to her, but then said that she would have loved to have been able to return and part of her aim was to set aside the dismissal decision. She said that she couldn't see how she could go back if the situation remained the same and she had been told by staff that the atmosphere and morale was not good there. She considered a return in current circumstances was very difficult, but there was no possibility without adjustments.

65. The appeal hearing took place in the Claimant's absence, chaired by Mr David Portlock, chair of the Respondent, together with two other members of the board. The meeting was delayed to give the Claimant or her representative an opportunity to attend, but when it was clear that no one else was coming, Ms Peberdy was asked to present the Respondent's case outlining the basis for the original decision to terminate the Claimant's employment. Ms Peberdy was then questioned by the board members, in particular regarding what had been said regarding the Claimant's prospects of return to work during her period of absence and the rationale behind placing the Claimant on a DPP. The panel then adjourned to deliberate in private. It was concluded that reasonable adjustments were planned for the Claimant, but that little could be done to implement them as she did not return to work. This included teaching a small class with additional support and the offer of a phased return of any length needed. It was concluded, on the basis of the evidence heard and the review of documentation, that the process had been fair. It was agreed that Mr Portlock write to the Claimant to provide her with a further opportunity to put forward any representations she wished given her originally stated intention to attend the meeting. Mr Portlock completed a record of the hearing which he emailed to the Claimant that day offering her a final opportunity to provide any additional written evidence by noon on Friday 17 May. The Claimant indeed provided further information on 16 May which was considered by the panel when it reconvened on 20 May. In this the Claimant expressed shock at being placed on a performance plan and referred to only a matter of weeks previously having had such confidence in her abilities that she had approached Ms Stinton and Ms Peberdy, who encouraged the possibility of her taking on Key Stage 1 leadership responsibilities. Before the Tribunal, Ms Peberdy accepted that request to have been made and that the Claimant had been told what would be required to enhance her prospects of a leadership role, which was the approach she would have taken to any such request. It was not an appropriate occasion to raise issues of inadequate performance, she said.

66. In her further submission, the Claimant also referred to difficulties with the DPP itself and changes made to it as late as 30 April. The Claimant went on to describe anxiety and depression which had resulted, including then from being advised of the class it was intended she would teach in the following school year.

67. The panel, however, considered that the decision to dismiss ought to be upheld. The performance plan had been instigated to support the Claimant following feedback in response to the OFSTED assessment. It had been discussed with the Claimant and amended in line with her requests. It had been subsequently reviewed and agreed with her union representative. The Claimant had been absent for a prolonged period and her period of ill-health had been supported in terms of occupational health referrals and the suggestions made in respect of her arrangements on any return to employment. The January 2019 meeting had been arranged outside of a formal attendance panel to consider termination of employment at the behest of Mr Bircumshaw on the Claimant's behalf. He again had, at that meeting, confirmed that the Claimant did not wish to put forward a case against dismissal. Since the decision, the Claimant had confirmed that she did not wish to continue working at the school.

68. The Claimant in her evidence before the Tribunal described very convincingly the distress, anxiety and panic she began to suffer following her being told that she was to be subject to a performance plan. This clearly resulted in a significant loss of confidence and she explained that she was anxious being in crowds and came to the point where she did not wish to leave the house to socialise or for routine domestic activities such as shopping. She was frightened about seeing anyone connected with the school. She experienced substantial headaches and fatigue and could become easily exhausted whilst undertaking the simplest and most gentle day-to-day task. Often, she did not sleep well or feel refreshed by either sleep or rest. She was anxious going to unfamiliar places. She felt that she would never be able to rebuild her career as a teacher. The Tribunal also heard from her partner Mr Craig Worrell who again gave very clear and convincing evidence of the Claimant having periods where she felt a little better, but in circumstances where he could never be confident that there would not be a relapse around the corner. It was difficult for him to take her mind off things and to put her in a calming and secure environment. He described her suffering from panic attacks, feeling constantly tired, having bouts of insomnia and disturbed sleep patterns, being unable to leave the house on her own and in the company of others, having a lack of energy, struggling for self-confidence, struggling in social situations particularly where there were crowds of people, being unable to relax whilst on holiday, struggling to make decisions and with normal everyday tasks such as opening mail, answering the door, the phone, making calls to people, shopping, cooking and cleaning. He confirmed that she struggled with visiting Skipton due to her being worried that she would bump into work colleagues, former pupils or parents. She had developed an aversion to driving and visiting both familiar and new places.

