EMPLOYMENT TRIBUNALS

Claimant: **Ms Y Omar**

Respondent: **Brampton Manor Trust**

Heard at: **East London Hearing Centre**

On: **17, 18, 19, 20, 24 November 2020, 13 January 2021 and in chambers on 13, 14 January and 2 March 2021**

Before: **EJ Jones**
Members: **Mr Quinn**
Mr Woodhouse

Representation

Claimant: Ms A Brown (Counsel)
Respondent: Ms Bewley (Counsel)

RESERVED JUDGMENT

The complaints of disability discrimination succeed.

The claimant is entitled to a remedy for her successful complaints. The parties are to write to the Tribunal with a revised schedule of loss and a counter schedule and the Tribunal will set a date for a remedy hearing and notify the parties accordingly.

REASONS

1 This has been a remote hearing, which was consented to by the parties. The form of remote hearing was V: Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and the liability issues could be determined in a remote hearing. The documents the Tribunal referred to are named below and were in the trial bundle prepared by the parties. The witness statements were also prepared by the parties.

2 This was the claimant's complaint of direct and indirect disability discrimination; harassment, victimisation and a failure to make reasonable adjustments. The respondent resisted her complaints. There was an agreed list of issues at pages 83 – 90 of the bundle of documents. Those were modified at the end of the hearing. Each item in the most recent list of issues is referred to separately in the section of this judgment headed '*Applying law to facts'*.

3 The claimant relied on the condition of Multiple Sclerosis (MS) as the physical/mental impairment which has a substantial, adverse, long-term effect on her ability to carry out day to day activities. The respondent accepted that the Claimant is a disabled person for the purposes of the Equality Act 2010 and MS is one of the conditions that is recognised as a disability in Schedule 1, para 6. The Claimant was diagnosed with MS in March/April 2018.

Evidence

4 The Tribunal had an agreed bundle of documents. It also had a witness statement from the Claimant and witness statements from Ayesha Jamal-Deen, teacher and mentor to the Claimant; Stuart Roberts, Vice Principal at the Brampton Manor Academy and line manager for the Assistant Principal who line managed Science and Maths; Mark Balaam, Assistant Head Teacher who line managed Biology, Chemistry and Physics; and Dayo Olukoshi, CEO and Executive Principal of the Respondent Trust and Principal at the Academy. The witnesses all gave live evidence at the hearing.

5 From that evidence the Tribunal made the following findings of fact. The Tribunal has endeavoured to only make findings of fact on the evidence that relates to the issues that it has to determine. We have not made findings of fact on all the evidence in the hearing but only on those matters within our remit.

6 The Tribunal apologises to both parties for the delay in writing up this judgment. The initial delay was caused by difficulties in finding when the Tribunal could meet together to make the decision. Further delay was caused by pressure of work on the judge.

Findings of fact

7 The claimant applied to the respondent in January 2018 for a post as a newly qualified teacher at the Brampton Manor Academy. On 25 January, she was offered the role to commence on 1 September 2018, following completion of the teacher training course that she was on. Previously, in November 2017, the Claimant had a bout of optic neuritis, which she had been told by the hospital specialist was a very serious eye condition where the optic nerve at the back of the eye is inflamed. After a short stay in hospital and undergoing some tests, she was told that she may develop a neurological condition in the future.

8 At her interview, she told Dr Olukoshi about the optic neuritis. She did not refer to it as a disability because at the time, she had not been advised that this was a disability. It had not yet been diagnosed as MS. On or around 5 February 2018, the claimant completed a medical questionnaire online for the respondent. This was assessed by the respondent's health screening service who produced a

report on 25 February 2018, which stated that the claimant was unlikely to be covered by the Equality Act 2010 and that she did not require any reasonable adjustments.

9 In April 2018, after a series of tests at hospital, the claimant was given the probable diagnosis of Multiple Sclerosis. On 14 April she wrote to the respondent to inform them of this. She told the school that she was still going through tests to confirm it and that she was experiencing migraine headaches and some deep-seated fatigue that was not relieved by sleep. She stated that she was aware that the disease was likely to progress but was not sure how that would occur in her case. She was not sure how the disease would manifest itself in the future. She expected that she might have to do the respondent's occupational health assessment again. She ended the email by asking the Respondent to let her know what happens next. Sally Denbow, HR manager for the respondent replied to the claimant on 16 April to confirm that the respondent had received and understood her email. She confirmed the claimant's job offer and stated *"you need to keep us informed of how you are progressing, including any adjustments that your doctor recommends."*

10 The claimant's job with the respondent as a newly qualified teacher (NQT) included her completing her training 'on the job', under their supervision. She would have to undergo assessments while at the school. She would not be a fully qualified teacher until she completed that year. The claimant's only teaching experience prior to her employment with the school was her work placement during the PGCE (Post-Graduate Certificate in Education) course, between February and June 2018.

11 The respondent did not make any changes to the claimant's occupational health assessment on file. Dr Olukoshi's live evidence was that on receipt of the claimant's letter, the school decided that it was enough to reassure her that her job was still there and leave the responsibility with her to let the school know if there were any adjustments required. The sentence to that effect in Ms Denbow's email referred to above was the only time the claimant was told that it was her responsibility to let the respondent know if she required any adjustments. She was not told that this expectation continued once she started at the school.

12 Dr Olukoshi spoke with Mr Roberts about the claimant and told him that she was still coming and that she had been advised to keep the school informed of any adjustments that her doctor recommended. Dr Olukoshi did not speak to Mr Balaam about the claimant but Mr Roberts told Mr Balaam of her MS diagnosis as he thought that he should know as he was the ultimate line manager for the Science department. There was no further discussion of her health before she started in September.

13 The school did not contact the claimant between the letters in April and her starting at the school in September. In July, after more tests, the claimant's diagnosis of MS was confirmed. While on her PGCE course at UCL (University College London), once she told them of her diagnosis she was referred to occupational health for assessment and guidance on adjustments. It was the Claimant's evidence that she only missed 4 days of school during her placement.

14 The Respondent runs the Brampton Manor Academy in East Ham, London. It is a secondary school, which provides secondary and further education to around 2,500 pupils. The Claimant was employed as a teacher of Science.

15 Dr Olukoshi is the Executive Principal of the Trust. He manages the day to day operational needs of the Brampton Manor Academy as well as the Langdon Academy which was also part of the Trust. In relation to this school, he line-manages 4 Vice Principals, who are part of the Senior Leadership Team (SLT), to whom he has delegated a lot of the day to day matters. The SLT also includes the Assistant Principals. It was his evidence that most of the employee matters were handled by the Vice and/or Assistant Principals. As a Science teacher, the Claimant was in the Science department. The Science department comprised of three departments, each with its own Head of department: biology, chemistry and physics. The Claimant was line managed by Head of Biology, Shamyla Qureshi; who in turn was line managed by an Assistant Principal, Mark Balaam, who was line managed by a Vice Principal, Stuart Roberts who reported to Dr Olukoshi.

16 Mark Balaam's evidence was that he had not had specific training in managing staff with disabilities. He was familiar with the Respondent's absence management policy but had not been trained in applying that to employees with disability. We find it unlikely that apart from Dr Olukoshi, any of the other senior managers at the respondent had training on managing staff with disability in the workplace. Dr Olukoshi confirmed that he had training in applying the Equality Act 2010 to the recruitment process and in making jobs accessible to disabled applicants by making workplace adjustments. He was aware that as an employer, the respondent had a duty to make reasonable adjustments and that one size did not fit all. He knew that adjustments needed to be personalised to the needs of the particular employee.

17 When the claimant began working with the respondent there was no discussion between her and the managers about her needs as person with MS. We heard that the loose arrangement between managers was that Mr Balaam would focus on the teaching and learning and that Mr Roberts would deal with the claimant's medical condition and its implications for her work but there was no meeting between them where this was discussed and agreed and the claimant was never informed about this arrangement.

18 On Sunday 2 September, the claimant's MS medication ran out. She contacted the hospital pharmacy but was told that due to the potent nature of the medication, they were not authorised to prescribe it before she attended the hospital to take a blood test. The hospital phlebotomy service could only be accessed between Monday and Friday. The claimant sent an email and waited for a response.

19 On the following day, 3 September, the claimant attended an INSET training day at the school. This was her first day at work. Although the pupils were not in school, it was the first day of the new school year. During the day the claimant received communication from the hospital, which informed her that if she wanted to have the blood test done she needed to attend the hospital that afternoon. This was at Charing Cross Hospital, which is in Hammersmith and the service was due to close at 4pm. She guessed that the journey was likely to take her more than 1.5 hours, because as she did not drive, she would have to do it by public transport.

The INSET training day was scheduled to end at 2.35pm. She realised that in order to get there on time, she would need to leave the training early.

20 She approached her NQT mentor, Ayesha Jamal-Deen and told her about her diagnosis and that she needed an urgent blood test. She asked if she could leave school at 2pm. The claimant was advised to speak to Shamyla Qureshi, Head of Biology. She spoke to Ms Qureshi and had to repeat all her personal information but Ms Qureshi was unable to authorise the Claimant leaving half hour early. The claimant was told to see Mr Balaam in his office. The claimant went to Mr Balaam's office and spoke to him about it. Mr Balaam confirmed that he knew that she had MS as Mr Roberts had told him. He asked for evidence that the hospital had contacted her and she showed him the email. He then asked her where it was and how long it would take her to get there. This was the first time that the claimant was travelling to the hospital from the school so she was not able to tell him exactly how long the journey would take. Mr Balaam then opened the TFL or Google journey planner on his computer and stated that he did not think there was any need for her to leave early and that he considered that she would make it on time. The claimant did not feel able to argue with him and it was unlikely that she wanted to do so during their first conversation, on the start day of her new job. She felt intimidated by the conversation with Mr Balaam. She also felt that he was more concerned about the consequence of authorising an absence of 35 minutes before the end of the day, on other staff, rather the real possibility that the claimant would not getting her medication, which would risk her having a relapse. He effectively refused her application for half hour leave. She agreed to stay until the end of the training at 2.35pm, because she felt that she had no choice.

21 Mr Balaam did not take into account that the claimant would need extra time to get to the actual clinic from her arrival at the door of the hospital. The claimant spent to rest of the INSET day worried and concerned that she might not make it. At the end of the training day, Ms Qureshi gave the claimant a lift in her car which meant that the claimant arrived at the clinic at around 3.55pm, with only 1 minute to spare. She was in a flood of tears and pleaded with the staff at the hospital to do the blood test, which they did. She found the whole experience very stressful.

