THE EMPLOYMENT TRIBUNALS

Claimant: **Mrs C Kelly**

Respondent: **Durham County Council**

Heard at: **Newcastle Hearing Centre (by CVP)** **On:** **3 and 4 February 2021**

Before: **Employment Judge Morris (sitting alone)**

Representation:

Claimant: **Mrs J Archer, the claimant's sister**
Respondent: **Mr A Webster of Counsel**

RESERVED JUDGMENT ON LIABILITY

The judgment of the Employment Tribunal is that the claimant's complaint that her dismissal by the respondent was unfair, being contrary to sections 94 and 98 of the Employment Rights Act 1996, is not well-founded and is dismissed.

REASONS

Procedural matters

1. I consider it appropriate first to record that the conduct of this Hearing was fraught. In light of the medical evidence before the Tribunal (for example the letter from the claimant's GP dated 6 July 2020 (446)) there can be little doubt that the claimant is seriously unwell.

2. I made allowances and adjustments to accommodate that as did, I am pleased to record, Mr Webster in his conduct of the case on behalf of the respondent. At the outset I encouraged the claimant to say if ever she needed a break and asked her that question from time to time during the Hearing. I am pleased that the claimant did request breaks as did Mrs Archer on her behalf and the Tribunal adjourned as often and for as long as was requested.

3. During the course of cross examination towards the end of the second day of the Hearing the claimant's requests for breaks became more frequent. When we

reconvened after one such break at 3.45 Mrs Archer explained that the claimant was becoming tremendously stressed. She did not want to adjourn to another day but she was finding it difficult to answer questions as well as she had done earlier, which was a cause of concern. She asked me if I had any suggestions. I answered that there were really only two options: first, we could take a longer break during which the claimant could hopefully compose herself or we could adjourn the Hearing but that would involve inevitable delay. I commented that they need not be discrete alternatives as we could, first, take a longer break after which, secondly, the claimant could decide whether or not she wished to proceed or adjourn. That proposal was adopted.

4. When we reconvened after about 15 minutes Mrs Archer informed me that the claimant would like to proceed and thanked me for being very considerate. In the circumstances, Mr Webster then said that he would not pursue any further questions with the claimant which, therefore, only left limited re-examination by Mrs Archer with which the claimant said she would be comfortable.

Representation and evidence

5. The claimant was represented by Mrs J Archer, her sister, who called the claimant to give evidence. Evidence in support of the claimant was given by two former employees of the respondent, Mrs F Chesters and Mrs D Appleby, who had worked with the claimant at Tow Law Millennium Primary School ("the School") but they were not called to give evidence as Mr Webster accepted, without challenge, the content of the witness statements that each of them had produced.

6. The respondent was represented by Mr A Webster, of Counsel, who called four witnesses to give evidence on behalf of the respondent: namely, the Headteacher of the School, Mrs L Jackson, and three of its governors, Mrs L Croft, Mr R Manchester and Mr J Hart.

7. The evidence in chief of or on behalf of the parties was given by way of written witness statements, which had been exchanged between them. I also had before me a bundle of agreed documents comprising some 546 pages. The numbers shown in parenthesis in these Reasons refer to page numbers or the first page number of a large document in that bundle.

The claimant's complaints

8. The claimant's complaint was that her dismissal by the respondent was unfair, being contrary to Section 94 of the Employment Rights Act 1996 ("the 1996 Act") in that (at the risk of over-simplification) while she accepted that the reason for her dismissal was capability, the respondent had not acted reasonably in relation to her dismissal.

The issues

9. As the respondent accepted that it had dismissed the claimant, the issues in this case are as follows:

9.1 Has the respondent shown what was the reason the claimant's dismissal and, if so, was that a potentially fair reason within section 98(1) of the 1996 Act?

The respondent says that the reason was capability (in the sense of long term absence as a consequence of her ill-health) and the claimant did not dispute that that was the reason for her dismissal. Capability is such a potentially fair reason dismissal.

9.2 If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant including as set out below?

9.2.1 Did the respondent genuinely believe the claimant was no longer capable of performing her duties?
9.2.2 Did the respondent adequately consult the claimant?
9.2.3 Did the respondent carry out a reasonable investigation, including finding out about the up-to-date medical position?
9.2.4 Could the respondent reasonably be expected to wait longer before dismissing the claimant?
9.2.5 Was dismissal was within the range of reasonable responses?

Although it was agreed that this hearing would be limited to the question of liability and would not address remedy it was nevertheless also agreed that the following further issues would be considered at this hearing:

9.3 If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would have been dismissed had a fair and reasonable procedure been followed/have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825.

9.4 Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before her dismissal, pursuant to section 122(2) of the 1996 Act; and if so to what extent?

9.5 Did the claimant, by blameworthy or culpable actions, cause or contribute to her dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to section 123(6) of the 1996 Act?

Consideration and findings of fact

10. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the Hearing and the relevant statutory and case law (notwithstanding the fact that, in pursuit of some conciseness, every aspect might not be specifically mentioned

below), I record the following facts either as agreed between the parties or found by me on the balance of probabilities.

10.1 The respondent is an extremely large and well-known local authority with significant resources including a dedicated Human Resources Department ("HR").

10.2 The claimant was employed by the respondent at the School as Office Manager. Her employment commenced 6 June 1994 and terminated when she was dismissed on 12 February 2020, the effective date of termination of her employment being 21 November 2019.

10.3 Nothing untoward occurred during the first 25 years so of the claimant's employment. Indeed, she was well thought of as an effective and efficient Office Manager. Three members of staff worked within the School office: the claimant, the School Secretary and a Clerical/Resource Assistant all of whom worked part-time undertaking slightly more than 20 hours each week.

10.4 Around the beginning of 2019 the School considered it necessary to introduce certain changes to working practices some of which were essentially being dictated by government while others were considered necessary in the interests of the financial viability of the School. The claimant was concerned about the impact of these changes, which she felt could not be introduced without impacting upon the efficiency with which the functions for which she was responsible at the School could be carried out.

10.5 One such change was the introduction of a new Cash Handling and Transportation Policy. The claimant had explained to Mrs Jackson and school governors that the existing staffing levels would not allow them to comply with the new policy and attempts were made to address her concerns, which involved the production of five drafts of the policy. The claimant remained dissatisfied, however, and eventually the governors adopted the policy as they were required to do by the respondent. This upset the claimant greatly and she felt that her trust in management was broken.

