EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT		RESPONDENTS
MISS C BALDWIN	**V**	**CLEVES SCHOOL (1)** **MR C HODGES (2)** **MS S MILLER (3)**

HELD AT: LONDON SOUTH **ON: 2-6 March and 5-8 October 2020**

EMPLOYMENT JUDGE: MR M EMERY
MEMBERS: MS C UPSHALL
MS L GRAYSON

REPRESENTATION:
FOR THE CLAIMANT **Mr J Wynne (Counsel)**
FOR THE RESPONDENT **Mr C Burrows (Counsel)**

JUDGMENT

1. The claim of direct disability discrimination (s.13 Equality Act 2010) succeeds in part against the 1st respondent.

2. The claim of discrimination arising from disability (s.15 EqA 2010) succeeds in part against the 1st respondent.

3. All claims of a failure to make reasonable adjustments (s.21 EqA 2010) fail and are dismissed.

4. All claims of harassment related to disability (s.26 EqA 2010) fail and are dismissed.

5. All claims of victimisation (s.27 EqA 2010) fail and are dismissed.

6. All claims against respondents 2 and 3 fail and are dismissed.

RESERVED REASONS

The Issues

1. The claimant was employed as an NQT Teacher from September 2014 to the date of her resignation, 18 March 2015. She alleges continuing disability discrimination from early on to the end of employment. The respondents accept that the claimant was disabled at the relevant time, but they deny that they had requisite knowledge of the claimant's condition during the relevant period.

2. Direct Discrimination – s.13 EqA 2010

   2.1 Was the claimant treated less favourably than a non-disabled person in the same or similar circumstances would have been treated by the respondents:

      2.1.1 On 29 September 2014 did R2 say to C that she was or might be a danger to pupils?

      2.1.2 R3's email to C's PGCE mentor asking for details of C's ill health during her PGCE (not disputed by the respondents).

      2.1.3 R3 fail to adequately support C in the preparation of her supporting evidence file? C relies on Ms Hamlyn a fellow NQT as the comparator.

      2.1.4 On 3 December 2014 did R2 say to C she was "25% worse than any other teacher in the school", would she hit out at children, was she emotionally stable enough to undertake her role; and that she and would not pass her 1st term NQT? C relies on a hypothetical comparator.

      2.1.5 On 2 February 2015 did R2 describe a lesson he observed as *"poppycock"* and unfairly assess it in comparison to other teachers?

      2.1.6 On 14 February 2015 was the allegation made by R2 against C, that she had used inappropriate language in the classroom, unfounded? C relies on a hypothetical comparator

   2.2 And if so, was this because of her disability?

3 Direct Discrimination by perception - s.13 EqA 2010

3.1 Was C treated less favourably by the respondents on the basis they perceived she was disabled with multiple sclerosis or similar condition? The respondents deny they perceived C was suffering from MS:

3.1.1 On 29 September 2014 did R2 say to C that MS was *"not the sort of thing that he would want around children*", whether she was a danger to children and whether she would be likely to strike a child, and suggest that the diagnoses was not desirable at the school?

3.1.2 On 29 October 2014, R3 emailing C's PGCE tutor seeking what C alleges was confidential medical information; and thereafter did R3 say to C that she was *"disappointed in me and my professionalism"*?

3.2 Was C treated less favourably that the respondent treats or would have treated others when compared with a hypothetical comparator?

3.3 If yes, was it because the respondents perceived C to be disabled?

4. Discrimination arising from Disability – s.15 EqA 2010

4.1 Did the respondent treat the claimant unfavourably because of something arising in consequence of her disability? The claimant alleges that the following was less favourable treatment:

4.1.1 On 6 November 2017 was C asked by a member of staff *"what is actually wrong with you are you disabled or something, is there something wrong with your legs"?* Was C's confidential medication information being inappropriately shared?

4.1.2 On 27 November 2014 did R2 asked her why she had needed recovery time from a lumbar puncture, she was to describe the procedure, and asked was she well enough to teach and told that her absence was being counted against her?

4.1.3 On 3 December 2014 did R2 say to her she was *"25% worse than any other teacher in the school"*, would she hit out at children, was she emotionally stable enough to undertake her role; and that she and would not pass her 1st term NQT?

4.1.4 On 9 December 2014 receiving an NQT report which failed her 1st term and which stated C was *"lacking in integrity"* and other remarks which C alleges were untrue and defamatory.

4.1.5 On 12 December 2014, was pressure put on C to sign an OH referral form, and was a letter from the school to a mortgage company conditional on her doing so?

4.1.6 On 18 December 2014 did R2 change a meeting time to allow a prior discussion with C's union rep without her presence, to enable an

ultimatum to be put to C that she could stay at the school with a NQT failed report. or leave with a clean NQT record?

4.2 Was this treatment because of matters arising from her disability – the claimant's medical appointments and disability-absences?

4.3 If yes, was the alleged unfavourable treatment a proportionate means of achieving the legitimate aims of ensuring that the claimant was complying with the NQT requirements of the role, and for the respondents to be able to properly manage staff absence?

5 Failure to comply with duty to make reasonable adjustments – s.21 EqA 2010

5.1 Did the respondents have a practice whereby they provided insufficient support to her as an NQT with her disabilities?

5.2 Did the PCP place the claimant at a substantial disadvantage in comparison with persons who are not disabled, by causing or contributing to her failed NQT term 1?

5.3 Did the respondents have knowledge that the PCP placed the claimant at a substantial disadvantage?

5.4 Would an adjustment have minimised or mitigated the substantial disadvantage? The claimant relies on the following adjustment: R2 and R3, providing greater support to her in undertaking her role and completing her NQT obligations.

5.5 Can the respondents prove that the substantial disadvantage would have not have been eliminated or reduced by the proposed adjustments?

5.6 Did the respondents fail to take such steps as were reasonable to avoid the substantial disadvantage caused by the application of the PCP?

6 Harassment – s.26 EqA 2010

6.1 Did the respondents engage in the following unwanted conduct:

6.1.1 On 29 September 2014, did R2 say to C that MS was not the sort of thing he would want around children and was she likely to strike a child or staff?

6.1.2 On 14 October 2014 did R2 ask if she was emotionally stable and able to teach, and was she a danger to children?

6.1.3 On 21 October 2014 did R2 ask if she was a danger to children, why she was still suffering from her ill-health, and was she fit for work?

6.1.4 On 29 October 2014, R3 emailed her PGCE tutor: in this email did R3 ask for confidential information and thereafter say to the claimant that she was disappointed in C and her unprofessionalism?

6.1.5 On 5 November 2014 did R2 query the claimant's medical leave, the time it took to recover from the lumbar puncture and request her past medical history?

6.1.6 On 6 November 2014 did a member of staff make a comment *"what is wrong with you …*" (see 4.1.1 above)

6.1.7 On 14 November 2014 did R2 send the Head of Year to question C about her health and ask her personal and embarrassing questions?

6.1.8 On or after 27 November 2017 did R3 disclose C's confidential medical information to staff members and thereafter were her medical issues (including her latex allergy) discussed and was she asked embarrassing questions by staff members?

6.1.9 On 9 December 2014 receiving an NQT report which failed her 1st term and which stated C was *"lacking in integrity"* and other remarks which C alleges were untrue and defamatory.

6.1.10 On 2 February 2015 did R2 state a lesson of C he had observed was *"poppycock"* and grade it unfairly?

6.1.11 From 2 February 2015 while off sick did C receive calls each day at inappropriate times including during medical appointments and at night?

6.2 If so did this conduct relate to the claimant's disability?

6.3 Did the conduct have the purpose or effect (taking into account the claimant's perception, the other circumstances of the case and whether it was reasonable for that conduct to have that effect) of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

7 <u>Victimisation s.27 EqA 2010</u>

7.1 Did the clamant make a protected act? The respondents accept that the claimant may have made a protected act to her Union, but was unaware of this until early December 2014.

7.2 Did the respondents subject the claimant to any detriments by:

7.2.1 On 29 October 2014, R3 emailing C's PGCE tutor seeking what C alleges was confidential medical information; and thereafter did

R3 say to C that she was *"disappointed in me and my professionalism"*?

7.2.2 On 29 October 2014, did R3 state that she would "step back" as C's mentor?

7.2.3 On 3 December 2014 did R2 inform C she was 25% worse than any other teacher, was she emotionally stable, could she hit out at pupils/staff, she would fail her Term 1 NQT?

7.2.4 On 9 December 2014 failing her Term 1 NQT and receiving a report which described her as having no integrity and what she alleges to be false/defamatory remarks.

7.2.5 On and after 18 December 2018 after she had raised grievance, was the claimant alienated from colleagues by R3?

7.2.6 The grading of her lesson and alleged comment of poppycock

7.2.7 Making allegations against her on 14 February 2015 of inappropriate conduct

7.3 If so was the detriment because the claimant did a protected act?

8 Disability – knowledge

8.1 The claimant contends she was disabled from the outset of her employment. She contends that the respondents were aware she was disabled from mid-September 2014, when she informed Ms Miller and at end September 2014 Mr Hodges, of her potential diagnosis of MS, and her medical history. The respondent does not accept it had constructive and/or actual knowledge of disability at any stage prior to the claimant's resignation.

8.2 Did the respondent have actual or constructive knowledge of disability anytime between September 2014 and March 2015?

The Law

7. Equality Act 2010

6 Disability

(1) A person (P) has a disability if-
a. P has a physical or mental impairment, and
b. the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

15 Discrimination arising from disability

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

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) ...

(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.

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case.

(2) The circumstances relating to a case include a person's abilities if—

a. on a comparison for the purposes of section 13, the protected characteristic is disability;

26 Harassment

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

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

…

(3) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

…

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

136 Burden of proof

(1) This section applies to any proceedings relating to a 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 provision concerned, the court must hold that the contravention occurred

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Schedule 8 – Duty to Make reasonable Adjustments; Part 3 Limitations on the Duty - *Lack of knowledge of disability, etc.*

20(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) …

(b) than an employee has a disability and is likely to be placed at the disadvantage…

Relevant case law

8. *Direct Discrimination*

a. Has the claimant been treated less favourably than a hypothetical comparator would have been treated on the ground of her disability? This can be considered in two parts: (a) less favourable treatment; and (b) on grounds of the disability (*Glasgow City Council v Zafar [1998] IRLR 36)*

b. The requirement is that all *relevant* circumstances between complainant and comparator are the same, or not materially different; the tribunal must ensure that it only compares 'like with like'; save that the comparator is not disabled (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2013] ICR 337*)

c. The tribunal has to determine the *"reason why"* the claimant was treated as she was (*Nagarajan v London Regional Transport [1999] IRLR 572)* and it is not necessary in every case for the tribunal to go through the two stage procedure*;* if the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial *(Igen v Wong [2005] EWCA Civ 142). "*Debating the correct characterisation of the comparator is less helpful than focusing on the fundamental question of the reason why the claimant was treated in the manner complained of.*" (Chondol v Liverpool CC UKEAT/0298/08)*

d. Was the claimant treated the way she was because of her disability? It is enough that her disability had a 'significant influence' on the outcome - discrimination will be made out. The crucial question is: 'why the

complainant received less favourable treatment … Was it on grounds of [her disability]? Or was it for some other reason..?" *Nagarajan v London Regional Transport [1999] IRLR 572, HL*. "What, out of the whole complex of facts … is the "effective and predominant cause" or the "real and efficient cause" of the act complained of?" (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372*, *[1997] ICR 33)*

9. Perceived Disability – direct discrimination

8.1 The parties accepted that disability by perception was a claim which in theory could be pursued. The respondents say they did not perceive the claimant to be disabled when they were informed of the claimant's potential diagnosis of Multiple Sclerosis.