22 During her conversation with Mr Balaam, we find it likely that he told her to think carefully whether she wanted MS on her employment records with the school. The claimant was offended by this comment and considered whether to take out a grievance against him for it. She did not want to start her employment with the Respondent in that way. After discussing the matter with Ms Qureshi, her line manager, she decided against it.

23 Mr Balaam confirmed in his live evidence that the respondent preferred staff members to attend hospital appointment outside of work hours. If they had to attend an appointment during the school day, there was process by which they had to apply for authorisation to be able to go. It was not as simple as bringing in the hospital letter to the school office.

24 During the next week, the claimant continued to worry about work and her health. Because of her experience when she asked to leave the INSET day half hour early, she felt that she could not take time off work despite her health deteriorating. She developed blurred vision during that week. She started to lose her balance and developed migraines and eye pain. However, she continued to

come to work for the whole week and waited until the morning of Saturday 8 September to go to the emergency department at Moorfields Eye Hospital. She saw a neurologist and after some tests, it was confirmed that the claimant was suffering from optic neuritis. The doctors at the hospital wanted to admit her for intravenous steroids but as she continued to be worried about taking time off work, she asked for an alternative. She was given a different medication which she could take at home. She was advised to stay at home for at least 5 days while she took the medication and to allow it to take effect.

25 On the evening of 9 September, the claimant emailed Ms Qureshi and informed her about what had happened. She told her that she had optic neuritis in her left eye, that she had been to A&E at Moorfields on Saturday where she had been given steroids, advised to stay at home for 5 days and that the medication came with a range of side effects including insomnia. She informed her that she had only recently been diagnosed with Relapsing-Remitting Multiple Sclerosis and that this was her first relapse so she did not know what to expect or how long it would last. She stated that her vision had deteriorated and will likely continue to do so. She asked what the respondent's expectations were for lesson plans, reporting sickness and who she should send her sicknote to.

26 The claimant did not go to school the next two days, Monday and Tuesday. Ms Qureshi responded on Monday evening to let the claimant know that on each day that she is absent, she should report to someone called Moses who was based in the school office. The claimant was informed that she should provide cover work to Ms Jamal-Deen every morning by 7.30am.

27 On Monday 10 September, Mr Roberts wrote to the claimant to invite her to a Stage 1 trigger level meeting under the respondent's managing sickness absence procedure. It is likely that she received it on the following day as we had an email from Ms Benbow in the bundle forwarding the letter to the claimant on the morning of 11 September. The meeting was set for 13 September. At the time the invitation letter was written, the claimant had been off work sick for 1 day. The letter stated that Mr Roberts was willing to change the location, time and method of meeting the claimant as adjustments to facilitate her attendance. Once she received the letter, the claimant started to worry again about her job and although she did not understand fully what trigger points were, she decided to return to school on the following day, against the doctor's advice, to make sure that she was not in trouble with the school.

28 The respondent's managing sickness absence procedure was in the bundle of documents at page 362. It states that there are 4 key aims of the policy: to understand the causes of any absence and the effect it may/will have on the employee's ability to carry out their job function effectively; to provide support to employees to help them manage their health, work or welfare problems, including work-related stress; to explore any options which could help employees to improve attendance and/or facilitate their return to work; and to outline the key stages of an absence management process and the potential outcomes.

29 The policy states that the stage 1: informal absence review applies when an employee has had either 2 or more working days absence due to sickness in the preceding 6 months or 2 or more absences due to sickness of whatever length within the preceding 6 months or above average absence levels for the Academy

or any absence that raises serious concern such as absences adjacent to a holiday or immediately preceding a weekend.

At the time she was invited to the meeting, the claimant had not had 2 or more days sickness absence.

30 Mr Roberts' evidence was that although it would have been possible to have a meeting with the claimant outside of the absence management process, he decided to start the process. He had not seen the claimant's email to Ms Qureshi before he invited her to the meeting. It is likely that he found out that the claimant was absent from work on 10 September from Moses but he did not enquire of the reasons the claimant gave for her absence.

31 Mr Roberts' evidence was that even if he had seen the email explaining the reasons for the claimant's absence, he would still have called her to a Stage 1 meeting after 1 day's absence. He insisted that having such a meeting was a supportive measure and that in doing so, he was seeking to find out the reasons for her absence and any adjustments she required to enable her to attend work.

32 The Claimant returned to work on 12 September as she was worried about the consequences of being managed under the respondent's absence management procedure (AMP). On her arrival at school, she had to attend a return to work meeting with Assistant Principal, Joyce Boakye. The Claimant completed a return to work form which was then reviewed by Ms Boakye in the meeting. The Claimant recorded on the form that she had optic neuritis, that it affected her ability to see and that she had been advised by her doctors to stay at home for 5 days but had come back to work before that time had elapsed. Ms Boakye recorded that the claimant had experienced blind spots and was currently experiencing limited peripheral vision. The note also stated that these were symptoms that the claimant typically experienced as an MS sufferer. There was no mention of an eye infection. Ms Boakye recorded that optic neuritis was inflammation of the optic nerve. Although she said that her eye condition was affecting her sight. We were surprised that given these details, Ms Boakye did not ask the claimant whether she was fit to be at work at that time. Ms Boakye recorded on the form that the claimant understood the importance of being at work to teach the students. She was told that she had to attend the Stage 1 meeting with Mr Roberts on the following day.

33 On 13 September the claimant met with Mr Roberts for the Stage 1 meeting. We find it likely that the claimant went through her MS symptoms in detail and explained that her absence had been as a result of blindness caused by optic neuritis, within the context of MS. She explained that the doctors at the hospital wanted to keep her in for treatment but that she had asked for medication that she could administer at home. She explained to him that MS is a disability and that she could not guarantee that in the future she would not be absent with issues related to the condition. We find it highly unlikely that the claimant told Mr Roberts that she had an eye infection or that she failed to inform him that her optic neuritis was related to her MS. The claimant would have made that connection and the name of the condition clear to him in this meeting, just as she had already done with Ms Qureshi and Ms Boakye. She wanted the respondent to be aware that having MS meant that she was highly likely to have further complications with her health in the future.

34 Mr Roberts' evidence was that he did not look at the claimant's self-certification form or the email that she sent to Ms Qureshi, either before or after the Stage 1 meeting. We find it unusual for a senior manager to hold a meeting and make such an important decision without gathering all the relevant information on the subject matter of the meeting, which in this instance was the claimant's absence on 10 and 11 September. If he did not, we find that he was not interested in looking at those documents because he knew that they would make no difference to his intended outcome of the meeting.

35 The claimant was still coming to terms with having a serious disability and the implications that this had for her life and her career. She wanted the respondent to understand that she had little understanding and control over her condition so it could take that into consideration when applying policy or managing her. in the meeting, Mr Roberts appeared to understand what she said about her disability. However, the claimant was surprised a few weeks later to discover a letter in her pigeon hole from Mr Roberts, which was the outcome letter from the meeting. The letter recorded incorrectly, that she had told him that she had an eye infection. Mr Roberts also recorded that the claimant had talked about her MS and that she could not guarantee that her symptoms would not flare up in future. He wrote that he had told her that her absence had an adverse impact on the running of the school and that her classes had been affected by her absence.

36 He made an adjustment for the claimant by agreeing to move her break duty to a different day, to give her more time to take her medication and this was recorded in the letter.

37 The letter informed the claimant that he set her a target of no further periods of absence from work due to sickness for the rest of the academic year. Mr Roberts confirmed that this was something that they would require of all staff who are off sick. He referred to it as an aspirational target. She was informed that if there were any further periods of sickness, the Respondent may move her on to Stage II of the Absence Management Policy which could result in her being given a written warning. Mr Roberts had not told the claimant in the meeting that he was going to issue her with this warning. We find that the claimant had been given this target after 2 days absence due to MS related sickness.

38 Mr Roberts confirmed that he was aware that at any time he could refer her to occupational health for an assessment and report but felt that it would have been up to her to indicate what adjustments she needed as she was in the best position to know.

39 The letter did not inform the claimant that she could challenge the application of the process. Although the Grounds of Resistance referred to Mr Roberts inviting the Claimant to question the process, both in the meeting and in the letter; but we find that the letter simply told her that she could address any comments/questions about the contents of the letter to Mr Roberts. She did not have any questions on the content of the letter as it was quite clear. There was no process that she was aware of, to challenge the decision that had been made.

40 The claimant became even more stressed about her health and her job after receiving the Stage 1 outcome letter. This is confirmed by a letter from Dr Victoria Singh-Curry, Consultant Neurologist at Charing Cross Hospital in which she

referred to the Claimant suffering significant stress at work in 2018. The claimant was worried about her health, the possibility of triggering a relapse and keeping her job so that she could qualify as a teacher which she was committed to.

41 She was expected to do break duty twice a week. This entailed a teacher having to be present, usually standing, in the playground, in all weathers, during break time, monitoring children's behaviour and intervening where necessary. One of the symptoms of her condition that she had advised the respondent of in her April 2018 email was fatigue that did not respond to sleep. When she asked Mr Roberts to be removed from break duty she referred to fatigue, vertigo, migraines and the partial blindness that she suffered in September.

42 Mr Roberts had previously agreed to move the break duty from Wednesday to Thursday, to enable the claimant take medication but what she had asked was to be completely relieved from doing it. Just before half-term in October the claimant raised with Mr Balaam her issues with her break duty. She told him that she was suffering from fatigue. She asked if she could be taken off break duty and explained in detail the medical reasons why she felt incapable of continuing to do it.

43 The claimant's recollection, which is disputed by the respondent is that Mr Balaam's said in response *"if you're unfit to do break duty, the next question is, are you unfit to teach?".*

44 We find it likely that Mr Balaam did make this statement. Those were the same words that she reported to Dr Olukoshi in their meeting in November, when it is likely to have been fresh in her mind. The claimant was shocked at this response and told Mr Balaam that she considered that what he said was offensive and that whether she did break duty was not a measure of her ability to teach. Mr Balaam said that this was not his opinion but that he felt that it was likely that if he told others, that is what they would think.