10.6 The claimant was absent from the School for one day on 25 March 2019. Amongst other things, her medical certificate referred to her absence being due to stress and anxiety, which the claimant confirmed to Mrs Jackson upon her return to work. She and Mrs Jackson agreed that she should be referred to Occupational Health ("OH"). A telephone appointment took place on 4 April 2019. The resultant report (37) contained the clinician's response, which included the following advice:

10.6.1 The completion of the respondent's Stress Policy and Procedure and Toolkit for Schools ("the Toolkit") (388), in particular the Stress Management Questionnaire (393m) to identify the perceived work

issues and to assist in developing a plan for supporting the claimant at work.

10.6.2 To develop an agreed, documented action plan with timescales for monitoring the effectiveness of any identified measures.

10.6.3 In general it may be helpful if regular meetings were arranged with appropriate line management to ensure the opportunity to discuss any concerns at an early stage.

10.6.4 The nature of the claimant's concerns was such that it was not medically possible to establish the extent to which any eventual support package would address the workplace stressors.

10.7 Also in 2019 a redundancy consultation process was commenced at the School. This resulted from the School having become over-staffed and a review by the governors showing that its expenditure on administrative staff was significantly greater than in comparative schools in the area (475). The claimant was not at risk of redundancy as her role was considered to be important for the school. She requested voluntary redundancy but for these reasons her request was declined. The claimant asked to be involved in the redundancy consultation process with the affected staff but Mrs Jackson did not agree to that as the claimant was personal friends with those who were at risk of redundancy and she did not want to place the claimant in a difficult position or to have friendships impact on the decisions that needed to be taken.

10.8 On 5 April 2019, the claimant wrote to the then Chair of Governors, Mr R Bell, (copied to Mrs Jackson) expressing her concern about the staffing situation (44). The timing of that letter was not good as the claimant only handed it to Mr Bell as he left the concluded meeting of the governors at which decisions had been taken that administrative staff at the school would be reduced from 31 August 2019, albeit that the requests for voluntary redundancy from the two affected employees would be accepted from that date. Mrs Croft then became the acting Chair of Governors. In light of what she considered to be the separation of roles between the School governors (with responsibilities for the School vision, financial risks and educational outcomes) and the Headteacher (with responsibilities for the day-to-day management of staff) Mrs Croft did not consider it appropriate to send a detailed reply to the claimant. Instead, on 13 May 2019, she acknowledged receipt of the claimant's letter to Mr Bell and informed her that the matter had been brought to the attention of the governors and the contents of her letter had been duly noted (45).

10.9 Mrs Jackson did not receive the OH report referred to above until 20 May 2019 but, as soon as she did, she gave the Toolkit to the claimant and asked her to look through it so they could have a 10 minute chat about it the following day. When Mrs Jackson went to discuss the Toolkit with the claimant, however, she declined. As there were only a few days left before the half-term break Mrs Jackson decided simply to let the claimant have

more time to consider it and revisit the subject after the break, which might benefit the claimant. Unfortunately, the claimant did not return to school after half term and her absence, from which she never returned, formally commenced on 3 June 2019. The reason for absence given on the claimant's medical certificate was "Acute stress reaction" (409). Similar diagnoses are given in subsequent medical certificates (410 to 414) albeit referring in addition to "severe anxiety". Each of the medical certificates advised that the claimant was not fit for work it not being indicated that the claimant might benefit from any of the alternatives such as a phased return to work or altered hours or duties. I also note that the certificated absence increased from one to two months and finally three months; that being from 27 December 2019 to 26 March 2020 (414).

10.10 On 5 July 2019 the claimant wrote to Mrs Croft (again copied to Mrs Jackson) (46). At this time the claimant had been absent from School for almost 6 weeks due to what she said in her letter was the acute stress reaction that was triggered by the decision to reduce the number of staff working from the office. The claimant explained that she was distressed that the problems that were causing her stress had not been addressed or even discussed and that the thought of returning to School in September without the issues being resolved was preventing her recovery. She asked that the governors should advise on the issues listed in her letter of 5 April. Once more Mrs Croft was alert to what she considered to be the separation of roles between the School governors and the Headteacher. She did not consider it appropriate for the governors to give the advice that the claimant sought in her letter and therefore spoke to Mrs Jackson A letter of reply from Mrs Croft (49) was sent to the claimant by Mrs Jackson under cover of an email of 1 August 2019. In her letter Mrs Croft explained the governors' reasoning for making the redundancies but also that it was intended that 6 hours for administrative/general office duties that had previously been undertaken by the Resource/Office Assistant would be increased with the establishment of a new 11-hour post that would be advertised in September. She also set out some up-to-date systems that had been put in place or were to be introduced by September to try to make the office run more smoothly and ease unnecessary pressure. These included an online stock book, an online uniform ordering system, electronic registers, school dinners being paid through Parent Pay, use of Facebook to communicate with parents thus reducing the need for letters and a computerised signing in system. These changes, she said, would have an impact on the office and would reduce the amount of time taken up with those tasks and free everyone to carry on with their own duties throughout the working day.

10.11 The respondent operates an absence management process entitled, "Schools Attendance Management Policy and Procedure" (380). In accordance with that procedure Mrs Jackson wrote to the claimant on 17 July 2019 to arrange the first absence management meeting on 4 September 2019, which coincided with the School reopening for the new term. The claimant attended the meeting with her trade union representative, Mr McCully. The claimant had produced a fairly detailed

report headed, "Notes for Absence Management Meeting – 4 September" (56) in which she set out in some detail her health and the issues that were causing her health problems, which she divided into the following sections: "Working Relationship and Trust", Communication and Listening", "Work Overload", "New Software and Other Changes" and "Team Building". In the event, however, she unfortunately became too unwell to go through this report. The claimant also took to this meeting part of the Toolkit (64) that she had completed and in which she had raised a number of issues relating to her work and working environment including the effects of the redundancies on the number of staff in the School Office, no consultation about that reduction or in relation to the introduction of new software, such changes not having been sufficiently researched prior to implementation, a lack of supportive feedback and no response having been received to her letter of 5 April 2019 to the governors/Headteacher. It was agreed that there would be a further meeting on 12 September but that did not take place as the claimant was too ill.

10.12 As the claimant became unwell during the meeting on 4 September, Mrs Jackson made a further referral to OH on 6 September, the appointment taking place on 25 September. The OH report is dated 26 September 2019 (68). Although there was a subsequent OH report arising from an appointment on 7 November (93), the claimant withdrew her permission for that report to be released to the respondent (99). This report of 26 September is therefore important as it is the last report that was available to inform the decision as to whether or not the claimant should be dismissed. The clinician's response in the report of 26 September included as follows:

10.12.1 The likely duration of absence may prove dependent upon the resolution of workplace stressors.

10.12.2 The claimant had reported on the impact of her anxiety including difficulty getting out of the house and being where there are groups of people.