10. Discrimination arising from disability

a. There are two steps, *"both of which are causal, though the causative relationship is differently expressed in respect of each of them"*:

i. did A treat B unfavourably because of an (identified) something? and
ii. did that something arise in consequence of B's disability?

"The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence." (Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305).

b. If the employer knows (or has constructive knowledge) of disability, it need not to be aware when choosing to subject B to the unfavourable treatment in question that the relevant "something" arose in consequence of B's disability (*City of York Council v Grosset [2018] EWCA Civ 1105*). In this case a lack of judgment by a teacher was contributed to by stress, which was significantly contributed to by cystic fibrosis; the Court of Appeal found that it did not matter that the school was unaware that the lack of judgment had arisen in consequence of his disability when s.15(10(a) is applied. If the employer knows of the disability, it would *"be wise to look into the matter more carefully before taking the unfavourable treatment"*.

c. There must be some connection between the "something" and the claimant's disability; the test is an objective test, and the connection could arise from a series of links (*iForce Ltd v Wood UKEAT/0167/18)* – but there must be some connection between the "something" and the claimant's disability.

d. The test was refined in *Pnaiser v NHS England [2016] IRLR 170, EAT*:

i. A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises. The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A, and there may be more than one reason in a s.15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

ii. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is irrelevant.

iii. The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. - it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

iv. "It does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment."

e. The fact that an employer has a mistaken belief in misconduct as a motivation for a particular act is not relevant in considering s.15 discrimination, in a case where the employer had a genuine but mistaken belief the claimant had been working elsewhere during sickness absence: it is sufficient for disability to be *'a significant influence … or a cause which is not the main or sole cause, but is nonetheless an effective cause of the unfavourable treatment'.' (Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893, EAT)*.

f. Justification: *R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213*: three elements of the test: *"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means*

chosen no more than is necessary to accomplish the objective?". When assessing proportionality, an ET's judgment must be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. *Hensman v Ministry of Defence UKEAT/0067/14/DM*, *[2014]).* The test of justification is an objective one to be applied by the tribunal, while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning. The test under s 15(1)(b) EqA is an objective one according to which the tribunal must make its own assessment" (*City of York Council v Grosset UKEAT/0015/16).* Under s 15(1)(b) the question is whether the unfavourable treatment is a proportionate means of achieving a different objective, i.e. the relevant legitimate aim. *Ali v Torrosian (t/a Bedford Hill Family Practice) [2018] UKEAT/0029/18:* this objective balancing exercise requires that to be proportionate the conduct in question has to be both an appropriate and reasonably necessary means of achieving the legitimate aim; and for that purpose it will be relevant for the Tribunal to consider whether or not any lesser measure might have served that aim. Although there may be evidential difficulties for a Respondent in discharging the burden of showing objective justification when it has failed to expressly carry out this exercise at the time, the ultimate question for the Tribunal is whether it has done so.

11. Reasonable adjustments

a. A failure to make reasonable adjustment involves considering:
   i. the provision, criteria or practice applied by or on behalf of an employer;
   ii. the identity of non-disabled comparators (where appropriate); and
   iii. the nature and extent of the substantial disadvantage suffered by the claimant.

   Environment Agency v Rowan [2008] IRLR 20, *[2008] ICR 218*

   "the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP'. *Newham Sixth Form College v Sanders [2014] EWCA Civ 734*.

b. *Provision, criterion or practice:* It is a concept which is not to be approached in too restrictive a manner; as HHJ Eady QC stated in *Carrera v United First Partners Research UKEAT/0266/15 (7 April 2016, unreported)*, 'the protective nature of the legislation meant a liberal, rather than an overly technical approach should be adopted'. In

this case the ET were found to have correctly identified the PCP as 'a requirement for a consistent attendance at work'.

c. Pool of comparators: has there been a substantial disadvantage to the disabled person in comparison to a non-disabled comparator? *Archibald v Fife Council [2004] UKHL 32*, *[2004] IRLR 651*, *[2004] ICR 954*: the proper comparators were the other employees of the council who were not disabled, were able to carry out the essential functions of their jobs and were, therefore, not liable to be dismissed.

d. While it is not a breach of the duty to make reasonable adjustments to fail to undertake a consultation or assessment with the employee (Tarbuck v Sainsburys Supermarkets Ltd), it is best practice so to do. The provision of managerial support or an enhanced level of supervision may, in accordance with the Code of Practice, amount to reasonable adjustments (*Watkins v HSBC Bank Plc [2018] IRLR 1015)*

e. The adjustment contended for need not remove entirely the disadvantage; the DDA says that the adjustment should 'prevent' the PCP having the effect of placing the disabled person at a substantial disadvantage. *Leeds Teaching Hospital NHS Trust v Foster UK EAT /0552/10*, *[2011] EqLR 1075:* when considering whether an adjustment is reasonable it is sufficient for a tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage—there does not have to be a 'good' or 'real' prospect of that occurring. *Cumbria Probation Board v Collingwood [2008] All ER (D) 04 (Sep)* - 'it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made *will* remove the substantial disadvantage'.

f. The test of 'reasonableness', imports an objective standard and it is not necessarily met by an employer showing that he personally believed that the making of the adjustment would be too disruptive or costly. *Lincolnshire Police v Weaver [2008] All ER (D) 291 (Mar)*: it is proper to examine the question not only from the perspective of a claimant, but that a tribunal must also take into account 'wider implications' including 'operational objectives' of the employer.

g. *Employer's knowledge: Gallop v Newport City Council [2013] EWCA Civ 1583*, *[2014] IRLR 211* – a reasonable employer must consider whether an employee is disabled, and form their own judgment. The question of whether an employer could reasonably be expected to know of a person's disability is a question of fact for the tribunal (*Jennings v Barts and The London NHS Trust UKEAT/0056/12*, *[2013] EqLR 326*,) Also, 'if a wrong label is attached to a mental impairment a later re-labelling of that condition is not diagnosing a mental impairment for the first time using the benefit of hindsight, it is giving the same mental impairment a different name'. *Donelien v Liberata UK Ltd UKEAT/0297/14:* when considering whether a respondent to a claim 'could reasonably be expected to know' of a disability, it is best practice to use the statutory words rather than a shorthand such as

'constructive knowledge' as this might imply an erroneous test. The burden – given the way the statute is expressed – is on the employer to show it was unreasonable to have the required knowledge.

12. Harassment

a. *Driskel v Peninsula Business Services Ltd [2000] IRLR 151*: Determining whether alleged harassment constitutes discrimination involves an objective assessment by the tribunal of all the facts; the claimant's subjective perception of the conduct in question must also be considered. The tribunal is therefore required to determine both the actual effect on the particular individual complainant and the question whether that was reasonable in the circumstances of the case. *Pemberton v Inwood [2018] EWCA Civ 564*: "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))." This means that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for them, then it should not be found to have done so.

b. *Dhaliwal* : "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award.'

c. 'Conduct': *'Prospects for People with Learning Difficulties v Harris UKEAT/0612/11*: suspension or other acts by an employer which would not normally constitute an act of harassment, can amount to acts of harassment; in this case the lack of forethought on the part of the employer and the peremptory nature of the suspension, with scant justification and absent prior consultation with the claimant, justified the tribunal's finding of unlawful harassment in this case.

d. Purpose or effect: Harassment will be unlawful if the conduct had *either* the purpose *or* the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive

environment for them. Where the claim simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention—which could be entirely innocent – is irrelevant. The test in this regard has, however, both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the complainant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that requisite effect; the objective element. The fact that the claimant is peculiarly sensitive to the treatment accorded him or her does not *necessarily* mean that harassment will be shown to exist.

e. Related to the prohibited grounds: The conduct must be 'related to' a relevant protected characteristic, including conduct associated with that characteristic. The tribunal has to apply an objective test in determining whether the conduct complained of was 'related to' the protected characteristic in issue. *Hartley v Foreign and Commonwealth Office UKEAT/0033/15:* Where adverse comments were made by managers amount an employee, the fact that the intent of the managers was not to "aim" at her condition was irrelevant – the tribunal must assess *"if the overall effect was unwanted conduct related to her disability.'*

f. *Land Registry v Grant* [2011] EWCA Civ 769: the tribunal must be careful not to cheapen the significance of the statutory wording; is must consider carefully whether the matters above can violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her.

13. <u>Victimisation</u>

a. The parties accept that the claimant's grievance dated 11 November 2019 was a protected act.

b. Detriment: *MOD v Jeremiah [1979] IRLR 436*, *[1980] ICR 13, CA:* a detriment exists 'if a reasonable worker would take the view that the treatment was to his detriment'. A detriment must be capable of being objectively regarded as such- *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11*, *[2003] IRLR 285*, *[2003] ICR 337,* 'an unjustified sense of grievance cannot amount to 'detriment'. *Deer v University of Oxford[2015] EWCA Civ 52* - the conduct of internal procedures can amount to a 'detriment' even if proper conduct would not have altered the outcome.

c. Reason for the treatment: **T**he detriment must be 'because' of the protected act. *Greater Manchester Police v Bailey [2017] EWCA Civ 425* - it remains the case as under the pre-EqA legislation that this is an issue of the "reason why" the treatment occurred. Once the existence of the protected act, and the 'detriment' have been established, in examining the reason for that treatment, the issue of the respondent's state of mind is likely to be critical. However there is no need to show

that the doing of the protected act was the legal cause of the victimisation, nor that the alleged discriminator was consciously motivated by a wish to treat someone badly they had engaged in protected conduct. A respondent will not be able to escape liability by showing an absence of intention to discriminate, provided that the necessary link in the mind of the discriminator between the doing of the acts and the less favourable treatment can be shown to exist. *Woods v Pasab Ltd (T/a Jones Pharmacy*) *[2012] EWCA Civ 1578:* 'the real reason, the core reason, for the treatment must be identified'

d. Where there is more than one motive in play, all that is needed is that the discriminatory reason should be 'of sufficient weight' *O'Donoghue v Redcar and Cleveland Borough Council [2001] EWCA Civ 701*, *[2001] IRLR 615, CA*

e. A claim for victimisation is not dependent upon the claim which gives rise to the protected act being successful - *Garrett v Lidl Ltd UKEAT/0541/08*

Procedural issues

14. At the outset of the 1st day Mr Burrows on behalf of all respondents made an application to adjourn the hearing, based on a serious medical issue involving Mr Hodges, the 2nd respondent and Headteacher of the 1st respondent. He had been admitted to hospital and discharged three days before, with a likely three weeks off school recovering having suffered what was described as a minor stroke.

15. Mr Wynne for the claimant was clear that the hearing could and should continue, the significant delay – this claim was issued in 2015 nearly 5 years ago – meant that any further delay would cause serious prejudice to the clamant and may give rise to an unfair trial. Mr Burrows pointed out that prior adjournments had been granted, all because of the claimant's ill-health. He stated that he had to take instructions from Mr Hodge as a named respondent, although he accepted that members of the school's senior management team were in tribunal and could give instructions.

16. The Tribunal and the parties discussed whether we could start the hearing, and assess whether Mr Hodges could be available for evidence at a designated time in the next few days (we have a 7 day listing); or proceed and adjourn part-heard if he was not available, on the basis that it would be easier and quicker getting a hearing with one witness (say, 1 day's evidence) than postponing. On instructions, M Burrows stated that one of the concerns of the respondents was that going part-heard would be a disadvantage, as the evidence would not be as fresh; that the issue of delay was analogous to a 6 year limitation and that a further delay would be *"no worse"* than the delay to date. Mr Hodges played a key role and his evidence is of importance to the school; Mr Burrows argued that proceeding "does not accord with the overriding objective" - notwithstanding the issue of further delay.