Applicable law

69. In a claim of ordinary unfair dismissal, it is for the employer to show the reason for dismissal and that it was a potentially fair reason. One such potentially fair reason for dismissal is a reason related to capability pursuant to Section 98(2)(a). This is the reason relied upon by the Respondent. If the Respondent shows a potentially fair reason for dismissal, the Tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the Employment Rights Act 1996 ("ERA"), which provides:-

> *" [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
> *depends upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> *shall be determined in accordance with equity and the substantial merits of the case".*

70. Classically in cases of ill health related capability a Tribunal will consider whether reasonable medical evidence was obtained, the degree of consultation with the employee and the possibility of alternative employment or changes to the employee's role. The Tribunal must not substitute its own view as to what decision it would have reached in particular circumstances. The Tribunal has to determine whether the employer's decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached. The Tribunal is referred to **Lynock v Cereal Packaging Ltd 1988 ICR 670** on relevant factors for the Tribunal to take into account. From **McAdie v Royal Bank of Scotland 2007 EWCA Civ 806**, it is clear that an employer can fairly dismiss an employee for ill-health capability despite the fact that the employee's stress-related illness is attributable to the conduct of the employer. Although the cause of the employee's incapability is a relevant factor for the Tribunal to consider when determining whether or not a dismissal is fair, the key issue is whether the employer acted reasonably in dismissing in all the circumstances, which include the fact that the employer was responsible for the ill-health.

71. A dismissal may be unfair if there has been a breach of procedure which the Tribunal considers as sufficient to render the decision to dismiss unreasonable. The Tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 in capability cases of poor performance, but the basic principles of fairness are still relevant in long-term ill health capability cases.

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

73. *"Disability"* is one of the protected characteristics listed in Section 4 of the Equality Act 2010. Whether someone is a disabled person is defined in Section 6 of the Act. The Respondent accepts that the Claimant had a mental health impairment which had a substantial adverse effect on her ability to carry out normal day to day activities. It does not, however, accept that at material times the impairment was long-term, i.e. that it had lasted or was likely to last for 12 months or more. 'Likely' in this context means 'could well happen'. It is to be judged as at the date of the alleged discriminatory act and not by reference to what might have happened thereafter.

74. The duty to make reasonable adjustments arises under Section 20 of the Equality Act 2010 which provides as follows (with a "relevant matter" including a disabled person's employment and A being the party subject to the duty):-

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

75. The Tribunal must identify the provision, criterion or practice ('PCP') applied, the non-disabled comparators and the nature and extent of the substantial disadvantage suffered by the Claimant. 'Substantial' in this context means more than minor or trivial.

76. The case of **Wilcox –v- Birmingham Cab Services Ltd EAT/0293/10/DM** clarifies that for an employer to be under a duty to make reasonable adjustments he must know (actually or constructively) both firstly that the employee is disabled and secondly that he or she is disadvantaged by the disability in the way anticipated by the statutory provisions.

77. Otherwise in terms of reasonable adjustments there are a significant number of factors to which regard must be had which, as well as the employer's size and resources, will include the extent to which the taking of the step would prevent the effect in relation to which the duty is imposed. It is unlikely to be reasonable for an employer to have to make an adjustment involving little benefit to a disabled person.

78. In the case of **The Royal Bank of Scotland –v- Ashton UKEAT/0542/09** Langstaff J made it clear that the predecessor disability legislation when it deals with reasonable adjustments is concerned with outcomes, not with assessing whether those outcomes have been reached by a particular process, or whether that process is reasonable or unreasonable. The focus is to be upon the practical result of the measures which can be taken. Reference was made to Elias J in the case of **Spence –v- Intype Libra Ltd UKEAT/0617/06** where he said: *"The duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that*

would otherwise arise. The carrying out of an assessment or the obtaining of a medical report does not of itself mitigate, prevent or shield the employee from anything. It will make the employer better informed as to what steps, if any, will have that effect, but of itself it achieves nothing." Pursuant, however, to **Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10**, there only needs to be a prospect that the adjustment would alleviate the substantial disadvantage, not a 'good' or 'real' prospect.