10.12.3 The advice regarding the completion of the Toolkit and for regular meetings to be arranged that had been given in the previous OH report was broadly repeated as was the observation that the nature of the claimant's concerns was such that it was not medically possible to establish the extent to which any eventual support package would address obstacles to a return to work.

10.12.4 Advice was given directed at the possibility of the claimant being helped to return to work.

10.12.5 The claimant had been referred to counselling

10.13 A meeting to follow-up on the discussions on 4 September was arranged for 16 October 2019 at which it was intended that the issues raised by the

claimant in the Toolkit would be discussed further. Unfortunately, the claimant was not well enough to attend but she confirmed that she was happy for Mr McCully to attend the meeting without her. In preparation for the meeting he sent to Mrs Jackson the Stress Questionnaire that the claimant had partly completed (72). That is an interesting document as it sets out over nine pages, in effect, a dialogue of responses between the claimant and Mrs Jackson: first, the claimant's response, then Mrs Jackson's response and details of the action being taken and finally a second response of the claimant. At the meeting Mr McCully advised, amongst other things, that the claimant was still unwell and not well enough to return to work and that "despite actions being taken by the school to facilitate a return to work it was unlikely that these would be enough".

10.14 Mrs Jackson sent the claimant a copy of the notes of the meeting as recorded in the Attendance Management Interview Form (82) and informed her that a further OH appointment had been arranged for 7 November. The claimant considered that there were several incorrect statements in the Interview Form and wrote to Mrs Jackson on 24 October (85) to make corrections including that she was accessing counselling not from Talking Changes but from Mind; the major issues highlighted in her Questionnaire were not addressed; specialists had not indicated that she had any confidence issues but that she had an acute stress reaction resulting in her suffering with severe anxiety because she had tried to have these issues resolved for several months before her attempts were even acknowledged. The claimant commented that she was unclear what the School considered to be reasonable adjustments. What she felt was necessary was that the issues that had caused such distress should be addressed.

10.15 Mrs Jackson wrote to the claimant on 4 November (91) hoping to arrange a further absence management meeting on 20 November. The claimant agreed in oral evidence that in her letter Mrs Jackson had made a genuine attempt to engage with her and get her back to work albeit adding that the issues she had raised had never been addressed. That meeting took place on 20 November (101). Once more, the claimant was unable to attend but was represented by her trade union representative Mr Glew, who put forward submissions on her behalf; the change in representative being the result of the claimant having lost confidence in Mr McCully. At the meeting Mr Glew reported that there was not a great deal of change in the claimant's health and that she was not ready to come back to work; she had accessed Mind; she would like historical issues addressed. He also agreed, subject to the claimant's agreement, to facilitate a mediation meeting on 11 December 2019, but the claimant did not agree to participate in mediation. The notes of this meeting also record that the claimant had attended a further OH appointment on 7 November and although she had received the report it had not yet been released to the School as it did not include information from her GP to the claimant had spoken.

10.16 Having received the notes of the meeting the claimant wrote to Mrs Jackson on 26 November again to correct inaccuracies. She noted that over the past six months her health had deteriorated and that was what was preventing her return to work. She therefore did not agree with the comment that she was not ready to come back. She explained that she had not agreed to the release of the OH report because the OH practitioner had said that he would compile his report after receiving a report from the claimant's GP but the claimant confirmed that as soon as she was happy that the OH report was accurate it would be released. As mentioned above, that report never was released prior to the decision that the claimant be dismissed.

10.17 The next absence management meeting took place on 19 December 2019 (107). As with the previous meeting the claimant was unable to attend but she was represented by Mr Clew. In advance of the meeting the claimant submitted a number of questions to Mr Glew, which she requested him to raise on her behalf (110). He provided the list of questions to Mrs Jackson. In summary, the questions included why Mrs Jackson and the governors had introduced the cash handling policy in 2015 without staff knowledge when it had been explained that the policy could not be adhered to with existing staff levels; despite the claimant having asked them several times since 2016, why had the governors not monitored the office workload prior to the redundancies; why had Mrs Jackson not provided support in certain situations and not followed up the absence policy to address issues early on; could Mrs Jackson explain why she felt the redundancies did not directly affect the office keeping in mind the claimant's comments that they could not manage without two staff at all times; why did Mrs Jackson and the governors not respond to her letters of 5 April or 5 July 2019; why were the questions on the Questionnaire she had completed in September 2019 not addressed; why were mindfulness sessions for stress and teambuilding not introduced as the claimant had suggested; how did Mrs Jackson and the governors propose they would manage the office workload after the redundancies; would Mrs Jackson comment on the claimant not being involved in providing information and explaining how changes would affect the office; if it is right that she was highly thought of, why had she been treated in the way she felt that she had been treated. The claimant concluded her letter, "My trust has been completely broken; I have been made to feel totally undervalued as a member of staff".

10.18 At the meeting Mr Glew expressed the opinion that there was no change in the claimant's health and he was unable to provide any information regarding the release of the OH report. The notes of the meeting record the next steps in line with the policy as being a referral to a governors' long-term capability hearing. In a brief undated letter to the claimant (113) Mrs Jackson responded to the questions that the claimant had asked Mr Glew to raise. She stated that she felt that the claimant's questions had "been addressed through the well-being document (stress management policy, procedures and toolkits for school) dated 6.9.19", and she concluded "I feel that I have responded and nothing else to say on those issues".

10.19 I find that Mrs Jackson’s response was brusque. Not surprisingly, it upset the claimant and led to her writing to Mrs Croft, as Chair of the Governors, on 10 January 2020 stating that she wished “to file an informal grievance” (115). In this respect the claimant passed an Informal Resolution form to Mrs Croft. Having taken advice from HR, she replied to the claimant on 23 January 2020 that she was unable to submit such a form as she was currently going through the Attendance Management Process, and anything that the claimant was not happy with should be brought up in that process (240). The claimant replied on 24 January commenting that the process had failed, challenging the advice that Mrs Croft had been given and again requesting that her grievance should be investigated.

10.20 By letter of 31 January 20 the claimant was invited to attend a Long-Term Attendance Management Hearing before the First Committee of the School governing body to discuss her continued absence due to ill-health (250). She was informed that the hearing was to be held on 12 February 2020. With the letter the claimant was provided with the confidential report that would be considered by the governors. She was advised of her right to be represented and to submit a written statement or other documentation prior to the hearing.