17. For the claimant Mr Wynne referred to Blackstone authorities - 2019 - chapter 9D - section entitled inability of witness to attend, paragraphs 9.51 onwards - Teimaz v LB Wandsworth - 2002 IRLR; 9.55 - and Shui v Manchester Uni - 2016 EAT; 9.63 - Azim v Univ Hospital Birmingham UK EAT //0094/10, *"the Gist is a fair trial requires the presence of the party or a major witness".* However, another factor to consider is that the claimant has serious mental ill-health issues, and there is a chance, a probability, that further delay will lead to deterioration of her mental ill health. And Blackstones makes clear that what the Tribunal needs to identify is whether a witness or party is genuinely unable to attend; if they cannot, it's a strong argument for an adjournment. Mr Hodges has had a minor stroke; he may be fit to attend next week, and *"we would want medical evidence to make decision whether to adjourn".* In response Mr Burrows suggested a short adjournment to get a medical report on Mr Hodges' prognosis.

18. The Tribunal adjourned to consider the law and the best course of action, bearing in mind the overriding objective and the clear requirement that a fair hearing requires the attendance of a party/witness. We concluded that we needed to balance against the fact of the very long delay to date, and the clear dangers of a further adjournment – for the claimant's health, for the parties generally, for the recollection of witnesses – against the very clear dangers of proceeding without Mr Hodges presence for a significant part of the hearing.

19. In concluding to proceed with caution, we balanced the right to a fair hearing for all parties, including their presence at the hearing, against the fact there had been a significant delay to date, and the events in this case occurred over 5 years previously. We concluded that there was a clear difficulty in having a fair hearing if we delayed further, given the risk there may not be a fair hearing if we proceeded. We wondered if it would be possible for Mr Hodges to give evidence the following week by Skype. We noted that other members of the SMT were present, and that full details of the evidence could be given to Mr Hodges. We stated to the parties that this issue would be carefully monitored and if there was any issue with fairness we would consider the issue further. The tribunal noted that other members of the 1st respondent's SMT were present on subsequent days, for example two trustees and the Chair of Governors attended on day 2.

20. In the event, Mr Hodges was not able to give evidence, the hearing adjourned after 5 days and was relisted for July 2020 and when this date as not possible, for October 2020 by CVP. At the outset of the resumed hearting the Tribunal discussed the issues of fairness, Mr Hodges indicated that he was aware of the evidence that had been given to date and he was happy to proceed. He gave evidence without any technical or other issue. This issue was not further raised by the parties during the case or submissions.

21. A further preliminary issue was disclosure. Outstanding issues were resolved by way of additional disclosure and explanations on disclosure already given. For example, Mr Hodges pasted and copied email chains and added a written commentary to the email, which was disclosed. In the event the original email

chains were disclosed also. In October, when the hearing resumed, there was further disclosure of documents found by the respondents, including the claimant's application form and handwritten notes which Mr Hodges stated were his notes of a classroom assessment. In the end the claimant consented to this late disclosure being added to the bundle.

Witnesses

22. The Tribunal heard evidence from the claimant. For the respondent we heard from the claimant's Trade Union rep, Mr Fred Greaves, Mr Craig Smith the respondent's Acting Deputy Headteacher at the time of the issues, Ms Moira Greenfield the Babcock NQT adviser, from Ms Karen Cummings the school's Head of Year, Ms Emma Turner the school's Business Manager, from Mrs Sarah Miller, a Teacher and the claimant's designated NQT mentor, also the named 3rd respondent. As stated above, we heard from Mr Hodges by CVP in October 2020.

23. The Tribunal spent the first day of the hearing reading the witness statements and the documents referred to in the statements. This judgment does not recite all of the evidence we heard, instead it confines its findings to the evidence relevant to the issues in this case, all of which was known to the parties during the investigation and disciplinary process.

24. This judgment incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The relevant facts

25. The Claimant was employed as an Newly Qualified Teacher (NQT). On joining the respondent in the claimant informed the respondent she had the condition of fibromyalgia; she ticked 'no' against disability.

26. The claimant's medical history relevant to the issues in this claim are as follows. In 2006 the claimant was diagnosed with Guillain-Barre syndrome, with associated chronic pain and mobility disabilities, chronic fatigue and ME. In 2011 she was diagnosed with Fibromyalgia and PCOS, and received a tentative diagnoses of Nutcracker Syndrome. By the time she commenced employment with the respondent all conditions bar Fibromyalgia were been in abeyance, she had not had symptoms relating to these conditions for some length of time prior to her employment commencing. The Tribunal accepted the claimant's evidence that she had no reason to suppose that these conditions would recur, hence she did not refer to these conditions on her application or any forms prior to starting her employment; this however contributed to the respondents suspicions about her health which occurred later that term.

27. The claimant was required to complete a formal NQT induction year. This requires amongst other things NQTs to meet statutory Teacher Standards (140 onwards) and the responsibilities of NQTs, including to *"provide evidence of their progress against the relevant standards"* (163), which would be used to

assess performance, including that NQTs have *"consolidated their initial teacher training and demonstrated their ability to meet the relevant standards consistently…"* (146-7). The claimant was one of 4 NQTs employed by the 1st respondent that year.

28. The claimant's initial relations with Ms Miller were good. The emails show a positive and friendly relationship between them. Their classrooms were next to each other, meaning that Ms Miller was in reach for an informal discussion. On 13 October 2014 a lesson of the claimant was observed and was graded good with elements of outstanding. (244-5)

29. At the time the claimant accepted the role in July 2014, she had not completed her PGCE as she was submitting some assessments late, caused by what her PGCE mentor described in emails to the claimant at the time as ill-health leading to *"the need to extend school placement"* (212); the claimant extended her placement to September 2014, consequently she did not have a completed CEDP - a booklet provided to the NQT's employer - at the completion of her PGCE year. The claimant did not make this clear to the respondents when she joined because she was unsure of the actual CEDP requirements. The claimant provided to Ms Miller some of her PGCE tutor's comments on development targets, which included *"listen to your body and when feeling well with extra energy, try to get as much planning done ahead of time as possible … pace yourself and rest at break and lunch and always be home before 5.00…".* On 11 September 2014 Ms Miller emailed Mr Smith for advice saying she was *"at a bit of a loss"* about what to do as she needed to know what professional objectives had been set for the claimant during her PGCE year. We accepted that these objectives were regarded as out of the ordinary by the respondents, and this was a factor which led to further concern and enquiries to the PGCE mentor in October 2014.

30. By mid-September 2014, just two weeks into her employment, the claimant was experiencing symptoms which were causing her and her treating doctors some concern and she was referred for diagnostic tests, a possible diagnosis of Multiple Sclerosis was mentioned to her. On 17 September 2014 the claimant discussed her relevant medical history and this possible diagnosis with Ms Miller, as acknowledged by Ms Miller in an email to the claimant later that day.

31. On 24 September 2014 the claimant away from school with cold / infection; an issue arose because the claimant did not call into school by 2.30pm that day, as required under school policy the day to say she would be returning the next day and so the school booked supply. She was sent home the next day, in the words of the school secretary in an email on 25 September 2014, *"to give her the chance to fully recover.."* (254). The claimant accepted in her evidence that the school was worried she was contagious, she stated she was not aware of the 48 period of recovery. This subsequently became an issue for two reasons; the claimant's total number of absences, 15, by the date of her end of term NQT report, and what the respondent characterised as an ongoing failure to properly inform the school of her return to work date in time. On her return, Mr Hodges asked to see the claimant about this absence; we accepted that he would have done so with any NQT, to check all was ok with them.

32. On 29 September 2014 the claimant informed Mr Smith of her possible MS diagnosis and the tests to come. She told him that she was on medication and suffering from tremors. He ended a brief email to Mr Hodges describing this conversation by saying *"Not good"* (260). A lot was made of this comment, whether it was negatively aimed and was a comment on the effect the claimant's ill-health could have at the school, or whether it was a factual statement – this was "not good" for the claimant. We accepted Mr Smith's intention behind this remark – in context that it was a very difficult issue for the claimant – it was "not good for her", and this comment was not about the potential impact of this on the school. We note that the allegations in the list of issues state that Mr Hodges had a conversation with her this date – that MS was not the sort of thing he would want around children, was she likely to strike a child. We noted that the conversation was in fact between the claimant and Mr Smith on this day, and we did not accept that his remark was made by Mr Hodges to the claimant.

33. The claimant was off work 6 - 7 October 2014; An email from the Head of Year to Mr Smith states *"just to let you know that I had a text from Cate after 5 to say she would be in…".* The Tribunal accepted that the reference to "after 5" was indicative that this was a late notification and that as far as the respondents were concerned, the claimant had not properly communicated this absence or her return to work. We accepted Mr Smith's evidence that this created logistical difficulty for the school, and we accepted that the need for timely communication by 2.30 was important for staff planning in a large school.

34. One significant issue in the case was the amount of supporting material the claimant had uploaded onto the school system for her first term NQT report. Mr Smith emailed all NQTs including the claimant on 10 October stating that the *"deadline for report submissions"* was 10 December 2014. Notwithstanding what the claimant said subsequently, that some NQTs had extended deadlines, we found that this deadline was applied to all NQTs, that the claimant was not given less time to upload the material than others.

35. On 14 October 2014 the claimant emailed about an appointment she had, that it involved injections in her spine, that accordingly she did not think she would be able to attend a planning meeting that evening, that she had *"read the planning and minutes after the two meetings I have missed…"* (281-2). On the same date she met with Mr Hodges and told him that she would be having a lumbar puncture. She alleges that she was asked if she was a danger to children, was she fit for work? These comments were denied in their entirety by Mr Hodges. We accepted that there was a conversation around the claimant's health. We accept that Mr Hodges expressed a degree of concern about the claimant's health in particular the potential diagnosis. However, we did not accept that Mr Hodges' approach was aggressive or unprofessional.

36. The claimant's targets had still not been sorted, and Ms Miller asked the claimant on two occasions by email for her PGCE tutor's email *"so I can email her regarding your targets" (*266, 270). Ms Miller wrote to the claimant's PGCE tutor, Ms Sternstein, who was also a referee for the claimant, on 16 October 2014 asking for this information including details on how she had met teachers

standards and what her future development requirements are (289). Ms Sternstein's response dated 19 October 2014 states that the claimant had been *"very unwell"* at the end of her course, which had led to delays in completing her CEDP, and she provided information on when CEPD would be completed.

37. On 20 October 2014 the claimant was absent from work. On 21 October Mr Hodges asked to meet with her *"to get an update on your state of health and yesterday's absence"* that day after school. The claimant responded in an email, explaining the reason for her absence, the wait for a lumbar puncture appointment, and stating she could not meet after school; he responded *"I would still like to meet today so when would you suggest"*. The meeting which followed was again the subject of contested evidence. The claimant states that she was asked similar questions – was she a danger to children, why she was still suffering from her ill-health, and was she fit for work? These comments were denied in their entirety by Mr Hodges. We accepted that there was a conversation around the claimant's health, that at this time Ms Miller had received Ms Sternstein's response which was causing additional concerns to Mr Hodges. We accept that Mr Hodges expressed a degree of concern about the claimant's health, and the school's understanding of her prior medical conditions, also he was at this time concerned about the lack of CEDP documentation and what Ms Miller had been told by Ms Sternstein. However, we did not accept that Mr Hodges' approach was aggressive or unprofessional towards the claimant.