45 We find it highly unlikely that Mr Balaam suggested changes to her break duty position, during this meeting. If he had, it is unlikely that the claimant would have approached the Executive Principal's PA to discuss the matter. It is more likely that because he made that comment and did not make any suggestions, she approached the Principal's office to try to discuss the matter with him to get an answer. She had been told by a member of staff in the science office that she could approach Dr Olukoshi directly if there was anything she was unhappy with. The claimant emailed Dr Olukoshi's PA about this. The message was passed to Mr Roberts so that he could deal with it.

46 It is likely that Mr Balaam thought that changing the claimant's break duty to duty in the Quad, which was a smaller space, would be more suitable as she could sit down while on duty. However, he did not suggest that to her on the day. He considered that this change might be appropriate because another member of staff who had a bad back sometimes did their break while seated in the Quad. He did not ask the claimant whether that would be of assistance to her.

47 On the following Monday, Mr Roberts approached the claimant to ask her to meet with him in his office. He asked her why she had sent the email to Ms Denbow and told her he was able to deal with anything that she needed. The

claimant felt that she was being blocked from having access to Dr Olukoshi. She explained to Mr Roberts that she had already approached Mr Balaam about being taken off break duty and she told Mr Roberts what Mr Balaam had said in response. Mr Roberts told the claimant that he would look into it for her and get back to her in writing about it.

48 We find it unlikely that the claimant said anything about being cold in her request to be removed from break duty, either to Mr Balaam or Mr Roberts. They assumed that this was the reason for her request.

49 In a short conversation about break duty with Mr Roberts in the corridor, he told her that he would take her break duty for that week and would look to rearranging it. The respondent was deliberately failing to grapple with the claimant's request to be relieved from break duty as opposed to moving it to other days or other parts of the school. Later that day, the claimant wrote a follow-up letter to Mr Roberts, dated 17 October, in which she provided details of the symptoms of her MS which were her reasons for asking to be removed from break duty. She was clear on the reasons why she was making this request. She referred to having many invisible symptoms, including sharp and painful pins and needles in her feet, blurred vision due to having nerve damage in both eyes, and fatigue typical of MS, which is different to ordinary tiredness and hard to explain for those who have never experienced it. It is likely that these were the symptoms of her MS that she referred to when she spoke to Mr Balaam and Mr Roberts about being removed from break duty.

50 The respondent effectively ignored that request. Mr Roberts' response on the following day was to continue the discussion about moving the place or day on which the claimant did her duty. He suggested that he would look at amending her duties so that she could do her duty in the library rather than in the playground. It was not clear who advised the respondent or why her managers thought that doing break duty in the library would be of assistance to the claimant in dealing with the MS symptoms that she outlined in the letter and in her conversations with Mr Roberts and Mr Balaam. She needed a real break during those times and supervising pupils in the library would not give her a break. The Respondent had not asked the Claimant whether doing her break duties inside would help her symptoms. She felt disheartened by Mr Roberts' response and the fact that he had copied in Mr Balaam as she had complained about his response to her request. She decided that it was not worth continuing the discussion. She gave in and stated that Wednesdays and Fridays would suit her new timetable best for carrying out her break duties.

51 The claimant's perception was that Mr Balaam was deliberately ignoring her around school during the last week before half term in October 2018. She sent him an email on 19 October in an attempt to repair their relationship, if it needed to be repaired. In the email she thanked him for his help over her first half term and stated that the teaching advice had been invaluable and that she appreciated it. The claimant was genuinely grateful to him for the assistance and advice he had given her on her teaching practice. It was clearly important to her that they maintained a good working relationship. Mr Balaam replied couple of hours later to say that it was his pleasure and to wish her a lovely half term break. In the hearing, Mr Balaam denied ignoring or ostracising the claimant at that time. He stated that he was busy as it was a busy time of year and that he may have been

distracted with work and other matters. We find it unlikely that he deliberately ignored her.

52 The claimant wrote to Emma Newall, who had been one of her tutors at University to ask for advice about what had been happening so far at the respondent. She outlined the difficulties she had been having with being taken off break duty and the respondent's reaction to her missing two days of school with optic neuritis. She referred to Mr Balaam's comment to her to think carefully about whether she wanted to have MS on her record. She asked Miss Newall whether it was a good idea to move schools, or take out a grievance. She described having had really disturbed sleep all week due to thinking about this matter and her worries about getting dismissed if she took out a grievance. She stated that her real concern was about failing to complete her NQT year and that although this was stressful, she did not fear getting dismissed as she believed it would be an act of discrimination relating to her MS. We did not have Ms Newall's response in the bundle but that letter gave a clear indication of the claimant's state of mind at the time.

53 Having reluctantly agreed that she would take her break duty in the library the claimant heard nothing from the respondent about it until she chased up Mr Roberts on 7 November. In his response, he confirmed that she was expected to do break duties in the library on Wednesdays and Fridays from 29 October. When the claimant attended the library to do her break duties she discovered that no arrangements have been made for her to do so. There was no chair available for her and she usually had to stand. The library was usually at full capacity and she had to monitor the pupils use of computers, carry heavy books from the previous lesson and walk around the library monitoring pupils' conduct.

54 In addition, one of the Assistant Principals, Ms Stewart would frequently come into the library and ask the claimant why she was not outside on break duty and the claimant would have to tell her that her duty had been changed from the playground to the library, which she was attending. The respondent had clearly not informed senior managers about the adjustment that had been put in place to support the claimant. That left her open to being regularly challenged as to why she was not in the playground during break time and colleagues' assumption that she was not fulfilling her responsibility.

55 On Monday 12 November, the claimant had an appointment at hospital for a blood test so that she could collect medication. The claimant had been unable to sleep the night before due to worrying about the implications of her attending work late the next day or calling in sick. That worry worsened her MS symptoms, which led to her calling in sick the following day. She sent an email to Ms Qureshi and Miss Jamal-Deen to which she attached her cover work for her classes. She stated that she was having problems with her vision, balance and that she was going to go to Charing Cross hospital to see if she needed to have another MRI scan as she felt she was getting worse.

56 While at Charing Cross hospital, the claimant received an email dated the same day from Mr Roberts in which he informed her that she had now reached/exceeded the trigger level as detailed in the sickness absence procedure and it was appropriate to move to Stage II, the formal stage of the respondent's AMP. The claimant was invited to a meeting in his office on Wednesday 14

November. The claimant was advised of her right to be accompanied and that the meeting was intended to consider her sickness absence in line with the procedure.

57 The claimant was upset when she read the letter and cried at the hospital. This was yet another thing that she had to worry about. She responded when she got home from hospital to say that she felt quite distressed both due to MS-related illness and the situation with the trigger meetings. The claimant asked if the meeting could be postponed as she would like more time to prepare for it. Miss Denbow stated that she would pass the request on to Mr Roberts.

58 This respondent's AMP in the bundle referred to Stage II as the formal absence review. This stage applies where the situation continues beyond the provisions of the informal stage. It does not give a set number of days of absence before this stage would be triggered. It does give a member of the senior leadership team authority to hold a formal absence review meeting with the member of staff in accordance with the procedure set out in the respondent's disciplinary policy and procedure. There are two different sets of steps that would be followed depending on whether the absence is continued absence or repeated absence. If it is continued absence then the respondent would consider whether medical evidence is required and any adjustments the respondent can take to facilitate the return to work. If it is repeated absence, the same procedure applies but there is an additional step in which there will be a consideration of whether the member of staff has met the targets set at the informal stage. As this was now the formal stage it could have serious consequences for the employee concerned.

59 The claimant went into school a day after she received the letter. When she got there, she was told that management were looking for her. The claimant was worried about trigger meetings and potentially facing disciplinary proceedings or losing her job if she reached the formal stage of the respondent's AMP. She was approached by Ms Boakye who told her to follow her to office. However, before she could meet with Ms Boakye, the Claimant was invited into another room with Miss Qureshi in which Mr Roberts and Mr Balaam were also sitting. The claimant had no notice of these meetings and was only expecting a return to work meeting that day. Her expectation was that the sickness absence meeting would either be postponed as she asked or be held on the following day, as scheduled.

60 Once the Claimant came in to the room and sat down, Mr Roberts asked her whether she had requested to postpone the meeting scheduled for the following day because she was planning to involve the union. We find it odd that she should be asked this question when the invitation letter had clearly stated that she had a right to be accompanied by a friend or trade union representative of her choice. Although the claimant was at that time trying to find a trade union representative to represent her, she responded that she was not as she was scared to admit it. She did not know if she was doing something wrong and she was not sure what was going to happen at this impromptu meeting.

61 The managing absence policy makes no mention of a meeting between three members of management and the employee. It also does not allow the respondent to move the meeting forward. It was unclear to the tribunal how the respondent considered that moving the meeting forward would allay the claimant's fears about the meeting. It is likely that the claimant felt ambushed and that she was powerless to stop the process. Having already been told that the meeting that

she had asked to be postponed was instead not only still going ahead but was also to be brought forward; there was nothing to indicate to the claimant that if she asked again for the meeting to be rearranged to another time, that this would be granted. Mr Roberts told her that they were there to support her but it is unlikely that she felt supported and she expressed that in the meeting.

62 Mr Roberts asked Ms Qureshi to cancel the claimant's lesson so that she could attend the meeting. The claimant was not consulted about this. The claimant was told to meet with Ms Boakye for a return to work meeting and to then return to Mr Roberts office for the Stage II meeting. Although the meeting had been unexpected and the claimant felt intimidated; by the time she returned to Mr Roberts' office she was able to explain that she felt that the respondent should put in place a reasonable adjustment to relieve her of break duty altogether rather than given her a different version of the same responsibility. Mr Roberts disagreed. It was his position that break duty was an integral part of her role as a teacher and that as far as he was concerned, it would not be a reasonable adjustment to relieve her of that duty. He stressed to the claimant the impact her sickness absence was having on her classes. Ms Boayke has made the same point to the claimant in their meeting.

63 The claimant was so upset by the meeting and the respondent's use of the managing sickness absence procedure that she considered resigning from the respondent's employment and submitting a grievance. She spoke to her trade union representative who advised her against both. The trade union representative asked her if the respondent had ever referred her to occupational health to see what adjustments are needed and whether the respondent had ever given her reasons in writing for not making the adjustment that she had requested. The respondent had done neither. In the hearing Mr Roberts described this as a '*pastoral'* meeting. We find it unlikely that the claimant experienced it as such.