10.21 The above correspondence between the claimant and Mrs Croft then continued in similar vein before it concluded with an email from Mrs Croft on 6 February (249). She confirmed that she had raised the issue again with HR who had replied that the issues the claimant had raised had already been raised using the Toolkit, and as a result it would not be appropriate for those issues to be looked at under the resolution process. It had been suggested, however, that the claimant could use the issues that she had raised as the basis of the statement of case she would present to the First Committee at the Attendance Management Hearing on 12 February.

10.22 During the hearing, in relation to the respondent’s refusal to entertain her grievance the claimant drew attention to a section of the respondent’s Resolution Policy headed, “Counter claims”, which seemed to support her contention that the attendance management procedure and the grievance procedure could run concurrently or the attendance management procedure could be suspended while the grievance was investigated. In the section within that same Policy headed, “Issues outside the scope of the policy”, however, it is clear that attendance management is one of a number of issues “that cannot be raised through the Formal Resolution process” and, therefore, I am satisfied that the advice of HR as conveyed to the claimant in the letters from Mrs Croft was correct.

10.23 Mr Manchester acted as chair of the governors’ First Committee that conducted the Attendance Management Hearing on 12 February. He and the other governors were supplied with a pack of papers (191), which included details of the claimant’s absences, relevant documents and the respondent’s absence policy. The claimant did not attend the Hearing and chose not to be represented by her trade union as she had no confidence

in the representation provided thus far. She did, however, submit for consideration by the Committee a detailed written statement, with 12 appendices (261), and indicated that she was happy to answer any questions via email. The statement submitted by the claimant is a matter of record, which I have considered in detail, and I acknowledge that the following summary cannot do it justice. I nevertheless record that the claimant's statement included references to the following:

10.23.1 Details of Sickness Absence. The claimant pointed out that her symptoms had been directly caused by a lack of support at work and repeated failure of management to address the issues she had raised.

10.23.2 Stress Management – Support Programme. The historic issues that had initially caused the problem were ignored and her symptoms became worse because the real issues were totally avoided.

10.23.3 Attendance Management Interviews. The claimant had attended the first meeting on 4 September, which had to be cut short because she became so distressed. She was told that the details that she had provided regarding her health would be sent to OH but that had not happened. After 25 years in a role that she had loved the claimant had been devastated by Mrs Jackson's final response to the questions she had provided for Mr Glew to raise at the final attendance management meeting on 19 December. This had caused her to raise a grievance in relation to which she was still awaiting a response.

10.23.4 Occupational Health Involvement. At the first meeting on 29 April the clinician wanted no details of what was causing the stress at work as she felt that would be addressed through the Stress Management Programme, which she had recommended, but that did not happen until September.

10.23.5 Operational Difficulties. The claimant had been incredibly disappointed that management did not consider even discussing the impact that the redundancies would have on the office, which is very different to how it appeared on paper. The new 11-hour role was not advertised until 17 September and some of the software which had been implemented had not been sufficiently researched and had increased the office workload.

10.23.6 Conclusion. The claimant disagreed that the Absence Management Policy had been followed. In this she pointed to the lack of regular contact that she had had with Mrs Jackson, the governors responses to her letters of 5 April and 5 July, the first attendance management meeting being over 12 weeks from her first day of absence, the OH advice on 29 April to place her on the

Stress Management Programme not being acted upon until September by which time she had developed severe anxiety.

10.24 Appendix 12 to the claimant's statement includes what I consider to be a heartfelt "Closing Statement" (301) the first sentence of which in particular is relevant to the issues in this case: "As a consequence of how this situation has been handled by management and a lack of support I have been left in a position where I am too unwell to return to work and feel it most unfair that Governors can choose to terminate my contract on grounds of capability".

10.25 Amongst other things, the First Committee brought the following matters into account in coming to its decision:

10.25.1 The claimant had been absent from work for more than 32 weeks due to acute stress reaction and anxiety and, at the time of the Hearing, she remained absent. The claimant not attending the Hearing further demonstrated that she was not yet able to engage in work-related meetings and, as such, was unlikely to be ready to return to work in the near future.

10.25.2 The School had followed the appropriate absence management procedures as was confirmed by the Attendance Management Interview Forms in respect of the meetings held on 4 September, 16 October, 20 November and 19 December 2019. In this respect the committee noted that the claimant had not attended the later meetings but the governors were satisfied that she was given the opportunity to attend, that she had union representation in attendance and that she had input into each of the meetings either through a union representative or by putting forward written submissions and feedback. It was nevertheless acknowledged that the attempts to engage with the claimant had been restricted due to her not being able to participate in meetings.

10.25.3 The claimant had been referred to OH but had not agreed to the release of the final report. The most recent OH report was dated 25 September 2019 (68). It did not give any conclusive answer about when the claimant might return to work but that return would be dependent upon the resolution of perceived workplace stressors, and that it was not medically possible to determine the extent to which a support package would address any obstacles to a return to work.

10.25.4 In her report Mrs Jackson had advised the Committee that the claimant's absence was having a real impact on the administrative running of the School and that she was having to undertake a lot of administrative duties herself, which impacted on her ability to carry out her usual duties. Mrs Jackson's report detailed a number of matters that had been introduced within the School office but they did not seem to have increased the likelihood

of the claimant returning to work. Mrs Jackson had expressed the view that there was no likelihood of the claimant returning to work, which the Committee considered was supported by the available evidence.

10.26 The Committee considered other options, such as a managed return to work, but felt that a return was unlikely and made the decision to dismiss the claimant. That decision was confirmed to the claimant in a letter of 12 February 2020 (338). Amongst other things in that letter it is recorded that the governors had concluded that there were no alternative roles within the School and due to having no information from OH, redeployment within the respondent could not be considered. In oral evidence the claimant agreed that she could understand the view of the Committee on the evidence available to it.

10.27 The claimant was offered an appeal against the decision, which she exercised by letter dated 17 February 2020 (343). The Appeal Hearing was originally arranged for 23 March 2020 (346) but that was postponed due to the pandemic and was rearranged as a virtual hearing to take place on 22 April by way of Teams.

10.28 In preparation for the appeal hearing Mr Manchester produced a written statement of case (370c) and the claimant produced a written appeal statement (359). She also submitted nine detailed questions to be asked of the Chair of the First Committee (366). Additionally, the claimant was asked a number of questions (361) in advance of the hearing. These included whether she was now prepared to release the most recent OH report with her comments attached if appropriate and she was requested to confirm if the understanding was correct that she was medically not fit to return to work and there was no prospect of a return to work on the horizon.