38. Ms Miller responded to Ms Sternstein's email on 24 October 2014, asking for *"…further light on this matter … by confirming what was wrong with Cate, when she was unwell and also how many days she was absent …".* She said she was copying in Mr Hodges, and said *"I would also appreciate it if you kept this email correspondence between you and I."* (305). Ms Sternstein cc'd her email in response to the claimant and declined to answer Ms Miller's questions, other than to say the claimant's final placement *"was not supportive…".*

39. This correspondence caused suspicion amongst the respondents, that information had not been provided by the claimant. Ms Miller accepted that their suspicions were not *"addressed"* with the claimant, that she could not recall asking the claimant *"the full picture",* and that one of the issues for the respondents was the claimant's health. Mr Hodges was asked the reason why this request was made of Ms Sternstein and he said there were two issues: a need for *"more information on her practice"* which would normally have been in the career entry profile which had not been received; secondly Ms Sternstein's first email *"contradicted what the claimant had been telling us, so we responded."* On being asked whether there was a concern the claimant was not telling the truth, Mr Hodges answer was *"Yes, on this point".* The Tribunal concluded that the respondents' reasons for asking questions related in large part to suspicions around the claimant's health, whether there had been any significant health issues the previous year which were carrying into this year and whether there had been a failure by the claimant to disclose this information on her application to the school. Mr Hodges conceded in his evidence that in retrospect it was *"misjudged"* to ask for this information, he *"did not know how this would develop."*

40. The claimant's case is that she immediately challenged Ms Miller about her questions to Ms Sternstein, saying that *"she went behind my back",* that Ms Miller's response was "*this was information shared between two professionals"* and the claimant was *"unprofessional".* While Ms Miller did not recollect all this conversation in her evidence, we accepted the claimant's account that there was a reference to professionalism, and that the claimant stated she considered this to be unprofessional conduct by Ms Miller, the claimant expressed her anger to Ms Miller.

41. We did not accept that Ms Miller stated she would *"step back as a mentor"* apart from classroom observation, and would only undertake *"selected mentoring tasks.."* (350). It was put to the claimant that this was not formally documented, and in fact that Ms Miller was undertaking mentoring meetings and was also, on the claimant's account, discussing issues such as her latex allergy and car parking issues with her into November 2014. The claimant accepted in her evidence that she could not *"recall the exact timing"* of when Ms Miller stepped back. She also accepted that there continued to be mentor and classroom meetings *"they were awkward but she still was my mentor".* The Tribunal concluded on this evidence that Ms Miller continued to undertake, professionally, her mentoring role with the claimant and that the claimant was not disadvantaged by any lack of contact or assistance from Ms Miller in the claimant's NQT Term 1.

42. The Tribunal also accepted that in the claimant's mind, given Ms Miller's actions in contacting Ms Sternstein, there was an inevitable deterioration in their relationship, it was no longer warm, and there was a lack of trust from the claimant as she felt very strongly that there had been a breach of trust by Ms Miller in making enquiries about her medical history behind her back. Ms Miller accepted in her evidence that there had been a deterioration in their relationship, in her view *"because she did not engage with me, but I was always there".* Mr Hodges again accepted in his evidence that from the claimant's perspective he could understand how disappointed and upset she would have been by this issue.

43. On the same date, 24 October 2014, Ms Miller emailed the claimant her objectives, and providing points to how to achieve them: including developing lesson time management skills; incorporating 5Rs; develop skills to deploy staff effectively (304). The Tribunal accepted that these were supportive objectives, ones which the claimant appreciated were provided to assist her. The claimant had further mentor meetings with Ms Miller thereafter – 3, 12 and 17 November and which work related issues were appropriately discussed between the two of them (e.g. 309-311).

44. On 5 November 2014 the claimant told Mr Hodges of the date of her lumbar puncture – 19 November - and she advised that this may be a 3 day process and more recovery time may be required (312-3). Mr Hodges clearly wanted to discuss in person, and said so in his email response. The claimant says she met with Mr Hodges, who queried the length of time the process would take as he believed the process would take less time. We accepted that Mr Hodges

was entitled to ask questions on the length of the process, at this time the claimant's absences were building up, and up to a week's absence was clearly an issue for her in her NQT first term. Whilst the questions were clearly personal to the claimant, the Tribunal did not accept that any questions asked were overly intrusive or unacceptable in the circumstances.

45. On 7 November 2014 Mr Hodges wanted to meet the claimant again, the claimant emailed saying *"I have an important meeting to attend now after school, so will be unable to meet to discuss the lumbar puncture procedure further"*, adding that she would forward the neurology letter to him (315). In response Mr Hodges asked again for a meeting, and emailed again on 11 November 2014 *"… linked to these health issues, I had intended to discuss your teaching practice with you".* He raised concerns about her career entry profile and he referenced Ms Miller's email to Ms Sternstein*, "…and I understand that your tutor explained this had not been completed because you had been forced to start a practice again … after a lengthy period of ill-health…. Although I intend to talk to your tutor directly about the career entry profile document can you clarify for me the issue around your training and practice? Can you also outline your health issues and absence periods during your training? It is important that I have clarity and understanding .. in order to know how best to support you"* (321). On 13 November the claimant responded with her explanation of what had occurred: an issue with her first placement school (which she said subsequently lost its ITT status) and a decision for the claimant to continue her final placement to end of summer term; she refers to having suffered from *"stress and exhaustion on top of my current diagnosis of fibromyalgia"* and other issues. Her email states her *"disappointment"* at Ms Miller's request for health information "…sent without my knowledge…" that she considered it to *be "unprofessional".* Mr Hodges response was that Ms Miller had not been unprofessional, his concern was with the conduct of Ms Sternstein *"who has created an issue … I will pursue the matter directly"* (320).

46. The Tribunal considered these emails carefully. While this emails do not form part of the allegations within the claim, we noted that Mr Hodges was expressing concern about the claimant's absences and health during her PGCE year. We appreciated that Mr Hodges had at this stage genuine and serious concerns about the claimant's health and its potential impact on her NQT year, that he was genuinely seeking *"clarity and understanding"* to enable her to be supported as best as possible. He also had, we considered, genuine and reasonable questions to ask the claimant about her PGCE year and its potential impact on her NQT year, he also wished to know more about her current state of health, in part because of its potential impact on her classroom teaching. These were, we found, all reasonable issues for him to raise.

47. However, the Tribunal also concluded that Mr Hodges was doubling-down on Ms Miller's contact with Ms Sternstein, saying it was appropriate, and it was Ms Sternstein's conduct he was concerned about. We concluded that Ms Hodges response had the effect of causing the claimant serious concern. She was raising what she regarded as an attempt by Ms Miller to gain confidential medical information and was questioning why, she was raising concerns about Ms Miller's conduct. However these concerns were being peremptorily

dismissed with no attempt made to address them, on an issue where she clearly considered Ms Miller to have acted unprofessionally and in breach of confidence. We concluded that this was an intransigent approach by Mr Hodges towards an NQT teacher. We concluded that there was as a result a failure to address the claimant's legitimate concerns. We wondered why HR advice was not taken before taking such a major step as contacting a tutor asking for medical information, one with implications for data protection, and medical and professional confidentiality. While Mr Hodges says he was asking questions on issues relating to the claimant with Babock on their regular visits to the school, it appears he did not do so in relation to this issue. Noting Mr Hodges concession that he could now understand the claimant's concerns about medical confidentiality, we concluded that if a slightly more reconciliatory approach had been taken, recognising the claimant's concerns but also addressing some of the issues that were of concern to the respondents, better relationships may have been maintained between the claimant and respondents.

48. The claimant first logged onto the Babcock website, onto which she had to download her terms material for the end of term report, on 11 November 2014. She and Ms Miller had a Weekly Mentor meeting on 12 November at which the claimant accepts they discussed the need to set up the folder and collect evidence for her file. The claimant's claim of a failure to make reasonable adjustments includes an alleged lack of support from Ms Miller, and a significant issue in the evidence was the support given to her in comparison to that given to her comparator. Two pieces of evidence were, we considered, conclusive on this issue. Firstly, the claimant says that she and her comparator compared their evidence and it was of comparable standard and quality which suggests that the claimant believed her evidence was good enough. Secondly, the claimant's evidence was that her evidence was paper-based and that Ms Miller did not offer to look at it (nor did she offer it to Ms Miller to check). Ms Miller's evidence, which we accepted, was that she did check some of the paper documentation and they discussed improvements and that more evidence was needed, but that the portfolio needed to be uploaded, which the claimant failed to do until it was too late to check and properly advise on.

49. The claimant also accepts that her evidence had not been uploaded, and she only uploaded it a few days before it was due. We noted that Ms Miller's part-time working week meant it was difficult for her to check this material before the deadline. We noted that the weekly mentor meetings did not suggest the claimant was raising any concerns about her progress on this evidence or was not aware of what was required. We noted Ms Greenfield's evidence that the aim of the NQT material is to *"show the developmental trail of the NQT. To start with objectives from end of teacher training and work on objectives which should be looked at ongoing".* We considered that had the claimant provided her evidence, Ms Miller would have offered her professional view on the materials. We concluded that this is not an issue of inadequate support by Ms Miller or anyone else: if the claimant was struggling with evidencing her progress with the appropriate material for the term 1 NQT report she could have said so, and Ms Miller would have assisted; and on the claimant's own case she believed her material was of adequate standard.

50. The claimant was off work for the lumbar puncture process from Wednesday 19 to Friday 21 November 2014. There was a further issue on Monday 24 November, as it appears that the claimant had not confirmed on the 21st whether she would be in on the 24th, and on the Monday she had not confirmed by 2.30pm whether she was going to be absent the next day. The school secretary rang her and the claimant confirmed she was hoping to be back to school on Thursday 24 November. Mr Smith characterised this failure to contact the school on time, *"it's a frustration, we're a big school and organisation of teachers is significant. But this was not a negative personal view of the claimant."* The claimant's evidence was that she understood that the school was aware of her absence, however we also noted that any communications had not been to the school office by 2.30 as was required.

51. The claimant was off work again ½ day Tuesday 2 December 2014. This was a day on which the claimant was aware she was meant to have a lesson observation having been told so the previous Friday (25 November). According to Ms Smith and Mr Hodges this absence was not communicated and at 19.01 Mr Hodges emailed the claimant - *"The office team tried to contact you on a number of occasions today without success …. Whenever you feel fit to return I would like to meet you for a return to work interview"* (345). The claimant's view in her evidence is that she would have texted her absence to Ms Cummings "… or *I may not have known at this stage whether returning or not the next day. This was sickness going around the school."* The Tribunal accepted that this was another example of the claimant not fulfilling the reporting obligations of letting the school know by 2.30 whether she would be in the next day.

52. The claimant met with Mr Hodges on 3 December; she emailed her union rep after this meeting, saying she had a *"particularly difficult day"* having been told, she says, that her illness meant she would not pass her 1st term "*I was told today that because of my illness I am not progressing … and so would not pass even if my mentor looked through my evidence"*. She stated that other NQTs did not need to complete their evidence until next week or the week after…" and that Ms Miller was no longer going to be her mentor, apart from for classroom observations. *"… I am worried now … they don't seem to want me in the school…"* (351-2).