64 Mr Roberts wrote to the claimant, dated 13 November 2018 to confirm what happened in the meeting. He confirmed that the claimant had asked to be released from the requirement to do break duties but he had explained to her that this was not an option and that the respondent did not consider her request to be reasonable. He recorded that the claimant stated that there were no further amendments or requests that she could suggest to the respondent to support her and ensure her full attendance at work. He informed her that he was not going to issue her with a formal written warning this time but that a review meeting had been arranged for 19 December. That date could be brought forward if the claimant's attendance deteriorated or she failed to return to work and in that case, her absence may be dealt with under Stage III of the respondent's AMP. This was in line with the respondent's procedure which stated that unacceptable sickness absence would render an employee liable for dismissal. He reiterated that the respondent's concern was its duty of care to the students to ensure that their education was not disrupted and that it was keen to assist the claimant to ensure that she fulfilled her contractual obligations to the school. There was no mention of disability in the letter.

65 On 22 November the claimant sent a three-page letter to Dr Olukoshi in which she was polite and grateful but also indicated that she wished to resign. She set out the history of her relationship with the respondent and her struggles in coming to terms with her diagnosis of MS. She listed the positive things that she

loved about the respondent. She also stated that she wished that she had been given a little support in dealing with her illness, that she had been listened to and supported. She detailed how she had tried to speak to Dr Olukoshi in mid-October but Mr Roberts had intervened.

66 The claimant informed Dr Olukoshi that she had tried to fix all her medical appointments to weekends and after school wherever possible to avoid having to miss school. She expressed regret that the school had not listened to her and stated that this had contributed to her decision to leave. She stated that she knew her rights as an MS patient. She asked if she could be allowed the opportunity to clear her classroom and do what was necessary to ensure a smooth transition.

67 The Claimant clearly intended to resign. She indicated that even though she generally liked the school, she made this decision because she considered that the Respondent had failed to give her the adjustments that she requested.

68 The claimant was called into a meeting with Dr Olukoshi who expressed sadness at her decision to resign. He then went through the problems which the claimant had cited in her letter and put the respondent's position on those matters to her. This was not a grievance meeting. At the time, the claimant thought that she was resigning and it is likely that she viewed this as a sort of exit meeting. Therefore, her intention in attending this meeting was not to negotiate reasonable adjustments, raise a grievance or to get any further benefit from the respondent.

69 She did tell Dr Olukoshi about Mr Balaam's statement that if she was unable to do break duty, he would question whether she was fit to teach. Dr Olukoshi agreed with her that such a statement would be inappropriate. Dr Olukoshi did not put anything in writing about this to the Claimant. If he did speak to Mr Balaam about it as he said in evidence, nothing was put in writing to the Claimant about it and we find that it was not taken seriously. She also complained about how Mr Roberts had handled her request for reasonable adjustments. Dr Olukoshi said that as far as he was concerned, Mr Roberts' decision to change the break duty day was a sensible and reasonable decision.

70 The conversation moved on to the claimant's plans for the future. The claimant had no plans and did not have another job to go to. The respondent knew that she really wanted to be a qualified teacher. Also, that she liked being at the school. The claimant shared her concerns and worries about her health and the fact that she was still coming to terms with being a person with MS. She had MRI scans, medical reviews and other appointments at the hospital and with her consultants coming up in the near future and she talked to him about them. She was clearly feeling overwhelmed by her condition.

71 Dr Olukoshi told the Claimant that she was welcome to return to the respondent at any time, once she had got a better handle on her health. He also stated that he wished that she could remain at the school because she would be an excellent role model to many young girls and others. This caused the claimant to reflect on her original ambitions when she first applied to work for the respondent and to become a teacher. Dr Olukoshi indicated that she could come back in January and the respondent would continue the adjustments that had already been provided and it would consider making further adjustments. He mentioned a few alternatives for the Claimant such as working flexibly on a daily rate, almost like a

supply teacher, which was dependant on the needs of the school; or deferring her NQT year. The Claimant warmed to the idea of having a break and returning to the school in January.

72 By the end of the meeting, the Claimant had agreed to take a leave of absence from the school and return in January. He advised her to submit a request for a special leave of absence, which would be unpaid and would last until the beginning of the new term in January 2019. He advised the Claimant that she would also need to write to him to withdraw her resignation. Dr, Olukoshi wished her a restful break and stated that he looked forward to welcoming her back in New Year, hopefully in a better state of health.

73 Before she left, the claimant created a document which detailed the work she had been doing with the pupils, the location of their books and any other details that someone picking up her classes would need to know.

74 The claimant was on special leave from the respondent between 26 November 2018 and 6 January 2019. There were no firm plans between the parties about what would happen with the claimant working arrangements when she returned in January 2019. While the claimant was off, she had severe fatigue, a heavy feeling in both her legs making it difficult to walk and in particular, to ascend stairs. She had continued visual disturbances, migraines, worsening vertigo and an overall feeling that she was getting worse. The claimant had MRI scans on her brain and spinal cord on 14 December 2018 which showed that she had new lesions on her brain. The earliest emergency appointment that she was able to get with her neurologist was 23 January 2019.

75 The claimant felt positive about returning to school in January. She was reassured after the meeting with the executive principal. On 19 December, the claimant had a telephone call from Ms Qureshi, her line manager and Head of Biology who informed her that Dr Olukoshi had agreed that she would have a phased return back to school which meant that she would not be teaching during the first week back and then would increase her timetable slowly over the following week. The claimant was happy with this arrangement and felt confident about returning to school and being able to take on her role again.

76 The claimant returned to work on Monday, 7 January 2019.

77 In the hearing, Dr Olukoshi, Mr Balaam and Mr Roberts all denied the that there had any agreement that the claimant should return to work on a phased return. The respondent had not given any thought to what arrangements the claimant would need on her return to work. Prior to her return date they had not contacted her to find out about the state of her health or for any update on any recommendations from her doctors. They expected her to raise with the school on her return, any adjustments that she needed. However, the claimant did not know that this was the respondent's expectation.

78 We found it unlikely that as a Head of Department, Ms Qureshi would have arranged a phased return with the Claimant without the respondent's authorisation. Also, she was the Claimant's line manager and head of department and could reasonably be expected to know the impact on the school of the Claimant having a phased return. It is likely that she took that into consideration when she informed

the Claimant that she was having a phased return. Although the Respondent's evidence was that the school could not accommodate a phased return, we find it likely that Ms Qureshi must have discussed this with Dr Olukoshi before offering it to the claimant. It was unlikely that it had been offered on a whim on the first day back as she had previously telephoned the claimant to tell her that this was happening.

79 We were told that there was another teacher who had been offered a phased return which had been cancelled. We had no further details.

80 Dr Olukoshi did not show either Mr Balaam or Mr Roberts the claimant's resignation letter and it was highly unlikely that he discussed the contents with them.

81 On the claimant's return, Mr Balaam's evidence was that he was surprised she was not teaching that first morning. Mr Roberts instructed Mr Balaam to speak to Ms Qureshi about why the claimant was not teaching.

82 Mr Balaam and Mr Roberts decided that there should be no phased return and that the claimant should resume teaching on the following day. Mr Balaam wrote to Miss Qureshi on 7 January to confirm that the claimant should be told this and that she should get up to speed with lessons and preparation. During the day, Ms Qureshi told the claimant that there had been a mistake and that she was going to get her full timetable with immediate effect. Mr Balaam's evidence was that the needs of the school meant that the claimant could not have a phased return.

83 However, the respondent accepted that as a result of the claimant's meeting with Dr Olukoshi in November, he agreed to consider reducing the claimant's timetable. There was no consideration of the effect on the claimant of having been told by her line manager that she is coming back on a phased return and then having that rescinded.

84 Mr Balaam and Dr Olukoshi confirmed in evidence that they were aware that part of the reasons for the claimant's resignation in November had been her concerns that the school had not been making appropriate arrangements for her because of her disability but they insisted that it was up to her to go to the school if she needed any reasonable adjustments.

85 While the claimant had been off, the schemes of work had changed for Key Stage 3. The claimant had been included in email correspondence from Kelly Davies to the team about the new plans for KS3, in which she pointed them to resources that she had created. It is likely that the claimant thought the phased return would give her time to get up to speed with the changes. On the first day back, she was not sure what the changes actually entailed. The text messages that she sent to her husband on 7 January show that the respondent's decision to put back in the classroom from the following day, caused her some confusion and stress. Rather than having the time to gradually get back up to speed with her classes, the claimant was immediately thrown into a full timetable with no adjustments and no handover or briefing from the teachers who had been teaching her classes while she had been away.

86 The claimant's timetable had been divided amongst different teachers across the school some of whom were not science teachers. As the claimant had been expecting a phased return, she had not been in touch with those teachers before returning to school to find out what they had taught the class and where they were in the syllabus. Those teachers had not been asked to prepare handover notes for her as she had done for them in November. If she had been aware that there would not be a phased return then it is likely that she would have contacted them before returning to work. Although Mr Balaam instructed Miss Qureshi to meet with the claimant and the teachers who had taught those classes, no one made sure that those meetings happened. The claimant had to contact the teachers herself. The claimant had not prepared lesson plans for the classes for that week and therefore had to spend every night at school, after teaching, preparing her lessons. She also found herself working on the next few weekends to prepare lessons.

87 During that first week, the claimant's MS symptoms flared up and on Saturday, 12 January 2019, she developed an excruciating migraine headache, had a large blindspot in her left field of vision and an inability to feel her left leg. She did not find out until later that these were signs of a severe MS relapse which progressively worsened over the following days and weeks. Despite these symptoms, due to concerns about triggering Stage III of the absence process, the claimant came into work on Monday 14 January. She let everyone in the science department office know that she had had a relapse and could not feel her left leg. In evidence she stated that it would have been obvious that she was having problems with the left leg while she was walking around the school.

88 The claimant had already filled out one of the respondent's green forms which was the form for requesting leave to attend a medical appointment. This was for 23 January. On the form she indicated that she had developed new symptoms, including new lesions and that her appointment had been moved on an emergency basis so that her medication could be changed. On 15 January, in a text to Ms Qureshi, the claimant told her that she had been to the emergency department on the weekend, due to a completely numb left leg. She stated that she had spoken to the neurological team at Charing Cross Hospital and that they advised her that it was likely that she was having an MS relapse.