10.29 In her reply (362) the claimant first explained that it was not correct to say that she had refused to release the OH report. She had received the report but it contained inaccuracies which she had asked to be corrected. She had received no response to that request and, contrary to what she had been informed, the OH consultant had not received a report from her GP, which was because the respondent had failed to pay the GP's invoice for writing the report. In answer to the second question, having set out the background to her progressively worsening health and the reasons for that, the claimant stated as follows:

> "I have now been left in a position where I am so ill that I do not see any prospect of ever being able to return to work. It takes me all of my time to be able to leave the house even shopping. This has been caused by the way Management has handled the situation."

The claimant then stated that her "position has been made untenable" for the reasons she gave, which included the lack of support in her role and her failed attempts to have the issues resolved through the proper

channels. She observed, “My health is shattered; this fact alone makes it impossible for me to move forward into alternative employment.”

The claimant concluded, “As a consequence my return to work has been made impossible ….”

10.30 Mr Hart acted as Chair of the Appeals Panel. Mr Manchester attended the Hearing to present his statement of case and answer questions including those that had been submitted by the claimant (366). The claimant did not attend the Hearing and, once more, chose not to be represented. The appeals panel was satisfied that none of the evidence or information the claimant had submitted caused them to think the original decision that she should be dismissed was in any way unfair, incorrect or invalid. The claimant had confirmed that she was not fit to work and that she did not think she would ever be able to return. As such, the Panel upheld the original decision, which was confirmed to the claimant, with reasons being given, in a letter dated 24 April 2020 (371).

Submissions

11. After the evidence had been concluded the parties’ representatives made submissions which addressed the matters that had been identified as the issues in this case; Mr Webster in the context of relevant statutory and case law. In the hope that might be of assistance to Mrs Archer, I briefly summarised the principles, which I would be taking into account in making my decision as contained in the following case law (albeit not thinking it helpful to give the case names): Spencer v Paragon Wallpapers [1976] IRLR 373, East Lindsay District Council v Daubney [1977] IRLR 181 and, at Mr Webster suggestion, McAdie v Royal Bank of Scotland [2007] IRLR 895 CA. It is not necessary for me to set out the representatives’ submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions below. Suffice it to say that I fully considered all the submissions made and the parties can be assured that they were all taken into account into coming to my decision.

12. That said, the key points made by Mr Webster on behalf of the respondent included as set out below. Given my decision in this case, I have decided that it is neither necessary nor helpful to refer to Mr Webster’s submissions in relation to Polkey or contributory fault.

12.1 The respondent could not wait any longer. It did made every effort to enter into discussions with the claimant and to discern the true medical picture.

12.2 The claimant’s sickness absence had commenced on 3 June 2019. Each fit note made it clear that she was unfit to return to work and that there was no prospect of a phased return or alternative duties. That was consistent with other sources notably OH. The last report to which the respondent had been privy was dated 23 September, the advice in which had been followed: the stress policy had been adhered to, it had sought to arrange regular meetings and the claimant had access to counselling.

Likewise in respect of the April report and the respondent did not have the November report.

12.3 The claimant had not attended the meeting of the First Committee on 12 February 2020 but had submitted a lengthy pack of documents culminating in her closing statement. The claimant had said that she was too unwell to return to work and there had been no suggestion that there was ever a prospect of her returning to work in any capacity.

12.4 Similarly, at the appeal hearing the claimant had submitted the documents and questions. In answer to questions asked of her she had stated that she was so ill she did not see any prospect of a return to work, her health was shattered, it was impossible for her to move to alternative employment and her return to work had been made impossible.

12.5 As to consultation, the first OH report having been received on 20 May Mrs Jackson proffered the questionnaire and suggested a discussion the following day, which the claimant had declined. Ms Jackson had therefore decided to park this until after half term but then the claimant had gone off sick.

12.6 The attendance management meeting on 4 September was the only one the claimant had attended. Others had been arranged on 12 September, 16 October, 20 November, 12 December, 19 December and 12 February. The claimant was too ill to attend any of those and had broken down during the meeting on 4 September, which had to be curtailed; and she had been too ill to attend the appeal by video. There was no criticism of the claimant in this but the respondent had attempted to engage with her to secure her return to work.

12.7 The part-completed questionnaire had been received on 4 September to which Mrs Jackson had responded on 12 September (72) making genuine efforts to address and alleviate claimant's concerns yet that was not well received. Again there was no criticism of the claimant but genuine attempts were being made.

12.8 The claimant says that her illness was caused by the respondent's actions. In McAdie it is stated that there will be limited circumstances in which it is appropriate or necessary to entertain the possibility that the illness was caused or contributed to by a respondent and this is not such a case. In any event there was no culpable conduct on the part of the respondent. The claimant relies upon historical issues. The cash handling procedures long-preceded her illness but even so Mrs Jackson made five attempts to accommodate her concerns but then had to impose the procedures. This was an example of employees not liking change. Similarly the 2016 restructure and the 2019 redundancy, which the claimant did not like or agree with but there was nothing improper or culpable on the part of the respondent. In any event, when it came to the decision to dismiss there was nothing else, in the McAdie sense, that the respondent could do.

13. The key points made by Mrs Archer on behalf of the claimant included as follows:

    13.1 She relied upon the evidence before the Tribunal. It was right that the claimant had been absent for 36 weeks but 9 of those weeks had been holiday. Had the issues been addressed earlier the claimant would not have had any sick leave and an early return to work would have been facilitated. Instead, the historical issues have continued.

    13.2 The claimant worked part-time and temporary staff could have been employed during her absence and the headteacher could have assisted. The claimant did not object to change but the way in which it was implemented. Communication was key. The claimant's health prevented face-to-face meetings but she had produced written documents that she hoped would help but they had not as was shown by the headteacher's response that she had "nothing to add".

    13.3 The School had failed to do what should have been done. The consultation procedure was not followed, the true medical position had not been determined; for example, reliance had been placed on an out of date report that had been reviewed during the dismissal hearing and the information was out of date even in the November report, which would have been available had the respondent paid the GP's invoice.

14. At this point Mrs Archer explained that that was this was as far as she had got. I was surprised at this as I had explained at the commencement of the Hearing and again just before the lunch adjournment on the second day that after the evidence concluded I would give her the opportunity to put forward the key points by reference to which she submitted that the claimant's claim should succeed. I nevertheless asked Mrs Archer if she needed more time to consider any further submissions that she might like to make but she replied that for the claimant's sake she would not ask for more time but would rely on the evidence statements and the bundle of documents.

The Law

15. The principal statutory provisions that are relevant to the issues in this case are to be found in the 1996 Act and are as follows:

    "94 The right.

    (1) An employee has the right not to be unfairly dismissed by his employer."

    "98 General.

    (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show —

    (a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it —

(a) relates to the capability …. of the employee for performing work of the kind which he was employed by the employer to do,

....