79. If the duty arises it is to take such steps as is reasonable in all the circumstances of the case for the Respondent to have to take in order to prevent the PCP creating the substantial disadvantage for the Claimant. This is an objective test where the Tribunal can indeed substitute its own view of reasonableness for that of the employer. It is also possible for an employer to fulfil its duty without even realising that it is subject to it or that the steps it is taking are the application of a reasonable adjustment at all.

80. Discrimination arising from disability is defined in Section 15 which provides:-

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

81. Again, there can be no liability if A shows that A did not know and could not reasonably be expected to know that B had the disability.

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

Conclusions

83. The first question for the Tribunal to address relates to the Claimant's status as a disabled person. In his submissions, on behalf of the Respondent, Mr Price accepted that the Claimant at all material times had a mental health impairment which had a substantial adverse effect on her ability to carry out normal day-to-day activities. He is right to make that concession. The Tribunal has found that the Claimant did indeed from the beginning of May 2018 experience a significant breakdown in her mental health which rendered her unable to function as she would normally expect to have been able and which significantly limited her ability to carry out basic domestic tasks, to interact socially with others and to enjoy proper relaxation and obtain adequate rest. No argument is advanced by the Respondent regarding any lack of actual or constructive knowledge of the Claimant's symptoms and their effects. It is not, however, accepted that at the time decisions were taken regarding the Claimant's future employment that those effects were long-term within the meaning of Section 6 of the Equality Act 2010.

84. The Tribunal concludes that the limitations on the Claimant's ability to carry out normal day-to-day activities had been quite constant since May 2018. The Claimant may have had slightly better days and periods, but the evidence is clear that there could be no confidence that those periods would be sustained and the Claimant was at all times vulnerable to and indeed did experience relapses in her symptoms. Effectively, there were periods where she was able to be distracted from thoughts which triggered her feelings of anxiety and depression, but those periods were short lived and precarious.

85. By the time the Respondent came to make decisions regarding the termination of the Claimant's employment in January 2019, the effects on the Claimant of her condition had not lasted for 12 months. However, the Tribunal concludes that by January 2019 they were certainly likely to last for a period of 12 months or more. By the beginning of January they had endured for a period of 8 months. On 9 January 2019, occupational health reported that the Claimant's own GP could not give any indication of a date for a return to work and it was said that, for that to be achieved, the levels of stress would need to be significantly reduced. Certainly, at that point, it must be concluded that the Claimant was a disabled person and that it was likely that the Claimant's impairments would subsist and affect her for a further 4 months and more.

86. Indeed, the Tribunal concludes that the Claimant was a disabled person from an earlier point in time. Occupational health had reported the Claimant to have moderate to severe anxiety and depression on 10 September 2018. It is clear that such impairments are rarely resolvable quickly. A further report on 12 October had declared the Claimant to be unfit to work in any capacity due to the described symptoms and substantial limitations in her activities. On 29 October she was signed off work for a further 6 weeks and then on 10 December for a further 10 week period. The Tribunal must conclude that by 29 October (and, if it is wrong, certainly by 10 December 2018) the effects on the Claimant's ability to carry out normal day-to-day activities were likely to last for 12 months and more.

87. The Respondent, therefore, is potentially liable for any failure to have made reasonable adjustments and/or for any dismissal which arose from the Claimant's disability.

88. Turning firstly to the reasonable adjustments complaints, the Claimant firstly relies on the requirement for her to complete a personal development plan as a practice which put her at a substantial disadvantage in comparison to a person who did not share her disability. The Respondent does not argue that this was not a general PCP applied to teachers who were viewed as requiring to improve in their performance. The Tribunal accepts that the Claimant was put at a disadvantage by the implementation of the DPP in that working under the DPP (and the prospect then of returning to work subject to one) did make her feel more anxious and directly exacerbated the symptoms of anxiety and depression on an ongoing basis. The implementation of the DPP would not have had the same effect on an employee who did not suffer from anxiety and depression. It would no doubt

in most cases have been unwelcome and a cause for concern, but not to the extent that would have triggered effects in the individual which would have impaired their ability to carry out day-to-day activities in the way, as already described, the Claimant was affected.