53. Her claim states that at this meeting with Mr Hodges, she was told that she was *"25% worse than any other teacher in the school"*, would she hit out at children, was she emotionally stable enough to undertake her role? We note that these allegations are not mentioned in the email to Mr Hodges. We accepted that this was a very difficult conversation for the claimant, and Mr Hodges did reference her absences, and he did raise his concerns about the effect of her absences on her progress, and he did raise the potential effect of her symptoms and absences on her classroom teaching. Again, we considered it was reasonable to raise these issues with the claimant. While they may appear intrusive questions, we accepted that Mr Hodges needed to be sure that her classroom performance was not being affected, that her pupils were in no-way being disadvantaged.

54. We accepted that Mr Hodges told her that she would not likely be passing her 1st term NQT; this was, at this time, a position we considered he was entitled to take, based on the evidence he had at that date of the claimant's absence record and on the lack of visibility at that time on the claimant's evidence file. We note that her email is in this respect similar to Mr Hodges comments on 8 December in which he says that without looking at the claimant's evidence *"… I still don't see how we can confirm she is meeting the expected standards with 15 days off".* Mr Smith responded saying he had spoken to Babcock who advised *"… if we have evidence that she is not meeting the standards then she is to be given an unsatisfactory for this term. This will then automatically trigger support from Babcock who will come in the next term and support the school and Cate with moving forward. She said that 15 days off in itself is enough for it to be unsatisfactory".* To which Mr Hodges response was *"simple as that, the report should be more straightforward to write then."* (355a-b).

55. The written report has the following comments against different Teachers Standards: *"High rate of absence and professional conduct has made it very difficult to evidence this standard…"she regularly arrives late to school and is not prepared for the school day. She often leaves early …".* There is reference to a *"reluctance"* to attend meetings, and *"a number of concerns"* about her wider professional responsibilities. When absent she *"has not always notified the school in a timely manner…"* and "*we also have serious concerns regarding her communication with her mentor and year leader … She has sometimes not appeared at meetings without prior reason …"* On the Teachers Standard "Personal and Professional Conduct" the report states *"we have a number of concerns about Cate's performance this term. The first being her attendance due to ill health. She has missed 15 full days of teaching this term and … a number of year group and whole staff meetings. She often arrives at school at 8.30 unprepared for the day ahead. Our second concern is over her professional conduct. Cate has not been willing to embrace the support offered by an experienced member of staff and has not acted with integrity at all times. She has often said one thing to one person and something different to another. Her communication generally has been inconsistent where she has not always notified the school in good time of absence, has avoided meetings with both the mentor and headteacher and has not followed up on actions as required. She fails to understand the importance of her NQT years…"* Her target was set *"to work with the school to overcome the above identified weaknesses"* (364-7).

56. A meeting was to take place to discuss the report in person; however when asked to meet the claimant emailed saying that she was unable to meet that day, she said it was her only free evening of the week. In his email enclosing the report, Mr Hodges stated *"as we discussed last week, there are some obvious challenges to reviewing your performance this term due to your absence rate, this has unfortunately been made more difficult by a number of recent sick days coinciding with some of our key monitoring points like your observations….",* stating that she would be marked as unsatisfactory, that a member of the NQT team would be in touch to arrange support.

57. In her evidence, the claimant was clear that the work she submitted was of a comparable standard to that of her comparator whose work was graded and passed. The respondent's case is that the uploaded documents were of poor quality, often pasted copies of school policies. We accepted the respondents evidence that the work uploaded was not adequate, and that because she had uploaded much of her work at the last minute Ms Miller did not have time to check it before it was assessed. We accepted the claimant's work was not of the same standard as that of her comparator, that it would be easy to tell from any independent analysis of the uploaded work whether it was of acceptable standard or not; the claimant has produced no evidence that this was the case. An issue arose in the evidence given the apparent speed that some of the documents were read before being assessed. Again, we concluded that experienced teachers would know what they were looking for and could clearly assess that the documents were inadequate in the timescale.

58. It was put to the claimant that the report contains positive issues – and there are positive comments about her teaching, good behaviour management and communication, and that this was a *"developmental report"* which could be improved on. We accepted the evidence of Mr Greaves and Ms Greenfield that an unsatisfactory first term did not mean that the claimant would fail the whole year, that in fact this would be a trigger for additional support to assist the claimant to reach the standard by the end of her NQT, also if she had over 30 days absence in the year her NQT would be extended.

59. The Tribunal also accepted that on the available evidence the respondents were justified in concluding that the claimant had not met the appropriate term 1 NQT standards, and they were justified in failing the claimant in this first term. The claimant's absences were significant, 15 teaching days in one term, and we concluded that the respondents were justified in their view that her uploaded work did not contain the evidence required to show that she was meeting teacher standards. The claimant had also not always notified the school in time of all her absences, again a genuine issue of concern which the claimant was aware of.

60. However, we accepted that the term 1 NQT report was an official appraisal document. We accepted that the contents of an NQT report should not be a complete surprise to a NQT. Mr Greaves evidence, which we accepted, was that before the report was completed he would expect that the employee would have a chance to understand and *"meet the allegations"*. We noted the Statutory Guidance which states for *"Formal Assessments …NQTs should be kept up to date on their progress.* ***There should be no surprises.****"* (document's own bold). While the respondent's case is that the claimant was avoiding meetings, equally the respondents did not at any time inform the claimant that a meeting was required to address their issues of concern.

61. We accepted that there were phrases in this report which could have a significant effect on the claimant's future career: the concern over her professional conduct, not embracing the support of her mentor; and not acting with integrity. We noted that many of these issues had not been raised with the claimant, and they were clearly going to be issues of contention: integrity;

saying one thing to one person and something else to another; deliberately avoiding meetings; not following up; failing to understand the importance of her NQT year. One significant issue, the statement that the claimant failed to embrace the support of her mentor, was, we found, an issue which arose in part from the failure of the respondents to appropriately deal her concerns over the PGCE tutor contact.

62. Mr Hodges reasoning for adding the issue of integrity was he said in his evidence because *"I did not think she had been fully transparent regarding her previous practice and issues we may have supported her with, for example her potential health issues in practice, and she said no health issue, that the training school was at fault. And now, since understanding the number of significant health issues - it was her right not to disclose health issues, but she did not share so did not know how to support. And she did not tell us about her practice, we did not know how to support her. It did not need to be hidden…"*

63. In her evidence on the issue of effective communications with other staff members, Ms Miller said that the issue was *"not engaging properly",* not an issue of the manner of communication. She accepted that the clamant had good relations with some members of staff, including TAs and other teachers.

64. On the issue of 'integrity' and the evidence the respondents relied on to reach their conclusions that the claimant lacked it in some respects, we concluded that the respondents did not evidence at the time, and have not evidenced in these proceedings, their view that the claimant was deliberately avoiding meetings. The meetings she is alleged to have avoided were often arranged at short notice after core school hours; on one occasion her response was that she had tried to look for Mr Hodges, who was not available. On another, for example 7 November, she gave a reason why she could not meet. We noted that this was in the context of a deteriorating relationship because of the request for medical information from the PGCE tutor, which Mr Hodges now accepts was misguided and which we found caused the claimant to lose confidence in him.

65. We also concluded that the issue of 'integrity' had not been raised with the claimant, and that in stating the claimant lacked integrity the respondents were relying on issues not discussed with her. While the claimant accepted in her evidence that the report would reference absences, and we found she was aware she may well fail the NQT term 1, she was completely unaware that it would suggest she was lacking integrity. We noted also that Mr Smith accepted in his evidence that at this stage, writing the report, the respondents did not seek the advice of its HR providers, Babcock, that the issues with the claimant had not been flagged as a concern, that they had not sought any advice at this stage on NQT support available for the claimant via Babcock. Mr Smith's evidence in relation to individual absences was that the claimant acted appropriately – for example the page 253 urgent Dr's appointment – he acknowledged that he did not seek a Dr's letter; and he accepted that the claimant's response was professional and contained *"all the information"* needed.

66. Mr Greaves evidence, which we accepted, was that if there were issues of integrity – for example not providing medical letters, of suspicions about the amount of time off, he would *"expect the school to get their HR consultant to investigate and advise".* Mr Smith's evidence was that he accepted at the time of absences that they were genuine absences, that it was not an issue of genuine absence but *"the issue was timely receipt of information around absence".* Mr Smith accepted that there should be HR involvement if there were concerns about such issues, that Babcock were not involved until the NQT report, his evidence was that he did not think about whether or not HR should or should not be involved, he also accepted that as far as he was aware there was no enquiry initiated into the issue of the lack of evidence of medical appointments.

67. The claimant had been in contact with the Union and her rep Mr Greaves. He told her that it was said it was too late to change this term's assessment, that he had been in contact with Ms Mabson (HR of Babcock) and Ms Greenfield (NQT support Babcock) both of whom he had worked with in the past. His view was that *"…we can approach the other two terms differently with the right level of support or restart NQT…"*

68. The claimant considers that her application for a mortgage letter was being held as conditional on her signing an OH referral form. The email from the school secretary reads as follows: *"I would be grateful if you can sign and pass the form back to me … You can also check the letter I have prepared for the mortgage company…"* (373). The Tribunal was satisfied that there was no intent to make the OH form receipt conditional on the mortgage letter even though they were referenced in the same email.

69. A further issue arose over a medical appointment. On Ms Cummings account given in an email, the claimant informed her on Friday 12 December she had an urgent neurology appointment the following Monday which she was trying to change (383). On Sunday evening, she emailed Ms Smith saying that she had tried to rearrange the appointment but had been unable to. Mr Hodges asked for an appointment letter, (380) saying he was *"concerned"* that the claimant had only informed school the previous evening which he stated as *"unreasonable"* (383).

70. On 15 December 2014 the claimant wrote a detailed timeline of events in response to the Term 1 NQT report, saying that it was *"completely fabricated",* that many of the concerns had not been raised previously. She detailed events from September 2014, including issues around her absences; she states that she was asked whether she was a danger to children, whether she would 'lash out' at the children because of the medication she was on. She references the issue around the CEDP and the request for medical information, that Ms Miller told her how *"disappointed she was"* and that there was then an issue between the two of them, *"the conversation dragged out over two weeks…"*. She says that Mr Hodges seemed not to believe the length of time it took for a lumbar puncture when he called her into a meeting; she references being spoken to in a derogatory manner by staff over disability related issues, and parking space and gossiping over her latex allergy. She said that after the lumbar puncture

she was "ordered" to see Mr Hodges and asked to *"explain why I had needed recovery time … Was I well enough to teach? Was I emotionally stable? "* She references being told she was *"25% worse"* than any other teacher and was she emotionally stable enough for the role, and whether *"the condition would make me hit out at children or staff etc".* She says that she did not receive assistance from her mentor for her evidence file and had to research this online. She says that another NQT added the same evidence as her *"and was deemed acceptable".*

71. Mr Greaves stated in his evidence that this complaint was passed to Ms Greenfield in advance of the 18 December meeting between the 3 of them to discuss the NQT report. For Mr Greaves, the situation was not *"clear cut"* because the absence was *"extensive"* and there appeared to be limited evidence of evidence to support her progress and, as he stated in his account of the 18 December 2014 meeting in a statement dated 25 September 2015, *"the school had queried the documentation surrounding several hospital appointments".* In his evidence, he stated *"the main thrust of meeting was to do with evidence of progress in NQT assessment and evidence was insufficient to make a positive report".* Ms Greenfield's evidence, which we accepted, was that the PDP portfolio should *"be uploaded on an ongoing process" throughout the term, that the focus should be "a trail from beginning to the end of term … as we need to see the development process"*.