89 In the claimant's communications with the school, she usually sought to minimise the effect of her condition as she did not want to cause problems or to jeopardise her employment. For example, in that text message to Ms Qureshi, the claimant said that aside from a numb leg, she was '*fine'*. In her email to Mr Roberts on 21st January when she mistakenly referred to the date of the relapse as 21 January when it had happened on 12 January, she stated again that she was '*fine'* apart from a completely numb left leg, with no sensation whatsoever and '*a bit of a limp'*. She told him that this made it difficult for her to go up and down stairs especially when she had to go up three flights of stairs to her form room. She would be using the stairs at the same time as pupils and she was worried that she sometimes held them up when they were going from one class to another. It would have been clear to the respondent that the claimant was not '*fine'* as it is unlikely for a person to be '*fine'* with a completely numb left leg or with the other symptoms that she described.

90 In addition, it is highly likely that Miss Qureshi and Ms Jamal-Deen and other teachers in the department saw the Claimant struggling to walk up the stairs to her classroom but said nothing to her about it. She knew that it was noticeable because other teachers who were unknown to her stopped to ask her what had happened to her.

91 On or around 15 January, the claimant asked Sally Denbow if she could use a crutch. She told Ms Denbow that she had had a relapse. Ms Denbow agreed and gave her a crutch that had been left in the office by a student. The claimant used the crutch while navigating her way around the school and to her classes. Ms Denbow emailed Mr Balaam on 16 January to let him know the claimant was experiencing problems with her balance due to one of her legs feeling numb since the weekend and that she had given her a crutch that she found. Mr Balaam did not follow this up with the claimant. No one asked her if she was okay or if she needed anything.

92 Her discomfort prompted her to send the aforementioned email to Mr Roberts on 21 January to ask if it was possible to borrow a lift key so she could use the lift to get her classroom. The claimant was really worried about any further absence management procedures or of giving the respondent any impression that she could not cope with teaching or with being at school. This was why she said in her email *'By the way, my timetable and been at school every day etc is not a problem for me at all'.* The claimant was polite and accommodating in the email to Mr Roberts and in all her communications with her line managers. In the hearing she stated that she did not want to appear that she was not able to cope. At the same time, she did let them know of her symptoms and the effect it was having on her mobility.

93 The claimant told her mentor, Ms Ayesha Jamal-Deen and Ms Qureshi about her relapse. They appeared disinterested which left her feeling unsupported by them. Ms Jamal-Deen did not ask the Claimant how she was coping or set up a catch-up meeting with her. She did not set the claimant any NQT targets on her return. There were some informal observations.

94 As the claimant's mentor, Ms Jamal-Deen was responsible for helping/supporting her through the NQT process to becoming a qualified teacher. She was responsible for guiding the claimant, doing observations and providing feedback which was supposed to assist the claimant in improving her teaching practice. She also was responsible for completing reports recording the claimant's training, to the induction tutor. There were over 20 NQT's at the school who were looked after by one induction tutor. Ms Jamal-Deen's role was in addition to that of the induction tutor.

95 During the claimant's first week back, her year 11 class sat their Paper 1 Biology mock exams. She was expected to have marked those papers and produced the results on an Excel spreadsheet by Tuesday 15 January. As she had the relapse on 12 January, which led to her admission to hospital, she had not been able to meet that deadline. That was the reason for the claimant's email to Ms Qureshi referred to above. She asked for the deadline to be moved to Wednesday 16 January to accommodate the delay caused by her illness. The claimant did not receive a response to that request. Instead, Ms Qureshi spoke about the claimant to another head of department and science, Ms Bhome and

complained that the claimant had requested a marking extension because her MS. Ms Bhome later confronted the claimant in front of other staff asking why she had not done her marking. She indicated to the claimant that if she could not handle it at Brampton, she should leave. This upset her but she felt unable to talk to any of the managers about this incident.

96 The deterioration in the claimant's health continued in January so that she lost all sense in her leg up to her hip, including her bladder and bowels. This left her with anxiety and the fear of incontinence during the school day. She was constantly on alert that she might have an accident. During the day, on Tuesday 15 January, Ms Davies saw her struggling to walk to the office and offered to collect her last class from lineup. The respondent's practice was that each teacher had to collect their pupils from a lineup, settle them down and lead them into the classroom.

97 During that lesson, Ms Jamal-Deen and Ms Davies came into the class to begin a formal observation. The report produced from the observation was in the hearing bundle. It was completed by Ms Jamal-Deen. It indicated that the claimant was putting into place the strategies discussed and had ensured that pupils were confident with their keywords. However, some areas of development that had been identified were in relation to behaviour management as there had been some background noise and one student found it difficult to settle down. The targets set for the claimant was that she would need to plan lessons for this class in advance and send them to Ms Jamal-Deen a week in advance, starting from the lesson for the following week. She was also given the target to reiterate an effective behaviour management strategy within the class by setting high expectations and adjusting seating, if necessary.

98 The requirement to send her Year 10 lesson plans for this class to Ms Jamal-Deen a week in advance was likely to increase her workload that week, as this was a week after she had returned to school from her special leave. The claimant had been told that she was having a phased return to work which meant that she had not created any lessons plans in advance.

99 Ms Jamal-Deen's evidence was that she was not sure whether she was aware when she carried out the observation on 15 January, that the claimant had been in hospital on 12 January. However, there was no evidence that when she became aware she asked the claimant whether she was fully recovered, whether being unwell had affected her performance or whether there was anything she could do to support her to achieve the targets. During the class when she was being observed the claimant was experiencing distorted vision from a blindspot in her left eye, hearing loss alternating between her ears, fatigue and balance issues; all of which were symptoms of her MS relapse.

100 The claimant usually taught a full day on Tuesdays which meant that by 1:30 PM, she was as she described it, '*shattered'* and struggling to walk.

101 The claimant started to keep a diary to note her thoughts and feelings about her experience at the respondent. The note on 20 January, which was in the hearing bundle (177) demonstrated that the claimant was not feeling '*fine'* at the time but tearful, confused, self-conscious, defeated and overwhelmed. She ended the note by stating that the school had made her feel depressed and that her whole

perception of teaching had been ruined by Brampton. She noted that she did not want to stay in the career after leaving the school. This was another time when the claimant considered resigning from the respondent's employment.

102 On 21 January, Ms Jamal-Deen sent observations from the claimant's classes to Ms Qureshi. Although she stated in the email that she had highlighted some concerns with the claimant's teaching, it was not clear to Miss Qureshi what those concerns were. Ms Jamal-Deen subsequently explained that the set 1 class did not feel like a set 1 class due to there been limited progress within the lesson and that there had been 15 minutes of dead time in the year 12 class which had not been planned for. Miss Qureshi asked both the claimant and Ms Jamal-Deen to meet with her to discuss those concerns.

103 Following her requests for the lift key, the claimant met with Mr Roberts and Ms Qureshi on 22 January. Mr Roberts offered to move some of the claimant's classes around so that she could teach on the ground floor and not need to go upstairs. The claimant accepted the changes. Mr Roberts' offer to change her Form room to one on the ground floor was refused as the claimant had already formed a bond with her own Form group and wanted to stay with them.

104 Mr Roberts pointed out to the claimant that she had not followed protocol by approaching him directly for the lift key. He said that she should have raised the issue first with Ms Qureshi as her line manager. The claimant emailed Mr Roberts later that day to apologise for doing so and to again express her gratitude to the respondent for the adjustments that had been made. She thanked him for going out of his way to make adjustments for her and stated that she was very happy with how the matter had been dealt with.

105 Also on 22 January, Ms Jamal-Deen attended one of the claimant's lessons and completed an observation. (Page 185). She noted that the pupils' behaviour in the lesson had improved although there was still some work to be done in that area and that the claimant had ensured that all students were focussed and silent when the work was given out. The claimant had implemented the changes recommended from earlier the feedback. There were still some areas to improve and those were noted.

106 On the same day, Ms Jamal-Deen emailed the claimant with observations on the lesson plans that the claimant had sent her the previous day. She made a couple of suggestions but also commented that the lessons looked good and that the learning objectives were consistently being checked.

107 The claimant had an appointment at Charing Cross Hospital to be admitted for intravenous steroids, in the week beginning 28 January. When she was given a consultant appointment for 23 January, she asked whether she could have the steroids that day rather than have to also taking another day, 29 January out of school. The claimant was doing her best to minimise the amount of time that she was away from school because of her health. The hospital agreed but told her that due to the severity of her relapse she would need to come back on the following day, 24 January as the steroids had to be administered over two days. This was said to her verbally so she had nothing in writing to show to the respondent to request permission to be away from school on 24 January. However, as soon as she was told this and while still in hospital on the drip, she sent a text to Ms Qureshi

to inform her that it was a two-day infusion and that she therefore had to return on the following day to complete the course. The hospital agreed to supply her with a sick note.

108 The sick note was in the bundle of documents at page 188 and confirmed the claimant had been admitted to hospital for an infusion of steroids which was treatment for relapse. The steroid medication that was given to the claimant in January 2019 affected her in the following ways: she had double vision, and slowed thinking and insomnia. It was her evidence that she did not sleep at all for five consecutive nights from 23 January onwards. Also, that she was experiencing low mood and was tearful and neglectful of every aspect of her health and responsibilities, apart from making sure that she was prepared for and attended school. The claimant returned to school on 25 January.

109 On or around 25 January, Ms Qureshi and Ms Jamal-Deen invited the claimant to a meeting to discuss her teaching. Ms Qureshi's email of the same day recorded the main points of their discussion. There were concerns regarding expectations, behaviour and progress made by pupils in the claimant's class. They also discussed the data from the claimant's classes which showed that the children had not made the progress expected from their first term. While the claimant had been on unpaid leave in November and December, the claimant's classes had been taught by teachers of other disciplines. For example, 9BIB2 and 9BIM5 had been covered by PE teachers and 9BiN4 had been covered by a music teacher. The claimant felt that it was unfair that she was being blamed for the lack of expected achievement of those classes when she had been absent for part of the previous term. The respondent confirmed that around this time, there also concerns being expressed about Ms Qureshi's performance.

110 The claimant was subject to many observations during that half term. There was a dispute between the parties over whether the claimant was observed by Ms Jamal-Dean on 25 January. Ms Jamal-Deen was adamant that she had not done so, while the claimant was convinced that she had. Although she believed that she had been observed that day, the claimant could not recall any details of the observation.