89. Would, then, it have been a reasonable adjustment for the Respondent to have removed the plan? The Tribunal cannot conclude that it would have been. The Respondent needed to be able to manage the Claimant and her performance and the DPP was a legitimate tool to be used in that – particularly when other means of monitoring and support had been tried. This was in the context where the Respondent had genuine reasons for the implementation of the plan in the light of the assessment that the school was inadequate and that improvements needed to be made which involved a more formal level of performance management of a number of teachers, including the Claimant. The Respondent did not seek to implement the DPP without due discussion and consultation with the Claimant and was prepared to consider of any changes which might be made to it to assist her. The Claimant has not sought to suggest any specific changes which might have been made to the plan which would have removed her feelings of distress and indeed there were significant elements of the plan of a supportive nature which might have genuinely assisted the Claimant in terms of Ms Saleem's continuing involvement, the provision of teaching assistants and the Claimant's ability to observe and learn from others.

90. Holding the plan in abeyance for a period would not have provided a solution as, on the evidence, once the DPP was in place the effects on the Claimant would have been the same. The Claimant was unable to engage with the Respondent to facilitate a solution. Indeed, the removal of the plan would not, on the evidence, have straightforwardly enabled the Claimant to return to work in circumstances where she was clear that the Respondent's attempts to implement the DPP had already destroyed all necessary trust she needed in a continuing relationship.

91. The Claimant also relies on a requirement to teach the Amethyst class as a relevant PCP. That is a requirement of her, not of a general nature. However, the Tribunal finds that there was a more general practice of requiring teaching staff to teach whatever class might be assigned to them from time to time. Did this then put the Claimant at a disadvantage in that she would be unable to cope with teaching all classes, in particular the newly created Amethyst class which included pupils who, whilst they had moved up a school year, were still to be taught at Key Stage 1 level? On the evidence, the Tribunal cannot conclude that the Claimant was put at a disadvantage by being required to teach this class. The evidence in fact is of significant challenges in the teaching of any other year group in circumstances in fact where the Tribunal accepts that the Claimant was allocated this year group not, as she might view it, to set her up to fail, but as a class where she might be under less pressure and indeed more able to succeed. The Amethyst class consisted of only 12 pupils where the Claimant would have the benefit of two teaching assistants and where what might be termed the naughtiest and most difficult pupils had been removed and were

attending an alternative school. The Claimant, of course never taught this class.

92. The Tribunal concludes that allocating the Claimant to an alternative class would not have alleviated any disadvantage in any event and have got her back into a position where she could return to work and sustain that return. Again, the other classes could not objectively be termed as 'easier' and, fundamentally, the Claimant, the Tribunal finds, would not have been able to return to work working under a DPP regardless of the class she was allocated to be taught. Whilst it is correct that a combination of the DPP and the Claimant's allocation to the Amethyst class, caused the Claimant significant distress which prevented her from being able to consider a return to work, the DPP on the evidence was the fundamental bar to a return to work.

93. The Claimant's complaints alleging a failure to make a reasonable adjustment therefore fail and must be dismissed.

94. The Tribunal then turns to the Claimant's complaint of unfair dismissal. The Tribunal finds that the reason and indeed the sole reason for her dismissal was her long-term ill-health absence in circumstances where there was no foreseeable likely return to work. The Tribunal is not persuaded that Ms Peberdy was at all influenced by the Claimant's opposition to academisation. The Claimant's position was that she had said that she would not continue in school's employment if it became an academy in any event.

95. Indeed, there is significant evidence that the Claimant was genuinely viewed as struggling in her performance by Ms Peberdy and others. She did not seek to hamper the Claimant, due to the Claimant's views on academisation or otherwise by removing classroom support. The Claimant did not recognize that herself at the time. It is further noteworthy that it was not Ms Peberdy's decision that a number of teachers, viewed as not having progressed sufficiently in their performance, be placed on DPPs. The school by this stage was under close monitoring and management with an improvement board set up to implement changes it felt necessary to achieve a future improved OFSTED assessment. Part of that was the management of certain teaching staff through DPPs.

96. At the point of the decision to terminate the Claimant's employment she had been absent from work due to sickness for in excess of 8 months and indeed, at the time of the termination of her employment, that absence was about to reach the 1 year point. This was in circumstances where there had been no indication from the Claimant directly or through her union representative that there was any chance of a return to fitness and an ability then to return to work. The Claimant's incapacity was reflected by various occupational health reports in circumstances where occupational health had taken the views of the Claimant's GP into account. The Claimant herself tried to explore the possibility of a settlement agreement by which she would leave the Respondent's employment. Again, this was in circumstances of no indication of any ability or desire to return to work. The Respondent had

made numerous attempts to meet with the Claimant and had reasonably allowed the Claimant's views to be represented by her union representative in circumstances where the Claimant was declaring herself as unfit to attend a meeting to discuss her employment, with again no indication that this situation was likely to change.