72. One issue which arose was that the meeting with the claimant was due to start at 10.00, the claimant found out that Mr Hodges, Ms Greenfield and Mr Greaves met at 9.00. Mr Greaves described this as his *"normal procedure"* that when he discussed an issue for the first time it was *"curtesy"* to discuss with the Headteacher and found out the issues from the school's point of view. We accepted that this was Mr Greaves' explanation for this prior meeting, that it was his standard practice.

73. The parties all accept that the claimant became very distressed at the meeting, there was a dispute as to what occurred, whether Ms Greenfield was dismissive of the claimant's concerns and put up her hand to stop the claimant talking. Mr Hodges evidence which we accepted was that he did not recall this, that he would *"be very surprised if this would happen - I would suspend the interview as not appropriate behaviour."*

74. In his evidence to Tribunal Mr Greaves he said that *"we would have discussed"* the claimant's concerns about the accuracy of the report, and that Ms Greenfield *"would most certainly have checked and investigated these allegations".* Mr Greaves accepted that the gist of what the claimant was saying was that *'I am unwell and the way I have been treated is unfair'.* He said that it was his expectation that Ms Greenfield *"would be the first person to investigate and advise me of what she has found."* We accepted that the role of Ms Greenfield would be to consider whether the claimant's concerns had any merit, later in his evidence he stated that Ms Greenfield was *"very hot"* on issues on disability, and he would have expected her to have addressed the claimant's concerns. In her evidence Ms Greenfield accepted that the claimant *"may have presented"* this document, *"but I did not have an opportunity to go through those claims as*

the claimant became upset. At this time I withdrew from meeting at claimant's request, as I left at claimant's request and I left these issues for Mr Greaves to deal with as a meeting with his member." The Tribunal concluded that the claimant's written concerns were never taken forward or considered by the school or Babock despite being presented at this meeting.

75. One of the options for the claimant was to stay at the school and carry on the next term, another was to leave, the NQT report would not be submitted, and she could start again; that it was possible to stay on and recover the position by the summer. An email sent by Mr Smith the day after the meeting with Babock sets out the options, and adds that if her decision is to stay *"… the assessment is submitted, Babcock come in and provide intensive support, we up the levels of monitoring and consider disciplinary."* (429a). We accepted that this was consideration of disciplinary proceedings against the claimant in the future – that this was an option if the intensive support did not work or if there were other issues arising with her performance or conduct.

76. On 19 December 2014, Mr Hodges was asking Mr Greaves whether *"it is ever feasible to remove a teacher …due to concerns about someone's ability to work with children"*? (429c). We accepted that this was a question which at this time Mr Hodges was concerned about – enough to be open to the claimant's union rep – and it mirrored questions asked of the claimant – and at this time Mr Hodges had the evidence of the 12 December absence and failure to contact the school.

77. The claimant's decision was that she *"fully intends to return"* the next term. At the beginning of the Spring term, Mr Hodges stated that a support plan was being prepared, and that her mentor would continue to be Ms Miller who *"can meet you to maintain your regular meetings and offer support as required"* (432); a date was set for an observation and mentor meetings. Ms Greenfield was involved in the preparation of the action plan. One issue arose with Ms Miller's continued mentoring. The claimant's case is that another teacher was meant to be appointed as a mentor but was not. Mr Hodges accepted that at this stage Ms Miller had stepped back from informal mentoring. We note that the Mentor minutes of 21 January 2015 state that Ms Miller's *"role as mentor was outlined"*; the other teacher's *"presence in the meeting was clarified";* support was to be provided to the claimant by Ms Miller and two other teachers; issues were raised with marking of Maths books which *"was discussed in more detail".* We noted the detailed issues and action points arising, that the claimant asked questions, that there appears to be no significant dispute or complaint from the claimant on the issues raised by Ms Miller at this meeting. We accepted that support was available to the claimant from Ms Miller and two other experienced teachers.

78. The claimant had postponed a meeting at late notice arranged for 16 January 2015 to discuss her NQT support plan. Accordingly Mr Hodges sought advice on next steps from Ms Greenfield and then wrote to the claimant on 3 February 2015 requesting a meeting *"prior to your return to class to discuss a number of outstanding issues causing concern"* (470). The claimant's marking had been checked, and it was found that some pupils' books had not been marked since

October 2014, and others not marked to an appropriate standard (481-3). Advice was sought from Babcock, who advised *"In my view her conduct in particular in relation to her marking would be regarded as a disciplinary matter"* (439).

79. On 2 February 2015 the claimant's lesson was observed by Mr Hodges. The claimant went home that afternoon, and did not call in on 3 February, she was emailed by Mr Hodges (470) and referred to OH on 5 February. On 9 February she emailed Mr Greaves saying that she had suffered harassment and discrimination, that "the last straw" was that her lesson observation "*was failed and described as poppycock. They have created an environment in which I cannot be supported or succeed in my NQT year. It seems as though I am resented and discriminated against for undergoing medical investigations, being ill, and taking my grievance to the union."* (479).

80. Mr Hodges evidence was that the observation was balanced, shown by the notes (613a-613d & 613h-613l). The claimant's case is that she taught the lesson prepared by another teacher, as is normal, but the *"issue was the work sheet did not match the video which did not match the commentary. But this was not my lesson, it was agreed lesson plan…"* Mr Hodges view was that the lesson was poorly delivered. We noted that on the claimant's case there were glitches in this lesson, and we accepted that Mr Hodges view that the lesson was poorly delivered was not necessarily unreasonable; it was a snapshot lesson. We noted that at this stage Mr Hodges would have been of the view, in discussion with others including Ms Cummings, that there were significant other issues continuing on from the previous term, including missed meetings in January. Also, significant marking issues were coming to light, these would have been a factor in Mr Hodges mind in what was clearly a difficult discussion at the end of this lesson.

81. In her evidence the claimant stated that one issue with marking was that supply teachers had not marked books during her absences. That may have been the case, but the Tribunal considered that this did not explain the apparent lack of marking books during the periods when the claimant was at work; and we considered that the respondents were justified in raising this issue with the claimant as an issue to be investigated.

82. On 11 February 2015 the claimant was sent a letter by email and post by Mr Hodges inviting her to a meeting to discuss the following issues (487-90):

    a. Level of absences
    b. Absences not supported by any medical evidence
    c. Refusal to allow an OH assessment
    d. Failure to follow school policy around reporting absences – and giving examples of 15 December 2014 and 2 February 2015 and failure to report next-day absence by 2.30pm
    e. A failure to supply medical evidence for the current 9 day absence
    f. A lack of marking and feedback to pupils – in some cases from before October 2014 half-term

g. A failure to attend the following meetings since start of employment: 7 INSETs meetings, 6 weekly year group planning meeting and 8 mentor meetings
h. An issue of using inappropriate language in the classroom and parental complaint

83. The claimant forwarded a medical certificate on 13 February 2015. On 23 February 2020 she sent a detailed rebuttal to Mr Hodges, stating amongst other issues:
    a. Last term's absences were "entirely unavoidable" due to hospital tests, appointments and illness
    b. All appointments bar one had been communicated in good time, and there was a reason for what was an urgent 15 December 2014 appt which she had discussed with her Head of Year (as corroborated by Ms Cummings)
    c. The only two times she had left school early was for appointments she had discussed in advance and appointment letters shown at the time (and she enclosed these)
    d. She stated she had provided significant information about the lumbar puncture and the procedure, but that on 5 November 2014 *"you called me over and mentioned .. .that a lumbar puncture only takes a day… I stated that I felt I that I wasn't being believe or trusted…"*
    e. The issue with Ms Miller's contact with her PGCE mentor and Ms Miller *"stepping back"* as her mentor
    f. She had been the subject of gossip based on her medical information
    g. The support and guidance this term had taken on *"a very negative, humiliating and intimidating tone…"*
    h. She had not used inappropriate language in class
    i. Mr Hodges had referred to her last observation as 'poppycock'

84. The claimant states that the *"stress and worry of the medical investigations and the possibility of having a life-altering disease such as MS, was only worsened and added to by the anxiety, distress and misery caused by the victimisation and harassment I was receiving at school…".* She requested an early release from her contract based on *'the cessation of my NQT year with no detriment on my record'* (497-500).

85. In response, Mr Hodges said that a number of allegations had been made *"which the school takes incredibly seriously"* and she was invited to use the grievance procedure *"before you request to leave your post".* On 5 March 2015 Mr Hodges informed the claimant that her NQT report had already been submitted to the authority, that she had not added any comments to this report. She was asked again to confirm that her intention was to resign with immediate effect (507-8) and on 9 March the claimant stated that she was seeking advice and would respond (510).

86. The claimant then wrote a detailed rebuttal of some of the points made by Mr Hodges, including that she had not received a comprehensive induction, and was not aware of the policies or guidance on the school's hub; that she had raised issues which constituted a grievance in October 2014, and Ms Greenfield

was given details during the 18 December 2014 meeting. She stated that it had never been raised with her that she had *"lacked integrity … in any of our numerous meetings"*. She stated that she wished to resign *"but only with the clear record that was offered in December*", describing the report as *"fabricated … a vitriolic and personal attack, rather than being an honest comment on by teaching…"* (514-5). In response the claimant was told that the NQT report *"was now a matter of record and cannot be withdrawn…"* and she was asked to clarify her intentions. The claimant resigned on 18 March 2015. In response, Mr Hodges said that the Local Authority (Babcock) had reconsidered the NQT report*, "and they continue to agree that it is reasonable and entirely evidence based. Much of this evidenced was of course your evidence file which was scant and lacked detail."* (522)

87. On 1 April 2015 Babcock wrote to the claimant and invited her to add her dissent to the Term 1 NQT report in the NQT comment box *"…and I would invite you to do so, so that your concerns are a matter of record".* She was advised that it was not possible to restart induction as of Term 1 and that all potential future employees would be able to see the report on the NCTL database. The claimant was informed that she could work on casual supply basis for a period not exceeding 5 years following which she must find a post for Induction (523-4).

Submissions

88. Both parties provided comprehensive written submissions which the Tribunal considered along with cases provided.

89. Mr Burrows for the respondents raised at the outset one issue which the claimant was raising – whether the claimant's decision to resign formed part of a claim; the respondents' position is that her dismissal does not form a claim of discrimination arising from disability, as she alleges.

90. Mr Burrows general observation was that the parties had *"very different approaches"* to the evidence: in brief the claimant places reliance on documents she generated which were not contemporaneous - not the exact/precise same time as events she records/narrates. Albeit that they are closer in time than witness statements in these proceedings. But these documents should be treated with significant degree of caution, see paragraph 13/14 written submissions – for example the claimant says that one absence was sickness/bug, but her evidence was she was feeling too upset/low to go back into work. The *"claimant herself makes this concession, from documents created for a formal purpose"* and all documents have to be considered very carefully against the remainder of the documentary matrix. The Tribunal has been taken through bundle - and can accord proper weight to each of the documents on which the claimant relies to make her case.

91. Mr Burrows accepted that the claimant had not sought deliberately to mislead, but her perception of events was not recorded immediately at the point they occurred, but not a considerable time after, *"but they were not as accurate as they should be."*

92. By contrast the respondents evidence is largely based on discussions, and an absence of documents "is entirely consistent with the respondents approach throughout the 1st term"; to start writing formal letters / emails *"puts an entirely different complexion on the issue"* than the respondents say they were trying to achieve. This is an educational context and the claimant was an NQT in induction. Training/mentoring of the claimant was occurring *"and in order to maintain the supportive environment around the claimant that the respondents maintain was their approach – including under hostile questioning",* formal emails were unhelpful in this context. Mr Burrows accepted that there was *"a formal drawing back"* after 1st terms report by Ms Miller.