111 Ms Jamal-Dean confirmed in her evidence that there was an increase in the number of observations of the claimant's lessons. At the time, the claimant did not complain to the respondent, although she was unhappy about it. There was a lot happening for her at the time. She was unwell as she was still in the state of relapse with her MS. The frequent observations had her on high alert every day as she never knew when someone would come into her classroom. She was invited to many meetings by Mr Balaam and Ms Qureshi to discuss her performance and she continued to fulfil her full timetable of teaching, attend parents' evening, departmental meetings and prepare lesson plans in advance. She was never asked whether this was all manageable for her, given that the respondent knew about the relapse.

112 We had a copy of a completed NQT induction assessment report on the claimant, which had been completed by the induction tutor, Tabitha Kaiser and submitted on 31 January 2019. This appeared to be a formal report. It stated that the claimant was making satisfactory progress towards meeting the Teachers' Standards. It stated that she had some strengths and that there were some areas

for development that were being worked on and addressed by the school. There were no concerns expressed. The claimant had good subject knowledge, had started to establish a good routine with some of the year groups and needed to replicate that with others. Her lesson planning had been effective within some lessons and needed to be strengthened with others. She also needed to set higher standards of behaviour across all key stages and to establish clear rules on conduct and effort required.

113 It is likely that Ms Kaiser completed this by using feedback from Ms Jamal-Deen and Ms Qureshi/Mr Balaam as they were the ones performing observations and supervision of the claimant. The document reviewed the claimant's performance for the first term. In her comments on the report, the claimant wrote that that she agreed that it reflected the discussions that she had had with Ms Jamal-Deen and Mr Balaam over the course of the previous term. She stated that she would endeavour to develop the stated areas for improvement.

114 Mr Balaam asked Ms Qureshi to keep him informed of what was happening in the department. We find it likely that he did this because he was concerned over Ms Qureshi's performance. Ms Qureshi left the school on 2 February 2019.

115 On balance we find it likely that on or around 4 February, the claimant showed Mr Balaam and Kelly Davies a letter that she had her consultant write to support her and which is at page 426 of the bundle. The letter is from a neurology specialist registrar. It confirmed that the claimant was under the care of Charing Cross Hospital for relapsing-remitting MS and that her therapy was being escalated at present. It asked the respondent to provide all necessary help to the claimant to enable her to carry out her job effectively, including time to attend appointments and regular breaks, as needed. We find that the claimant felt that the respondent was not making the adjustments she needed and she asked for this letter in the hope that it would help. Mr Balaam did not recall seeing this letter. It was not addressed to him and did not ask for anything specific, which meant that it may not have registered in his mind. It is unlikely that he paid much attention to it or had it copied. However, we did find that having obtained it from the hospital, it is likely that the claimant did bring it in to school to show her managers.

116 On 5 February the claimant was told that she would be taking over Ms Qureshi's year 11 Set 1 triple class, which was not normally a class that would be given to an NQT as those pupils are preparing for external examinations.

117 On the same day, during a parents evening, Mr Balaam told the claimant that because of Ms Qureshi's departure, he would be taking over managing her and meeting with her to discuss her progress. That evening the claimant took on the responsibility to talk to the parents of Ms Qureshi's pupils because, as her departure had been sudden, no arrangements had been made to for someone else to speak to them in her absence. The claimant was able to give the parents the GCSE mock exam results and answer their questions.

118 Around the end of January Mr Balaam and Mr Roberts discussed the performance of three teachers within the department who they considered needed extra support. The claimant was one of those teachers. Her classes had achieved mixed results in assessments of their performance; with some of her classes

achieving above their target grades and others performing lower than expected. Those were the results that she had previously discussed with Ms Qureshi.

119 Mr Balaam's evidence was that the respondent took into account the claimant's leave of absence when looking at the assessments. Also, some of the assessments were done before she began her leave and some afterwards. It was appropriate that the respondent take up with the claimant any issues that arose within her teaching practice so that she would have an opportunity to improve. As already stated, the respondent was also at this time concerned with the performance of two other teachers. We had copies of emails between the claimant and Mr Balaam in which she provided him with lesson plans and discussed her work. She was able to articulate clearly how she planned the lesson, why elements of the work were to be presented to the pupils in the order she had set out and what she planned to do at the following lesson. Her work between pages 202 – 210 appeared to be well thought out, organised and her approach appeared to be thorough. The claimant also prepared detailed handover information for Mr Balaam who was teaching one of her classes, which she sent to him on 7 February.

120 It is likely that the claimant was doing her best to take on board the respondent's criticisms, guidance and feedback. However, it is likely that she did not find Mr Balaam's method of giving support and guidance to be that helpful. When they met after observations she recalled that he would start by asking her whether she thought the lesson that he had observed was a good or a bad lesson. She felt that there was no right answer to that question and was cautious how she answered as it could be taken as her being unaware of the areas in which she needed to develop. He would tell her that there were issues with her performance but not tell her how to improve. He would tell her that she did not have to take on board what she did not agree with but also, that she would be penalised if she could not show that she had improved on what both he and Ms Jamal-Deen had spoken to her about.

121 There was no discussion in those meetings about the claimant health and whether there were any adjustments that she needed to help improve her performance to the standard required by the respondent. The claimant felt even more unsupported when she was told by colleagues that Mr Balaam frequently told others that she was always bringing up her illness, which was untrue. claimant felt unable to raise this with him because of the way he handled the discussions about the break duty in October.

122 By 11 February, Ms Jamal-Deen asked the claimant to send her lesson plans, in advance, for three classes. The email on page 210 does not give any indication that was because of any concerns but to help with the claimant's progression.

123 It was the claimant's evidence that Mr Balaam did not respond to her emails asking for teaching advice. He never responded when the claimant asked for advice on a lesson the claimant created for her class. We did have an observation feedback from Mr Balaam at page 212 in which he set out some areas for development for the claimant as well as her strengths. One of the points that he stressed in writing and in conversations with the claimant was what he described as her tendency to teach from the PowerPoint rather than making herself the focal point for the pupils. The claimant's evidence was that her MS had affected her

working memory which meant that she would lose her train of thought several times in a lesson, especially when being observed, which meant that she needed to glance at the PowerPoint to remind herself what she was going to say.

124 During the February half term, the claimant had an MRI scan done at the hospital which showed a new lesion in her thoracic spine, which worried her as it marked a further decline in her health. She was exhausted and felt that she was suffering from depression and that the new lesion may have been caused by the stress at work that she experienced during the previous half term. The claimant debated with herself whether she should return to school. It is likely that her desire to complete her training and become a qualified teacher was the overriding motivation for her decision to return to school. She also decided to write to the respondent to give them more information on her health and to ask for a reduced timetable as she felt that she could not cope with things as they were.

125 On 24 February, the claimant wrote to Mr Balaam and Kelly Davies. Ms Davies was now Acting Head of Biology. The letter was a long letter in which she outlined in detail how her disease had changed over the period since her return to school in January. She gave details of the medication she was on and how it affected her. She highlighted that the present medication meant that she would be required to miss school once a month to receive it at the hospital. This medication was likely to have side-effects that would inevitably take a toll on her body, while she adjusted to it. She intended to come into school every day and was negotiating with the hospital to try and have all her treatments done in one day so that she did not miss more school than was necessary.

126 The claimant asked whether it was possible for someone to sit down with her to work out what days would be the least disruptive for her to be away from school so that she could get this necessary treatment, while balancing her duties to the pupils. She stated that she did not feel that she could cope at present with a full timetable while her medical situation continued to worsen. She stated that every day was a battle for her but that she was not willing to take time off sick but would rather the respondent discussed potential adjustments with her, to help her survive the year. The claimant stated that she was on the brink of giving up. As she was presently on a timetable of 19 hours, she asked whether this could be reduced to 15/16 hours. She attached a copy of the letter dated 4 February from the neurology specialist registrar, which she had previously showed them.

127 Mr Balaam confirmed in evidence that he received this email on Sunday 24 February. He acknowledged to the claimant on Monday morning, the first day back at school, that he had received it. He told her that he had not read it. We find it likely that he read it when he received it. We find it unlikely that he would receive a long letter from a member of staff the night before the start of the new term and that he would not immediately read it. Also, this was a letter from a member of staff who he considered was underperforming and was someone with a known serious disability who had already resigned once before. Mr Balaam was a senior manager and would have been alert to the possibility that the letter contained information that he would need to respond to quickly. If this was another resignation letter or was informing him that she was going to be on sick leave, he would need to arrange for her classes to be covered. For all those reasons we find it likely that he read it when he received it.

128 It is also likely that he decided that he would delay responding to the letter until he and Mr Roberts had an opportunity to discuss it and decide on the respondent's approach to the claimant and to the matters she raised. They usually had a 1:1 meeting on Tuesdays so he decided to stall on responding to the claimant's email until after he met with Mr Roberts. In the interim, the respondent did not set up a meeting with the claimant to discuss how it could address the issues that she had highlighted in it and Mr Balaam did not forward the claimant's email to Mr Roberts. Instead, Mr Balaam emailed Mr Roberts with single word gradings on the claimant's lessons. He graded them as '*good*', '*not good'* or '*some improvements (this was a quick drop in)'.* There was no in-depth analysis of what the claimant's weaknesses were or whether they were related to the contents of the email that he had received the previous evening from her in which she outlined how her health had been affected by MS during the previous term.

129 The claimant asked Ms Jamal-Deen whether it was possible for her to send in her lesson plans slightly later than 2.35pm. Ms Jamal-Deen did not ask the claimant why she wanted to change the time or what would have been her preferred time. She simply responded to refuse because changing the time would have been inconvenient for her. There was also no discussion on whether there was a time that suited them both. She did not enquire about the claimant's health.

130 On Tuesday 26 February, Mr Balaam discussed the claimant's letter with Mr Roberts in their 1:1 meeting. They met during period 4, just before noon that day. They decided that Ms Davies should meet with the claimant to discuss her requests for reduced timetable, to see what the respondent could offer. It is likely that they also discussed and agreed at that meeting that they should escalate their performance management on the claimant.

131 Mr Roberts confirmed in his evidence that Mr Balaam was not asked to make a decision on the claimant's request for a reduced timetable. He said that Mr Balaam was only asked to '*gather information'* with Ms Davies. Had the meeting with the claimant occurred, he would then have had to bring that information back to Mr Roberts and they would have had to consider whether what the claimant was requesting could be put in place and could fit into the school timetable. In the interim, the assessments/observations of the claimant were not paused.