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —

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

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

Application of the facts and the law to determine the issues

16. The above are the salient facts and submissions relevant to and upon which I based my judgment. As indicated above, the claimant has brought a single complaint of unfair dismissal. The issues arising from the statutory and case law referred to above that are relevant to the determination of that complaint are summarised at paragraph 9 of these Reasons in relation to which I considered and applied section 98 of the 1996 Act and the relevant precedents in this area of law as more fully set out below.

17. The first questions for the Tribunal to consider are what was the reason for the dismissal of the claimant and was that a potentially fair reason within sections 98(1) and (2) of the 1996 Act? It is for the respondent to show the reason for the dismissal and that that reason is a potentially fair reason for dismissal. By reference to the long-established guidance in Abernethy v Mott Hay and Anderson [1974] IRLR 213, the reason is the facts and beliefs known to and held by the respondent at the time of its dismissal of the claimant.

18. The claimant did not challenge the respondent's position that the reason for her dismissal was related to capability. In any event, on the evidence before me, especially given the claimant's absence from work, in the context of the respondent's absence management policy, I am satisfied that the respondent has discharged the burden of proof to show that the reason for the claimant's dismissal was related to capability, that being a potentially fair reason.

19. Having thus been satisfied as to the reason for the dismissal, I move on to consider the second aspect of whether the respondent acted reasonably in

dismissing the claimant for the reason of capability with reference to section 98(4) of the 1996 Act. That section requires consideration of three overlapping elements, each of which I must bring into account:

19.1 first, whether, in the circumstances, the respondent acted reasonably or unreasonably;

19.2 secondly, the size and administrative resources of the respondent;

19.3 thirdly, the question "shall be determined in accordance with equity and the substantive merits of the case".

20. In this regard I remind myself of the following important considerations:

20.1 Neither party now has a burden of proof in this respect.

20.2 My focus is to assess the reasonableness of the respondent and not the unfairness or injustice to the claimant, although not completely ignoring the latter.

20.3 I must not substitute my own view for that of the respondent. This principle has been maintained over the years in decisions including Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439 (re-confirmed in Midland Bank v Madden [2000] IRLR 288) and J Sainsbury plc v Hitt [2003] ICR 111. In UCATT v Brain [1981] IRLR 224 it was put thus:

> "*Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, "Would a reasonable employer in those circumstances dismiss", seems to me a very sensible approach – subject to one qualification alone, that they must not fall into the error of asking themselves the question "Would we dismiss", because you sometimes have a situation in which one reasonable employer would and one would not.*"

20.4 The decision in Polkey v AE Dayton Services Ltd [1988] ICR 142 firmly establishes procedural fairness as an integral part of the issue of reasonableness, which applies equally in cases of ill health dismissal such as this, including as to the procedure an employer has followed regarding such matters as engaging in discussions with the employee and obtaining up-to-date medical advice, both of which elements I address below.

20.5 My consideration of whether the claimant's dismissal was fair or unfair is a single issue involving the substantive and procedural elements of the dismissal decision.

20.6 The 'range of reasonable responses test' (referred to in the guidance in Iceland Frozen Foods Limited and Post Office v Foley [2000] IRLR 827), which will apply to my decision as to whether the decision of the respondent to dismiss the claimant fell within the band of reasonable

responses of a reasonable employer acting reasonably, applies equally to the procedure that was followed in reaching that decision: see, in the context of an ill health dismissal, Pinnington v City and County of Swansea EAT 0561/03, applying Hitt.

21. Regarding the general consideration of fairness, I record that I brought into consideration of the issues considered below and my ultimate decision regarding the fairness of the claimant's dismissal, relevant factors including the impact of the claimant's absence on the School and her colleagues; for that reason the respondent has formal, structured policies which it applies in circumstances such as this; the significant size of the respondent (that being a specific element in section 98(4)); the fact that the claimant had more than 25 years' employment with the respondent at the School.

22. I acknowledge that while Daubney is accepted as being a leading authority on medical investigation in the context of a fair capability dismissal, the well-established principles in British Home Stores Limited -v- Burchell [1978] IRLR 379 (albeit there in the context of a conduct dismissal) that were more recently indorsed in the decision of the Court of Appeal in Graham v The Secretary of State for Work and Pensions (Job Centre Plus) [2012] EWCA Civ 903 apply equally in the case of a dismissal for ill-health. That was made clear in the decision in DB Schenker Rail (UK) Ltd v Doolan (Unfair Dismissal: Reasonableness of dismissal) [2010] UKEAT/0053/09/1304 where it is stated, "the Tribunal is required to address three questions, namely whether the Respondent genuinely believed in their stated reason, whether it was a reason reached after a reasonable investigation and whether they had reasonable grounds on which to conclude as they did. As set out below, I have brought each of those questions into account in making my decision in relation to which I am satisfied on the basis of the evidence before me as follows:

Genuine belief

22.1 The information available to the First Committee at the time it decided to terminate the contract of employment of the claimant is detailed above. It included the following:

22.1.1 The claimant had been absent from work for more than 32 weeks, remained absent, had not been able to attend all but the first of the absence management meetings or the Committee meeting and could offer no likelihood of a return to work in the foreseeable future despite a number of a number of apparently beneficial changes that had been introduced within the School office. Indeed, in the claimant's closing statement to the Committee she stated, "I am too unwell to return to work".

22.1.2 The claimant's medical certificates had consistently referenced acute stress reaction and severe anxiety and the length of the certificated absence had increased, the most recent being for three months from 27 December 2019 to 26 March 2020 with no suggestion that the claimant could return to work in any form.

22.1.3 The most recent OH report of 26 September confirmed that the claimant was not fit for work and did not give any conclusive answer as to when she might return.

22.2 The above situation continued to apply at the time of the consideration of the claimant's appeal by the Appeals Panel. Additionally, the claimant's answers to the questions that had been asked of her in advance of the Panel meeting only served to reinforce her inability to return to work. As set out above, she had stated, "I have now been left in a position where I am so ill that I do not see any prospect of ever being able to return to work. It takes me all of my time to be able to leave the house even shopping", "My health is shattered; this fact alone makes it impossible for me to move forward into alternative employment" and concluded, "As a consequence my return to work has been made impossible …."

22.3 In the above circumstances, I am satisfied that at the time the respondent (in the shape of the First Committee) took the decision to dismiss the claimant and (in the shape of the Appeals Panel) upheld that decision on appeal it was genuinely believed that the claimant's capability was such that her employment with the respondent should be terminated. The reality was, as the claimant accepted in oral evidence, that she had had substantial absences from work, which had not shown any improvement and there was no prospect of her return to work in the foreseeable future.