93. Mr Burrows argued that the claimant's case was to "to take phrases /short sentences and turn them to support her case". It is for the tribunal to judge and assign weight to these phrases and, where ambiguous, look back to their context – an educational setting and consider the respondents view of the evidence in relation to these documents. The end of term report "needed to be sufficiently clear as an informal approach was not working."

94. Mr Burrows stated that the lack of integrity occurred because the claimant was "not willing to take support" but that this was an issue of integrity - saying no issues at previous placement and then transpires that she was very unwell which was unknown to respondents at that point - and ill-health had led to absence. Consider page 290 (Ms Sternstein's account) and what is said by the claimant to Ms Miller and 321 (the claimant's email of 13 November to Mr Hodges) - spot that the claimant *"has said one thing to one person and something else to the other. This is the integrity issue … She has created the impression that she is saying one thing to one and another to another."* This therefore does not arise out of the claimant's disability, but arises out of a disconnect between what the referee has said and what the claimant has said, which arises out of the Career entry profile.

95. The tribunal should *"consider carefully the weight it assigns"* to documents generated by the claimant, and the weight it assigns on phrases in emails; also that it did not document every conversation should not be viewed as negative when reviewing the respondents oral evidence.

96. Knowledge of disability: the claimant did declare medical issues (paragraphs 19-26 of submission); but at 213 (email from MNASS on claimant's fitness for role) the clamant declares herself as fit for role. The claimant had conversations about Fibromyalgia and potential MS and on 29 /30 Sept, had discussions with Mrs Miller on clinical investigations. But this does not get away from the simple fact that there was much more at play - the medical records show more than fibromyalgia. The respondents were *"hamstrung"* by the IMAS report, and the claimant did not engage meaningfully as she should have done.

97. Groupthink? No – Ms Cummings and Mr Hodges were new in post; the union rep's involvement, Ms Greenfield – *"all recollect and their evidence carries significant weight on the events in which they were involved".* Conspiracy to remove the claimant and unfairly mark her portfolio? This simply does not

match what R and its witnesses say. Ms Greenfield and Mr Greaves had an obligation was to call out adverse behaviour.

98. On the claims, Mr Burrows argues that the direct discrimination and discrimination by association claims were not made out. No comments were made as alleged; the claimant may have been asked to outline issues related to health, but this was not an interrogation, and it is within the statutory guidance to raise any issues, both the mentor and the NQT. There was no statement that she may *"lash out"* or was a risk to pupils. There was a dispute whether some meetings took place as alleged by the claimant, or not.

99. There was no lack of support given to the claimant on the claimant's portfolio, whether or not the mentor - mentee relationship was as described, bear in mind that it was unusual for a mentor/mentee to have adjoining classrooms and be in the same year group. There was adequacy of support.

100. At the end of the 1st term options were presented to the claimant *"whichever choice the claimant makes there has to be a choice of benefit and risk. Either continue with NQT support function or change placement and waive 1st term in order not to have an unsatisfactory 1st term's report".*

101. Mr Burrows argued that the threat of the disciplinary issue was not about the 1st term "It was not considered at the outset of the 2nd term." When it was raised it *was "justified to do so as it related to marking…".* Mr Burrows argued that the issue of marking *"Can't be avoided, it must be tackled, if not addressed how can you bring its seriousness to the claimant's attention … this was an exercise of discretion."* Mr Burrows argued that any member of staff who did what the claimant did - not informing of returns and absences, not marking, *"would have rendered themselves open to worse sanction"*. Any hypothetical comparator would be treated the same - off work 15 days and who had the same portfolio issues.

102. Mr Burrows accepted that there was *"actual knowledge of potential disability"* from 29 September, and that s.15 EqA was engaged from this date. But the allegations did not happen as the claimant recalls. On causation, the treatment has to be unfavourable arising as a consequences of something arising out of disability. The more causal links there are the less likely to fall with s.15 test. and here, the issues are not absence themselves*, "the issue is how absences are handled, the communications around absence."* The issue of 15 days absence – 6/7 days disability related? Even if these days do arise out of disability the s.15 justification defence applies. The legitimate aim of complying with the statutory induction and the necessity of evidencing this, and the effective running of a large school. Proportionality: even where there is a lack of evidence arising and lack of marking arising out of absence, and this arises out of disability, the respondent only highlights the claimant's progress based on evidence she is required to present. Also proportionality may require an extension, but only when 30 days absence is reached. The unsatisfactory grading was proportionate as it triggers support and an independent view on provision – this is entirely proportionate. It does not cast them out, it's not said 'that's it', although this may have been the claimant's perception. *"This is what*

she sees. But this not the outcome of that term. Proportionately comes with additional support."

103. Reasonable adjustments: there was no engagement from the claimant and no knowledge by the respondents. The respondents did not have enough information from IMAS as the claimant was fit for work; the claimant had opportunities to engage with OH which were missed, and the claimant failed to provide information.

104. The claim of Harassment – the allegations do not equate with the respondents wanting to keep the clamant in school and help her progress. But this is the claimant's perception. The report – the *"fundamental purpose of the report is developmental, and sometimes we have to hear what we do not want to hear to develop."* And report is not one-sided, it does bring out the positive as well as the negative, notifying where development is required. In any event the respondent was not aware she was seeing union until early December, there was no protected act before mid-December And the continuing performance discussions are not in itself victimisation.

105. Mr Wynne for the claimant argued that the respondents were aware of issues related to her health, they wanted her to attend OH because of this knowledge, and the claimant was open about her health - - 234-236 states that for her fibromyalgia she may need support and time off – the respondents were "alert to the possibility". Also, on the respondents own case, Mr Hodges is asking to see the claimant to see how she is – and she discusses with Mr Smith *"tremors and medication, so the claimant is revealing lots to the respondents".* On her health issues prior to starting with the school, this was not an issue for adjustments, and she did not know that her condition *"was a subtle complex illness and which arose to be significant in September 2014 … a re-emergence of a latent condition."*

106. The big issue argued Mr Wynne was the absence for the Lumbar Puncture, this led to her being marked as unsatisfactory -and this is connected with re-emergence of Guillain – Barre, and all this occurred through the MS potential diagnosis.

107. The issue of danger to children and what was said/ dates of meetings. Mr Hodges did make these remarks – and see his email to Mr Greaves saying the same - 'is it possible to remove someone from the classroom…' – the same issue.

108. The respondents therefore clearly had imputed knowledge of disability by the end September 2014.

109. On the issue of integrity; the respondents rely on an email exchange where they are "talking at cross-purposes"; there was no suggestion that the claimant's PGCE s mentor realised how her remarks were going to be interpreted. The respondents argue 'integrity' but they did not challenge the claimant, or asked her 'tell us more'; it's just been 'left' as an issue. And the claimant's explanation and the respondent saying she has provide different evidence "It's the approach

Mr Hodges has taken to the evidence - this suits story the of the claimant not telling the truth". If their thinking was that this conduct amounts to a lack of integrity, *"they had to get to the bottom of this - as in fact the accounts are not irreconcilable."*

110. The issues of lack of integrity raised in the NQT report – 367 and the examples that follow – "if these are the examples then it doesn't follow that the conclusion is a lack of integrity". The claimant has always explained why she did not attend meeting. And the view on integrity has developed as a result of the claimant's ill-health – caused by absences and the mail exchanges with mentor. The respondent has decided before seeing the evidence that they wanted to give the claimant an unsatisfactory grade, and wanted to make it "strong enough". No one taken responsibility for negative comments. Chances are caused by negative view of claimant which is because of her absences.

111. The claimant's uploaded evidence. No-one looked at it after it was uploaded on 2 December 2014. No evidence that the claimant's work was not of proper standard; in fact the rest of the report appears to tie personal and professional conduct with ill-health. All of the comments are about absence and unprofessionalism "this document is just a personal attack on the claimant, almost entirely absence related" and there is "no way" these are not related to disability.

112. Ms Greenfield deals with the report on the basis that it is true, but she knows that the claimant as saying that this is all about absence. Ms Greenfield *"failed to engage with this issue, which suggests she did not approach the report with the critical eye that was required, which was this report was made worse because of the claimant's absence. Could this report be different, given some accommodation for absence?* And once the respondents "poison the air with a lack of integrity", she can't say it's tainted as this will be *"stacked against her".*

113. On 18 December the threat of disciplinary measures. Look at later correspondence which adds detail, see 429 ' disciplinary ..'. And then Mr Hodges identified a lack of marking and this leads to Ms Greenfield saying disciplinary. "This is not benign". To be benign would be to make sure the claimant understands our expectation. Instead documentation is got together for a disciplinary case against C. The respondent is *"avoiding all of the usual steps to solve this - to assist constructively and instead trying to trigger disciplinary."* When looking at policies in January, they are trying to put together a case against the claimant and this is the case from 19 December onwards.

114. By 18 December the relationship had broken down, discrimination had occurred, into January more failure. The claimant resigned in response to all of this; it was a discriminatory dismissal.

115. The evidence is all *"massively in the claimant's favour. The idea that the way that the claimant was treated was no-way because of her disability would be contrary to most of the key documents"*. It's obvious that the respondents took stance they did is because of the claimant's absences. "It spiralled out of control and was mishandled". They should have sought OH support to manage

situation which they could see was not working. They do not "they blundered on with a punitive stance."

116. Mr Burrows had a right of response: the issue of disciplinary – the timeline means there was "consideration of options and what the disciplinary grounds might be – but plan A was to get back in at beginning of next term with action plan." The documents show that maths marking being discussed within the action plan, this was being addressed with C.

117. The issue with the claimant's presentation of the PGCE issues – pages 320-321 – the issue is that the claimant downplays the effect of illness at the end of her previous teaching placement and puts blame on an earlier unhappy placement – this is the problem with the claimant's presentation. The issue is not the claimant's absence due to disability – "it is in essence her inability to raise her game or accept further consequences, that her lack of engagement and communications and professional curtesy was having on her Professional Standards.

Conclusions on the evidence and law

Direct Discrimination

118. We considered first, was claimant treated less favourably than a non-disabled person in the same or similar circumstances would have been treated by the respondents? As stated above, we considered that Mr Hodges did ask questions of the claimant about her health and its potential effects on her ability to teach her pupils; these were we found questions he would have asked of any non-disabled NQTs in the same or similar circumstances – i.e. where the NQT had not provided a PGCE assessment, where the NQT had raised medical or other concerns which could have an effect on their teaching practice and where there was an apparent issue not disclosed to them from the PGCE year which could be having a continuing effect on that comparator. We found therefore that comments made to the claimant on 29 September and on/around 3 December about the claimant's health and her relative performance would have been said to a non-disabled NQT in the same of a similar circumstance.

119. We also concluded that there was no lack of adequate support to the claimant, in mentoring support or in the preparation of her supporting evidence file. On the claimant's own case she did not think she did not need assistance, and she uploaded information too late to be properly considered before it was assessed. The claimant was treated no differently than Ms Miller would have treated a hypothetical comparator.

120. We carefully considered whether Mr Hodges referred to the claimant's lesson as *"poppycock".* We concluded that he was very clear the lesson was failed and why, and we are clear that Mr Hodges was also significantly concerned about other issues in the claimant's teaching practice including marking. Whatever precise words were said, and we do not consider he used the word poppycock, we concluded that the same words and tone would have been used to a hypothetical NQT in the same position as the claimant.