97. When the Claimant was told of the decision to terminate her employment and reverted with expressions of concern as to how she been treated, the Respondent sought to give the Claimant an opportunity to completely reopen the process and for the notice of termination to be rescinded. This was not an action of an employer hellbent on the Claimant's removal on the grounds of sickness or certainly because of the Claimant's views on academy status. The Claimant thereafter was given an opportunity to appeal against the decision and the evidence is of a very fully and fairly considered decision made by the Respondent at that appeal stage, where the Claimant's written representations were considered. She was not then arguing that she was in fact fit to return to work.

98. It is difficult, as Mr Price submits, to see what the Respondent might have done by that stage other than to terminate employment such that certainly dismissal must in all the circumstances fall within the band of reasonable responses.

99. This includes in circumstances where the Claimant's illness had been caused by the Respondent placing her on the DPP. There might be cases where it is unfair to dismiss an employee who is unlikely to be able to return to work for a significant period where the absence has been caused by the employer. Such a case will, however, be quite unusual. An employer will rarely be unreasonable in dismissing an employee who might never be fit to return. A case may be envisaged where an employer has behaved maliciously, intentionally or recklessly in causing a breakdown in an employee's health so as to render him/her unable to work. The circumstances here must fall very far from such a hypothetical situation, where again the performance monitoring which had taken place and was proposed to take place of the Claimant's teaching arose out of genuine concerns and where, whilst the Claimant clearly did not welcome the DPP, the Respondent had sought to provide support to the Claimant to enable her to reach the standards which it regarded as satisfactory. Certainly, there is nothing in the DPP itself or in the way it was implemented which in terms of reasonableness might have caused the Respondent to take any further step before considering or implementing a decision to terminate employment on the grounds of long-term ill-health. This is not a case where an alternative role or duties might reasonably have been explored. Again, even if the Respondent had suspended or removed consideration of the DPP, the Claimant was asserting there to have been an irretrievable breakdown in her relationship with the Respondent.

100. The Claimant was not dismissed for poor performance. She may never have been. The Tribunal does not make any finding that she was inadequate as a teacher. She was dismissed because she was unable due

to ill health to return to work where it reasonably did not appear to the Respondent that she would be able to in the future.

101. That decision was not unreasonable and Claimant was not unfairly dismissed.

102. The Tribunal finally addresses the Claimant's separate complaint regarding her dismissal being an act of unfavourable treatment arising from her disability. The Tribunal readily concludes that dismissal was an act unfavourable to the Claimant and that it indeed arose out of her sickness absence which in turn stemmed from her mental health disability.

103. However, the Respondent acted in pursuit of a legitimate aim in requiring reliable and effective attendance by teaching staff and in its duty, not least to pupils, to maintain service delivery and minimise disruption.

104. In all the circumstances, in dismissing the Claimant, it acted proportionately in pursuit of that aim. There was a real need to terminate the Claimant's employment in the light of her long-term inability to attend work due to ill-health with no positive prognosis for the future and in circumstances where the Respondent reasonably required certainty as to the availability of teaching staff. The Respondent operates a public service which must be provided as efficiently and effectively as reasonably practicable. It was a failing school which needed to demonstrate improvement. There is no evidence of any action short of dismissal which would have achieved Respondent's aim. The school was entitled to take steps to ensure what it viewed as the delivery of adequate teaching and learning to its pupils and had only implemented a DPP after more informal assessment had taken place of the Claimant, including through lesson observations and the involvement of learning support from a teacher outside the Respondent. Unfortunately, the Claimant became unfit to work. The Claimant and her union representative's position was that she could not return to work at the school. This coincided with the medical advice and against a background of a significant and ongoing period of absence. In those circumstances, dismissal has to be viewed as a proportionate response, such that the Claimant's discrimination complaint in respect of her dismissal must also fail and is dismissed.

Employment Judge Maidment

Date 16 April 2020