132 On the same day, the claimant was taken out of a lesson and told to attend a meeting with Mr Roberts in which he informed her that he had serious concerns around her teaching and overall performance. Mr Roberts told her that she was being placed on an informal performance management programme which would consist of continued unannounced observations by Ms Jamal-Deen, Ms Davies and Mr Balaam; with the addition of unannounced observations by himself and another assistant principal, Ms Stewart. The claimant was also told that she now had to send in all her lesson plans in advance. When she tried to discuss her letter of 24 February, he told her that she should take it up with Mr Balaam as it was separate from the capability issues that he was addressing. The claimant went to the meeting expecting a discussion about her letter of 24 February. She was upset that it was not about that.

133 Later that day the claimant forwarded her letter of 24 February to Mr Roberts, as he led her to believe that he was unaware of it. As always, the claimant

was polite and respectful in the email and expressed gratitude to Mr Roberts for giving her the lift key in the previous term.

134 The performance management process was confirmed in a letter from Mr Roberts dated 26 February, which also set out that the process would last about four weeks, with weekly meetings on Fridays to check her progress. The reason for the process being implemented was stated to be *'the quality of your teaching at all key stages, which requires improvement; and the outcomes for the pupils that you teach which has been inadequate'*. The claimant was informed that the respondent's minimum expectation was that the quality of teaching had to be '*consistently good*'. The first review meeting would be with Mr Roberts on 29 March. The claimant was informed that if her performance did not improve, the respondent would put her under a formal capability procedure. The letter made no mention of her health or the letter of 24 February.

135 The claimant was surprised by the respondent's decision to put her under a performance management process. She had never been told that the respondent had serious concerns about her performance. Ms Qureshi did not tell the claimant that she was escalating issues around the claimant's progress to Mr Balaam. Ms Jamal-Deen also did not tell the claimant that her performance was so poor that she was heading for a performance management process. The claimant was upset after the meeting. She taught her classes that day but by the end of the school day had developed an MS flareup in the form of blurred vision and flashing lights; with other symptoms coming on, later that evening. She had a relapse. In the evening of 26 February, Mr Balaam emailed the claimant to invite her to a meeting with himself and Ms Davies to discuss her letter of 24 February. The claimant was off sick on 27 and 28 February and sent the respondent a sick note dated 28 February for a month, to 28 March.

136 A note that the claimant made to herself on 28 February shows that she contemplated raising a grievance but had no hope that it would be properly addressed. She also considered looking in to taking legal action but was too sick and tired to follow that up. Instead, she emailed Dr Olukoshi to complain. She stated that in principle, she was not opposed to performance management, if it took her health situation into consideration. Dr Olukoshi responded to say that the respondent had shown her '*considerable understanding and support'* with her health condition since she started and that it was appropriate for the school to manage performance. He did not read that other documents she sent to him.

137 On 4 March Mr Roberts wrote to the claimant to invite her a Stage II formal absence review meeting to be held in his office on 7 March. The claimant was reminded of her right to be accompanied. The claimant asked for the meeting to be rescheduled because of the unavailability of her trade union representative and because she had hospital appointments. The meeting happened on 14 March.

138 Although it is a respondent's case that Mr Balaam and Mr Roberts split responsibility for the claimant capability issues away from considerations of her sickness absence; in this sickness absence meeting, Mr Roberts criticised the claimant for not sending in cover work for her classes. The claimant had spoken to Ms Davies about this and had been told that she did not need to worry about cover work as Ms Davies would cover her lesson planning. When the claimant informed Ms Davies that she was signed off sick for 4 weeks Ms Davies told her

that her classes have been divided among new staff and that she did not need to provide cover work. It is unlikely that Mr Roberts checked with the claimant's manager, Ms Davies before he raised this issue with the claimant.

139 The claimant attended the meeting with her fit note from her GP. She had been too ill to collect it before then.

140 The meeting minutes shows that Mr Roberts stressed at the start of the meeting that the claimant's absence was having a significant impact at the school having to arrange cover for all the claimant's lessons. The claimant trade union representative reminded the respondent that the claimant had a disability and not simply a cold and that consideration needs to be given to that. Mr Roberts outlined the adjustments that the respondent had been in place for the claimant which were: moving her classes to the ground floor, giving a key to the lift, arranging for her to do her break duties indoors and sitting down and moving the days of her break duty in order for her to take medication.

141 After some discussion the respondent agreed with the trade union representative's (TU) suggestion to refer the claimant to occupational health for a report. Mr Roberts stated that the respondent could not always facilitate all recommendations and adjustments and advised that if the claimant was not able to get back to work this was likely to lead to Stage III of the AMP, which could lead to disciplinary procedures. The trade union representative tried to engage Mr Roberts in a discussion about the claimant's request for a reduced timetable but he did not want to discuss it. He felt that this was a matter being addressed by Mr Balaam and not appropriate for discussion in this meeting. He refused to accept that it was connected to her health.

142 The appointment with occupational health (OH) was on 22 March. The OH doctor showed the claimant the referral form completed by Mr Roberts. In it he referred to capability concerns that the respondent had about the claimant. He stated that *'There are serious and ongoing concerns about this colleague's performance as a teacher and this is being actively managed through the school's appraisal procedure. Following a meeting with her on 26/2/2019, she was absent on 27/02/19 and then signed off from 28/02/19 to 27/03/2019 as stated above.'* This implied that the claimant went off sick because of the meeting on 26 February. Mr Roberts did not refer to the claimant's MS apart from reciting that it had been mentioned on the recent fit note from her GP.

143 The respondent's managing sickness absence procedure stated that action that could be considered at the Stage II meeting could include a formal written warning in accordance with the respondent's disciplinary policy and procedure, with an explanation that the employee's job could be at risk if their attendance levels did not improve. Mr Roberts did not issue her with a formal written warning at this meeting but did tell the claimant that if her attendance did not improve the respondent could proceed to a stage III meeting and from there to disciplinary proceedings.

144 In answer to questions from her TU representative, he confirmed that the Stage II meeting could be repeated. As her fit note was due to expire on 27 March, Mr Roberts stated that the claimant was expected to return to work on 28 March

and a failure to attend work on that day may trigger further action under the procedure. This was before the respondent had obtained the OH report.

145 Mr Roberts wrote to the claimant on 14 March to record what had been discussed at the meeting. The letter stressed the impact that the claimant's ongoing absence was having on the smooth running of the school. The letter did not mention MS but it did stress the adjustments that the respondent had made for the claimant. There was no acknowledgement that more or different adjustments may be required or recommended by the OH doctor. The claimant was advised that if she failed to return to work on 28 March there may be further action under the sickness absence procedure which could lead to a stage 3 meeting and her dismissal. A further review meeting was scheduled for 3 April.

146 The OH report was produced on 26 March. In it Dr Ong confirmed that the claimant was off sick from 27 February due to a major relapse of MS. Also, that the claimant had frequent and significant relapses since her diagnosis and that it was not uncommon for persons with MS to experience a very challenging time during the first 2 years after their diagnosis as it takes that time to determine which medication and dosage works right for them. She stated that since the claimant's major relapse in January, her symptoms remained significant with significant weakness in both her left arm and leg requiring her to use an elbow crutch as her balance had been affected. She confirmed that fatigue had been a significant symptom for the claimant. The claimant's symptoms were described as being consistent with a significant relapse of her diagnosed condition and not something separate from it. The claimant was declared unfit for work.

147 The OH doctor also confirmed that MS is a long-term condition subject to episodes of relapse and remission. The claimant tried to tell Mr Roberts this at their very first meeting under the absence management procedure, on 13 September 2018.

148 In terms of recommendations, the report stated that it was not possible to predict when the claimant would return to work as it would depend on whether she responded positively to the new medication. To the question of what effect would the condition have on the claimant's ability to do her job, the report answered that at present the claimant's balance was affected, she was experiencing difficulty walking, standing, ascending and descending stairs as well as significant levels of fatigue. There were no adjustments that could be recommended at this stage that would enable the claimant to return to work as she had just had her medication changed and was still very symptomatic. The OH doctor suggested that she would be better able to make recommendations once she was in receipt of a report that she had requested from the claimant's specialist.

149 The claimant's GP also confirmed that she was unfit for work and a fit note confirming this was sent to the respondent on 27 March. That fit note was due to expire on 25 April 2019.

150 On 28 March Mr Roberts wrote to the claimant to indicate that he was prepared to consider further action under the absence management procedure but would not do so until he received the further report from the OH doctor. He also asked the claimant for any suggestions she wished to make of support the school could offer her to facilitate her prompt return to work. He did not address any of

the points that the OH doctor made in her report about the significant issues the claimant was facing with her health.

151 Once the claimant was off sick there was no further communication from the respondent about her request for a reduced timetable. There was no response to her letter.

152 The claimant attended A&E on 2 April 2019. As the claimant had been off sick from the respondent for over 30 days, her NQT induction period had to be extended. A letter informing the claimant that her induction period had been extended to 18 October was written to her in April. On 25 April the claimant was signed off by her GP for a further month because of her recent relapse.

153 Another OH report dated 9 May confirmed that the claimant remained unfit for work. The OH doctor recommended that the claimant should be re-referred after 12 weeks to give her medication an opportunity to settle and so that she could experience improvement in her symptoms. Mr Roberts wrote to the claimant to invite her to another Stage II absence management meeting on 24 May. This was subsequently changed to 5 June 2019. The claimant had an appointment with a consultant neurologist on 15 May.

154 The claimant experienced financial difficulties as from February 2019, she was only in receipt of statutory sick pay. She was evicted from her home on 30 April 2019 and was homeless until July 2020. The claimant had to couch surf at various relatives' homes. At the same time, she was having physiotherapy to enable her to walk without crutches and use her left hand. After a few months the claimant's health began to improve.

155 In May 2019 the claimant was in communication with Ms Qureshi by text message. The claimant produced transcripts of their conversations in the bundle of documents. Ms Qureshi was critical of Mr Balaam and his motives in managing the claimant. She suggested that he falsified the claimant's observations and re-worded her emails about the claimant. Mr Balaam denied those allegations. We did not have the benefit of Ms Qureshi's live evidence.