Reasonable grounds

22.4 Following the order of the considerations in Burchell, I next address the question of whether there were reasonable grounds upon which to sustain the above belief. The above circumstances are also applicable to that question. Additionally, the following two points are of relevance:

22.4.1 The claimant's role of Office Manager was crucial to the administration of the School and her absence was having a real impact including that Mrs Jackson was having to undertake many administrative duties herself. As Mr Hart put it, the School could not function without an Office Manager and on three occasions in her appeal statement the claimant had stated she could not return to work to continue in that role.

22.4.2 The Attendance Management procedure had been followed and although the claimant had not been well enough to attend the meetings in person she had had trade union representation and had engaged with the process in writing.

22.5 Also of some relevance is that, as recorded above, in oral evidence the claimant agreed that she could understand the view of the First Committee on the evidence available to it.

22.6 Thus, I am further satisfied that in the above circumstances and for the above reasons the governors on the two committees had in their respective minds reasonable grounds upon which to sustain that belief

that the claimant's capability was such that her employment with the respondent should be terminated.

Reasonable investigation

22.7 The investigation into the circumstances of the claimant's absence and her capability included the four attendance management meetings at which the claimant's health and other circumstances were explored; in person with her at the first meeting and taking account of her written representations in respect of the other three meetings at which her position was also explained by her trade union representatives. Mrs Jackson accepted, with hindsight, that the delay between her receiving the first OH report on 20 May 2019 and the first attendance management meeting on 4 September 2019 was unfortunate and that it would have been preferable had that not occurred. I accept, however, that she did immediately provide the Toolkit to the claimant and tried to have a preliminary discussion with her the day after. The claimant declined to participate in that discussion due to pressure of work immediately before the half-term break and her sickness absence, from which she never returned, formally commenced on the day when she should have returned to work after that break. In these circumstances I find that no one can be criticised for the delay.

22.8 The investigation also involve two other important aspects. The first is having referred the claimant to OH so as to be aware of "the true medical position" (<u>Daubney</u>). At the time of the claimant's dismissal there were two OH reports available to the First Committee dated 4 April and 26 September 2019. The advice in those reports was similar being the completion of the Toolkit leading to the development of an agreed action plan and arranging regular meetings. Preliminary steps had been taken with regard to the Toolkit and action plan and regular meetings had been arranged but unfortunately, as mentioned above, the claimant had not been well enough to attend any of those after 4 September 2019. Importantly, the second report indicated that the claimant's health was worsening and neither report could identify any prospect of a return to work in the foreseeable future. It is right that some 4½ months had passed since the second of the reports was produced but the claimant had withdrawn her consent to the third report of 7 November 2090 being made available to the respondent. In these circumstances (and given the medical certificates, the observations of her trade union representatives at the attendance management meetings and the claimant's own statements regarding her health and the prospect of her return to work) I am satisfied that it was reasonable for the respondent to conclude that there was nothing to be gained by seeking a more up-to-date report to inform the decision of the First Committee.

22.9 The second aspect is that every effort had been made to engage in discussions with the claimant with regard to her ill-health and prognosis, in the later stages of which she was aware that she could be dismissed. The reality is that such engagement with the claimant was severely limited by her ill-health. So much so that, as mentioned above, she had only been

able to attend the first out of the four attendance management meetings (and even that had to be curtailed when she became too upset to continue) and was unable to attend the meetings of either the First Committee or the Appeals Panel. Nevertheless, attendance management meetings were arranged as appropriate and necessary and although the claimant did not attend in person she was represented by her trade union at each of those meetings and contributed either by submitting information and questions in advance or comments and further information following the meetings in light of the notes that were sent to her. Additionally, I have made particular reference above to what I have described as being a dialogue of responses between the claimant and Mrs Jackson as set out in the Stress Questionnaire. Similarly, although unable to attend the two governors' committee meetings, the claimant did submit the documents (including her statements and questions) to which I have referred in my findings of fact above.

22.10 I am satisfied that while far from ideal, the engagement with the claimant that was carried out by those acting on behalf of the respondent (Mrs Jackson and the two groups of governors) satisfied the guidance in Daubney: "Unless there are wholly exceptional circumstances, before an employee is dismissed on grounds of ill-health, it is necessary that he should be consulted and the matter discussed with him …", "If the employee is not consulted and given an opportunity to state his case, an injustice may be done", and in Spencer where it is stated, "Usually what is required is a discussion of the position between the employer and the employee so that the situation can be weighed up, bearing in mind the employer's need for work to be done and the employee's need for time to recover his health". I repeat that I acknowledge that there was no consultation or discussion in the normal sense but I am satisfied that there was engagement with the claimant that was sufficient to satisfy the above guidance.

23. For the above reasons, therefore, I am also satisfied as to this third question that at the stage at which the respective groups of governors formed the above belief on the above grounds the respondent had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

24. A further factor in this case arises from the claimant's contention that it was the actions and omissions of the respondent that gave rise to her ill-health and, therefore, caused the dismissal. In this regard I bring into account the guidance that I draw from the decision in McAdie.

25. In that decision, Lord Justice Wall giving the leading judgment of the Court of Appeal observed, amongst other things, as follows:

> *"It seems to us that there must be cases where the fact that the employer is in one sense or another responsible for an employee's incapacity is, as a matter of common sense and common fairness, relevant to whether, and if so when, it is reasonable to dismiss him for that incapacity. It may, for example, be necessary in such a case to "go the extra mile" in finding*

alternative employment for such an employee, or to put up with a longer period of sickness absence than would otherwise be reasonable."

"Thus it must be right that the fact that an employer has caused the incapacity in question, however culpably, cannot preclude him for ever from effecting a fair dismissal. If it were otherwise, employers would in such cases be obliged to retain on their books indefinitely employees who were incapable of any useful work. Employees who have been injured as a result of a breach of duty by their employers are entitled to compensation in the ordinary courts, which in an appropriate case will include compensation for lost earnings and lost earning capacity: tribunals must resist the temptation of being led by sympathy for the employee into including granting by way of compensation for unfair dismissal what is in truth an award of compensation for injury. We also agree with Morison P in sounding a note of caution about how often it will be necessary or appropriate for a tribunal to undertake an enquiry into the employer's responsibility for the original illness or accident, at least where that is genuinely in issue: its concern will be with the reasonableness of the employer's conduct on the basis of what he reasonably knew or believed at the time of dismissal, and for that purpose a definitive decision on culpability or causation may be unnecessary."