121. While we had no direct information on the allegation made in writing of inappropriate language, other than the claimant had received a parental complaint, we again considered that this action would have been taken against a hypothetical NQT with the same or similar record to date against whom a similar allegation was made.

122. We concluded therefore that in relation to these claims of direct discrimination, the claimant has not shown a difference in treatment, and this claim therefore fails.

Direct Discrimination by perception

123. We noted that the respondents conceded that they had at least implied knowledge that the claimant was disabled by end September 2015. Given the claimant's discussions with Ms Miller and her providing information on her earlier medical history and potential MS diagnosis, we concluded that the Ms Miller was aware from 16 September 2014. The claimant informed Mr Smith on 29 September, and this was the date we considered that all respondents were aware the claimant was likely to be suffering from a disability.

124. We asked whether the claimant was treated less favourably by the respondents on the basis they perceived she was disabled with multiple sclerosis or similar condition? Again, in relation to the 29 September 2014 meeting, we concluded that Mr Hodges would have made similar remarks to staff who were not disabled, who he believed may be having similar issues with their NQT year to date and similar issues in their PGCE year.

125. We concluded that the request for information from the claimant's PGCE tutor amounted to an act of direct discrimination by the 1st respondent. The reason: we considered that the reason why this request was made was directly related to the claimant's health, it was said because (i) the claimant's recent discussions about her health with Ms Miller (ii) her potential diagnosis of MS; (iii) Ms Sternstein's reference to the claimants "ill-health" during the PGCE year. We do not consider that, in a comparable situation, a comparator who had suffered ill health in their PGCE year and who had not provided all paperwork at the start of their NQT as a result, but who had not disclosed the fact of a potential disability and past disability to the respondents, would have been treated the same way. The email would not have been sent to that comparator's PGCE's tutor asking for medical information and for this not to be disclosed to the comparator. We concluded therefore that a comparator would not have had such an email sent asking for such health information. In reaching this conclusion, we acknowledged that the respondents view was the the claimant was hiding information from them, and this was their reason for the request for further information. But the respondents had no evidence she was hiding something, just a suspicion, and this suspicion was in any event connected directly to the fact the claimant had disclosed her potential MS diagnosis. We concluded that the reason why this email was sent to Ms Sternstein was because of the claimant's perceived disability, and this allegation is proven.

Discrimination arising from disability

126. Did the respondent treat the claimant unfavourably because of something arising in consequence of her disability?

127. We concluded that staff members may have asked questions of the claimant. However, the allegation on 6 November 2017 does not specify which member of staff is alleged to have made a pejorative remark and the claimant has not proven that this remark was made. Accordingly, there was no unfavourable treatment arising in consequence of disability and this allegation fails.

128. We accepted that on 27 November and on/around 3 December 2014 Mr Hodges did ask questions about the claimant's absences, what was wrong, whether she was well enough to teach, the lumbar puncture process and that her absences would affect her progress. We also accepted that these remarks in the main arose because of matters arising from her disability – the claimant's medical appointments and disability-related absences. However we concluded that the questions were, in the context they were raised, a proportionate means of achieving the legitimate aim of ensuring the claimant was complying with her NQT requirements and managing staff absence. Mr Hodges was entitled to ask for information, and while the claimant was uncomfortable with such questions, and the direct manner in which they were asked, we concluded that it was proportionate to ask such questions, given the clear legitimate aim of finding out as much information as required to support NQT teachers and manage sickness absence.

129. As stated above, we accepted that many of the issue in the term 1 NQT report were legitimately raised – the absences and the claimant's significant lack of evidence of progress towards standards. We accepted the respondent's "legitimate aim" as 'legitimate'. Our concerns centred on the reference to the claimant *"lacking in integrity"* and the examples given for this. We concluded that this was clearly an unfavourable remark for all the reasons set out above – including a possible future detrimental effect on her career.

130. We next considered what was the reason for this treatment – with a focus on why this treatment occurred (*Pnaiser)*. We concluded that the reason for this treatment was directly related to the claimant's disability or perceived disability, and that this was the evidence of Mr Hodges, that one of the reasons for this statement was that the claimant had not been *"fully transparent"* in saying no health issues previously, *"… and she said no health issue, that the training school was at fault…"*. We concluded that this showed this statement on integrity arose in consequence of Mr Hodges belief that the claimant's health condition was more serious than she let on in the application process and at the outset of her employment; his knowledge of her long-standing condition of Guillain-Barre syndrome, the potential diagnosis of MS. We concluded that this statement was made in consequence of her disability.

131. We next considered whether the respondent's statement was a proportionate means of achieving its legitimate aim. We concluded not. We noted that the

statement and the reasons for making it was not first discussed with the claimant, for all the respondents believed she may have been avoiding some contact with them. But the respondents also failed to properly investigate before whether the claimant did lack integrity, whether its perceptions were justified. We noted that an issue to consider on 'proportionate means' is whether an alternative approach could have been taken. We concluded that the respondents could, and should, have properly investigated their concerns before adding such an opinion in the report. We also concluded that the respondent failed to reflect on its actions, in particular its contact with Ms Sternstein, which Mr Hodges now accepts was misguided. The breakdown in relationships was caused or considerably contributed to by this action, and this contributed to the negative report. Making an allegation of lack of integrity was very serious, and we concluded there was no proper consideration of the likely effect on the claimant before doing so, that the proper context of the issues arising had not been properly explored. While there may have been questions to ask about what the issues were at the end of the PGCE year, it was clear from Ms Sternstein's report that she was supportive of the claimant in a professional capacity, and answered the health questions appropriately. Mr Hodges had not investigated further. We concluded therefore in this context that suggesting the claimant lacked integrity was not a proportionate means of achieving the respondents' legitimate aims.

132. We concluded that there was no connection whatsoever between the request to sign an OH form and the letter to the mortgage company. Accordingly, there was no unfavourable treatment arising in consequence of disability and this allegation fails.

133. We noted that a significant reason why the meeting time was changed with Mr Greaves was at his own request, his usual practice. We also noted that it was his view that the claimant should be given the option of remaining or leaving with a clean NQT. Therefore there is no unfavourable treatment arising in consequence of disability, and this allegation fails.

<u>Failure to comply with duty to make reasonable adjustments</u>

134. We concluded that the respondents did not have a practice whereby it provided insufficient support to the claimant. The claimant was, we found, provided appropriate support on her term 1 evidence file. While Ms Miller did step back as a mentor, at least two other members of staff were available and the claimant did have an informal mentor present at her January NQT meeting. We noted that the claimant did not raise any issue, for example that she was not coping with marking at this meeting, that the claimant appeared to accept (or did not object) to the issues raised by Ms Miller at this meeting.

135. If we are wrong, and there was such a practice, we concluded that the PCP did not place the claimant at a substantial disadvantage in comparison with persons who are not disabled, by causing or contributing to her failed NQT term 1. The reason – the claimant's evidence was that she believed her NQT evidence file was of an appropriate standard, she did not seek advice or support as a consequence.

Harassment

136. The claims of harassment fail for the following reasons:

137. The alleged comments on 29 September, 14 and 21 October, 5, 14, 27 November 2014 and 2 February 2015: We concluded as above that remarks about health were made, and a negative lesson plan result was communicated on 2 February 2015, but the remarks were not always as recalled by the claimant, and that they were in context appropriate remarks, even if unwelcome. Accordingly, on our findings on the remarks that were made, we concluded that there was no intent to harass. We accept that the claimant may have perceived the remarks as harassing, but given our findings on the remarks as made, we did not conclude that it was reasonable for the claimant to so perceive. They were, in context, reasonable questions to ask even if often asked in a somewhat terse manner.

138. We carefully considered whether Ms Miller's email to Ms Sternstein amounted to harassment. We concluded not. There was no intent to harass. We accepted that the claimant felt very upset and angry that this request had been made behind her back however we concluded that this act did not have the proscribed effect – it did not "violate her dignity" and it did not create an intimidating, hostile, degrading, humiliating or offensive environment for her. We concluded that this was conduct related to her disability and the claimant was clearly angry and she expressed this anger, but she was told the reason why the information had been sought, and why the respondents considered it appropriate to do so. While it was a clearly misguided thing to do, as acknowledged by Mr Hodges, and it angered the claimant who complained about it, in itself it did not create the statutory level of harm required for 'harassment' – it did not violate her dignity or create an adverse environment for her. There were reasons why the respondents contact Ms Sternstein which related to legitimate concerns they had, and the claimant was told this. A cooling in relations between her and Ms Miller did not affect the professional assistance given by, and available from, Ms Miller.

139. We carefully considered whether the NQT report reference to *"lacking in integrity"* amounted to an act of harassment. We concluded not. The respondents had concerns, and these concerns related to the claimant's practice in term 1 and whether these could be related to the PGCE issues, whether the claimant had been honest in her approach. There were the issues with reporting absence and attending meetings. We concluded that the respondent failed to raise these concerns with the claimant in an appropriate way, but we concluded that they were concerns which would have been raised with the claimant in any event sooner or later. Some of the issues arising were raised in a disciplinary letter. Ms Greenfield did not consider the remark should not be made in the NQT report. We concluded that whenever this issue was put to the claimant it would have caused significant concern and anger but that in context it was not reasonable for the statement to amount to harassment – if

not any concern of an employer about conduct made outside of a disciplinary process could in theory amount to harassment.

Victimisation

140. We concluded that the claimant made a protected act when she made allegations which were passed to Ms Greenfield on 18 December 2014. Any act made before this date the respondents were unaware of. Only three acts of alleged victimisation fall after this protected act, that she was alienated from colleagues, the lesson observation of 2 February 2015 and the allegations on 14 February 2015. We concluded that the latter two were clearly detrimental to the claimant, but that they did not occur because of the claimant's grievance. We concluded that there was no evidence she was alienated from colleagues. We concluded that the lesson observation was an accurate, if blunt, assessment of the lesson given by Mr Hodges in the knowledge that there were significant other issues with her practice which were going to be formally raised with her. We concluded that this was not because of the claimant's grievances, but because of his genuine concerns about the claimant's ongoing failure to meet Teacher Standards; similarly with the disciplinary allegations.

Claims against respondents 2 and 3

141. We concluded that the case as put was put against the school, respondent 1, that the claim was essentially one of vicarious liability for the acts of respondents 2 and 3. It was not suggested that respondent 1 could not be liable for the acts of another respondent. We did not consider that it was seriously put respondents 2 and 3 should be held individually liable for the acts of discrimination alleged. We concluded that the acts of respondents 2 and 3, whilst acknowledged in part to be misguided, and we found to be discriminatory, were anything other than attempts to address a complex situation with a NQT teacher. We considered that the main failing by individuals was not obtaining HR advice in time, while also noting there was a real desire to keep things as informal as possible as this was felt to be the best way to produce as successful outcome. Accordingly, we did not find respondents 2 and 3 liable for the acts of discrimination as found.

142. In summary:

140.1 The emailing of Ms Sternstein seeking information about the claimant's ill-health amounts to an act of unlawful direct discrimination by the first respondent.

140.2 The comment that the claimant was "lacking in integrity" amounts to an act of discrimination arising from disability by the first respondent.

140.3 All other claims fail and are dismissed.

Remedy

143. The parties are asked to write to the Tribunal within 14 days providing their dates of availability for a one hour telephone Preliminary (Case Management) Hearing. It would be preferable if this hearing could take place in January or February 2021.

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EMPLOYMENT JUDGE M EMERY

Dated: DATE 2 January 2021