"…. it is important to focus not, as such, on the question of that responsibility but on the statutory question of whether it was reasonable for the Bank, "in the circumstances" (which of course include the Bank's responsibility for her illness), to dismiss her for that reason. On ordinary principles, that question falls to be answered by reference to the situation as it was at the date that the decision was taken. Thus the question which the Tribunal should have asked itself was "was it reasonable for the Bank to dismiss Mrs. McAdie on 22 December 2004, in the circumstances as they then were, including the fact that their mishandling of the situation had led to her illness?""

26. Two considerations arise in respect of this aspect. The first is whether the respondent caused the claimant's ill health; the second is whether, even if it did, it was reasonable for the respondent to dismiss the claimant. In the strict sense it is probably right that the respondent did cause the claimant's ill-health in that the decisions and actions of Mrs Jackson and the School governors caused her acute stress and severe anxiety and led to her being absent from work and thence her dismissal. The question, however, is not whether there was such a simple causative link but whether the respondent was culpable for what occurred. In this case I find that it was not for the following reasons:

    26.1 The claimant's ill-health developed from changes introduced by the governors including the new cash handling policy, the restructuring of the administrative staff at the School and consequential redundancies. The claimant was clearly troubled by these changes and the effect that she considered they would have on the smooth running and efficient operation of the School office for which she was directly responsible. She was also concerned that they had been introduced without what she considered to

be appropriate monitoring and consultation and particularly without her involvement. While that might be right, I am satisfied that the governors were either obliged to or were entitled to act as they did and while it is certainly desperately sad that the changes impacted upon the claimant in such a serious fashion I am not satisfied that the governors can be said to have been in any way culpable for having implemented such changes.

26.2 In this respect the claimant repeatedly said at the time and during the course of the hearing that the issues that she had raised had never been addressed. I find, to the contrary, that they were addressed but were not addressed in the way that she wanted. An example is the Questionnaire document that she and Mrs Jackson completed in which Mrs Jackson did all address various issues but not to the claimant's satisfaction. The reality is that the introduction of the changes could not be revisited, the claimant could not now be involved in the decisions that had been made years ago and decisions to introduce the policies, restructure the administrative staff and make redundancies could not or would not be reversed; for example, additional staff would not be introduced into the School office.

26.3 Similarly, the claimant continues to complain that she had no response to the letters that she wrote to the governors on 5 April and 5 July 2019. The claimant did receive responses to those letters although I accept that the response to the first was little more than an acknowledgement. That said, the letter from Mrs Croft that was sent to the claimant on 1 August 2019 was a fairly comprehensive response that included explaining the governors' reasoning for making the redundancies, the establishment of a new 11-hour post and the new office systems.

26.4 Likewise the claimant complains that she did not receive a response to the grievance that she sought to raise. She did receive a response but again not one that was to her liking. On 23 January 2020 Mrs Croft wrote to explain the advice that she had received from HR and when the claimant challenged that advice Mrs Croft reverted to HR before writing again to the claimant on 6 February explaining why she was unable to raise a grievance, which I have found above was correct in accordance with respondent's policy.

26.5 A further factor is that the claimant declined the suggestion made by her own trade union representative that she and Mrs Jackson should engage in mediation.

27. I now turn to the second consideration of whether, even if the respondent did cause the claimant's ill-health, it was reasonable for it to dismiss the claimant. In this regard I consider there to be clear parallels between the cases of Mrs McAdie and the claimant before me. In the former case it was stated that at the point of dismissal the position, "was very stark", that the "medical evidence was unequivocal both that Mrs. McAdie was unfit for work and that there was no prospect of recovery" and that she had "herself said the same both to the Bank and in her evidence to the Tribunal". In these circumstances, I am satisfied that this was not a case where there was something more that the respondent could

and should have done ("the extra mile") to try to save the claimant's employment. As in McAdie, neither the medical opinions of OH or the claimant's GP nor her trade union representatives or she herself "were suggesting that there was any possibility of the employment continuing." Indeed, it is clear that the claimant was saying the opposite and, therefore, as found in McAdie, "There was in truth no alternative to dismissal." This is reinforced, I repeat, by the fact that in her closing statement to the First Committee the claimant had said "I am too unwell to return to work".

28. The final issue is the reasonableness or otherwise of the decision that the claimant should be dismissed. Referring to established case law such as Iceland Frozen Foods (again as indorsed in Graham) there is, in many cases, a range or band of reasonable responses to the situation of the employee within which one employer might reasonably take one view and another quite reasonably take another view. My function is to determine in the circumstances of this case whether the decision of this respondent fell within the band of reasonable responses that a reasonable employer might have adopted.

29. In this regard, the claimant had referred in her closing statement to it being "most unfair" that the governors could choose to terminate her employment on grounds of capability. She repeated that sentiment in answering questions at the Hearing. She confirmed that she had conveyed that she was too unwell to return to work, "but did not feel it fair" that she should be dismissed. She confirmed that even so there comes a point at which it is not sustainable to keep her in employment and that although her dismissal might not have been a great surprise, she "didn't feel it fair". It is quite understandable that the claimant considered it unfair that she should be dismissed. That is often the case in dismissal on grounds of capability and redundancy but it has long been established that the test of fairness directs "the tribunal to focus its attention on the conduct of the employer and not on whether the employee in fact suffered any injustice": W Devis & Sons Ltd v Atkins [1977] IRLR 314 HL.

30. Also in answering questions at the Hearing the claimant confirmed that it was not sustainable for her to continue in employment if there was no prospect of a return to work. Given the claimant's own evidence but also bringing into account the generality of my above findings I am satisfied that at the point of dismissing the claimant the respondent could not have been expected to wait any longer: Spencer.

31. In the circumstances and given my findings relating to the considerations in Burchell and McAdie, which are addressed above, I am satisfied that the dismissal of the claimant was a decision that fell within the band of reasonable responses of a reasonable employer in these circumstances. Indeed, I repeat, that as found in McAdie, "There was in truth no alternative to dismissal."

32. In summary of this aspect on the basis of my findings of fact and for the reasons set out above I am satisfied that the respondent acted reasonably in treating the reason of capability as a sufficient reason for dismissal with reference to section 98(4) of the 1996 Act.

Conclusion

33. In conclusion, my judgment is that in the above circumstances I am satisfied that the claimant's complaint that her dismissal by the respondent was unfair is not well-founded and is dismissed.

34. As did Lord Justice Wall in McAdie, I similarly conclude that I do not make the above findings and judgment in relation to the claimant's claim "without feeling real sympathy for her". My function, however, is to determine the claimant's claim in accordance with the law and the facts as I have found them to be, which is what I have sought to do.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENTJUDGE ON 14 February 2021

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