156 After some correspondence between the respondent and the claimant's TU rep on the advisability of holding the stage II meeting, the respondent agreed to postpone the meeting until after the next OH report had been produced.

157 The claimant began the ACAS conciliation process on 23 May and the certificate was issued on 8 July 2019.

158 The new medication was effective and by the time the claimant attended another OH appointment in July 2019, she was walking without crutches, her manual dexterity had improved and her balance and strength in her limbs were better. However, the claimant continued to be stressed about the work-related issues and worried due to the lack of understanding of her condition by senior management. The claimant was declared still unfit to work but the doctor considered that she should be able to return at the beginning of the new school year in September. The school was advised that fatigue was likely to continue to be a factor in the claimant's life which could cause worsening concentration and brain fog. The doctor made recommendations to assist her return to work. The

list of recommendations included a phased return, a health and safety assessment of her role, a gradual increase in her teaching duties over an 8-week period, being allowed to sit at times, being restricted from playground duty, being allocated a single classroom, being treated like a newly qualified teacher and having regular, supportive supervision meetings with her line manager as a supportive measure. The respondent was also advised to refer her for a neuro-psychometric assessment followed by a cognitive workplace needs assessment to identify any further adjustments she would need.

159 The claimant could not contemplate returning to work at the respondent. On 2 September she wrote to the respondent to resign her position. The respondent accepted her resignation and offered to pay her notice pay, which the claimant accepted. The claimant's last day of employment was 2 September 2019.

160 The claimant thought that her teaching career was over as her treatment at the respondent had led her to think that it was compatible with MS. In December 2019 she had an MRI scan which revealed that her condition was stable. There have been no new lesions since she left the respondent. In February 2020, the claimant attended a pre-employment OH assessment with her present school. She had applied to be non-teaching staff. Once the school became aware of her qualifications, the headteacher at that school offered her a full-time science teacher role. The school made adjustments, including not requiring her to do break duty at all and giving her access to the lift from her first day. Her new school's attitude inspired her with confidence and has led to her having an uneventful working life as a teacher. At the time of the hearing the claimant was working as a classroom teacher at this new school. Her condition remains stable.

161 The claimant contacted ACAS on 23 May 2019 to start the early conciliation process. The certificate was issued on 8 July 2019. The ET1 claim form was issued on 7 August 2019.

162 Since September 2020 she has been diagnosed with depression and anxiety disorder which she believes is related to her experiences at the respondent. In her witness statement the claimant set out all the ways in which her life at her new school has been affected by her experiences at the respondent. In September 2020 the claimant was prescribed 100 mgs of the anti-depressant, Sertraline for mixed anxiety and depressive disorder.

Law

163 The Claimant brings complaints of direct disability discrimination contrary to section 13 of the Equality Act 2010, discrimination arising from disability contrary to section 15 of the Equality Act 2010 (EA), failure to make reasonable adjustments prohibited by section 20 EA, disability related harassment (section 26 EA) and victimization (section 27 EA).

164 The Respondent conceded that the Claimant was a disabled person for the purposes of the Equality Act 2010 by reason of her multiple sclerosis. It was not disputed that the Respondent had knowledge of the Claimant's disability.

Discrimination arising from disability

165 Section 15 of the Equality Act 2010 states that:

> "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."

166 The way in which a Tribunal should approach section 15 claims was set out by Simler J (then President) in the case of *Pnaiser v NHS England* [2016] IRLR 170 as follows: -

(a) The Tribunal should first identify whether there was unfavourable treatment and by whom.

(b) The Tribunal must then determine what caused the impugned treatment, or what was the reason for it. The focus is on reason in the mind of the alleged discriminator at this point;

(c) The "something" that causes the unfavourable treatment need not be the name 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 or cause of it;

(d) Motive is irrelevant;

(e) The causal link between the "something" that causes unfavourable treatment and the disability may include more than one link. The more links in the chain of causation, the harder it will be to establish the necessary connection. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator;

(f) The knowledge required is of the disability only, and does not extend to knowledge of the 'something' that led to the unfavourable treatment;

(g) It does not matter in which order these are considered by the Tribunal.

167 What is unfavourable treatment? As the claimant submitted, for discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably' or put at a disadvantage. The definition of discrimination arising does not involve any comparison with a non-disabled person; it requires unfavourable treatment, not less favourable treatment. (See also *Griffiths v Secretary of State for Work & Pensions* [2015] EWCA Civ 1265). Persons may be said to be treated unfavourably if they are not in as good a position as others

generally would be.

168 The Claimant referred to the case of *IPC Media Ltd Millar* [2012] IRLR 707 in which it was held that the employment tribunal has to consider whether the proscribed factor operated on the mind of the alleged discriminator – whether consciously or unconsciously – to a significant extent. The tribunal would need to identify the person whose mind is in issue and who, in an appropriate case – becomes A above.

169 Unfavourable treatment will not amount to discrimination arising from disability if the employer can show that the treatment is a *"proportionate means of achieving a legitimate aim".* It is an objective test and the burden of proof is on the employer. The respondent must produce evidence to support their assertion that the treatment was justified and not rely on mere generalisation. The claimant referred to the case of *Chief Constable of West Yorkshire Police v Homer* [2012] ICR 704 in which Baroness Hale JSC gave guidance on objective justification, noting that in order for a measure, or treatment to be proportionate it *"has to be both an appropriate means of achieving a legitimate aim and (reasonably) necessary in order to do so"*. Treatment which is appropriate to achieve the aim but goes further than is reasonably necessary in order to do so may be disproportionate.

170 The tribunal should not simply review the employer's reasons applying a margin of discretion, but must carry out a "*critical evaluation"* and determine for itself whether, objectively, the means used are proportionate to any legitimate aim, balancing the detriment to the claimant against the legitimate aim and considering whether that aim could have been achieved by less detrimental means (*Allonby v Accrington and Rossendale College and others* [2001] ICR 1189). The Tribunal should make its own objective assessment of the relevant facts and circumstances, having regard to the employer's reasonable business needs, business considerations and working practices.

Direct discrimination

171 Section 13 Equality Act 2010 stipulates that *"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".* Section 23 deals with the issue of comparators. It states that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case. In most cases a suitable actual comparator will not be available and a hypothetical comparator will have to constitute the statutory comparator. *Shamoon v Chief Constable of the RUC* [2003] IRLR 285. In relation to direct disability discrimination complaints, the circumstances related to the case include a person's abilities if, on a comparison for the purposes of section 13, the protected characteristic is disability.

172 In a complaint of direct discrimination, the relevant comparator is someone who does not have the particular disability of the disabled person, whose relevant circumstances are the same as, or not materially different from those of a disabled person; *Aylott v Stockton on Tees Borough Council* [2010] IRLR 994 CA.

173 In *Nagarajan v London Regional Transport [1999] IRLR 575(HL)* it was stated that many people are unable or unwilling, to admit even to themselves that actions of theirs may be (racially in that case) motivated. It is not necessary for the prohibitive characteristic, in this case disability, to be the sole reason for the less favourable treatment. As long as it has significantly influenced the reason for the treatment, discrimination is made out. An employer may genuinely believe that the reason why he acted in that way had nothing to do with the employee's protected characteristic but after careful and thorough investigation of a claim, members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it or not, the protected characteristic was the reason why he acted as he did.

174 The claimant submitted that discrimination may be, and often is, unconscious and unintended, and discriminators rarely admit that they have discriminated even to themselves. The issue of motive has been considered by the Supreme Court in the case of *R v Governing Body of JFS* [2010] IRLR 136. Lord Phillips held that:

> *"in deciding what were the grounds for discrimination it is necessary to address simply the question of the factual criteria that determined the decision made by the discriminator. Whether there has been discrimination on the ground of [race] depends upon whether [race] was the criterion applied as the basis for the discrimination. The motive for discriminating according to that criterion is not relevant.*
>
> *However, where the factual criteria which influenced the discriminator to act as he did are not plain, it is necessary to explore the mental processes of the discriminator in order to discover what facts led him to discriminate. Such a "subjective test" is the exercise of determining the facts that operated on the mind of the discriminator, not his motive for discriminating. It is only necessary to consider the mental processes of the discriminator where the factual criteria underpinning the discrimination are unclear. It follows that a person who discriminates on the ground of [race], as defined in the Act, cannot pray in aid the fact that the ground of discrimination is one mandated by his religion.*

Harassment

175 Section 26 EA provides that:

> "(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.

…

(4) 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."

176 A single act, if sufficiently serious may constitute harassment.

177 The Tribunal considered the case of *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 in which Tribunals were advised on the approach to take to harassment claims. The Tribunal is to focus on three elements and take each separately (i) whether the employer engaged in unwanted conduct; (ii) whether the conduct either had (a) the purpose or (b) the effect of either violating the claimant's dignity or creating an adverse environment for her; and (iii) whether the conduct was related to (as amended) the relevant characteristic i.e. disability.

178 The EAT pointed out that the purpose and effect are alternatives so employer can be liable for effects even if they were not his purpose and vice versa. In relation to effect, there is a proviso that it must be reasonable that it did so. In the case of *Pemberton v Inwood* [2018] IRLR 542, Underwood LJ stated as follows:

> *"In order to decide whether any conduct falling within subparagraph 1(a) of section 26 EA has either of the prescribed effects under subparagraph (1)(b), a tribunal must consider both whether the putative victim perceives themselves to have suffered the effect in question and whether it was reasonable for the conduct to be regarded as having that effect. It must also take into account all the other circumstances."*

179 The claimant's case is based on effect rather than intent.

Victimisation

180 Section 27 of the EA provides that a person (A) victimises another person (B) if A subjects B to a detriment because –

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

181 Section 27(2) provides the list of potential protected acts. The protected act the claimant relies on is 27(d), i.e. that she made an allegation (whether or not express) that A or another person had contravened the Equality Act.

Unreasonable conduct by an employer, failure to adhere to its own rules and policies are all matters which might lead to an inference that the decision which has been made is victimisation for an earlier protected act *(London School of Economics v Lindsay* [2013] EWCA Civ 1650).

Victimisation may be '*by reason of*' an earlier protected act if the discriminator subconsciously permitted that act to determine or influence his or her treatment of the Claimant. *Nagarajan v London Regional Transport* [1999] IRLR 52.

Indirect discrimination

182 Section 19(1) of the Equality Act provides that indirect discrimination occurs when a person (A) applies to another (B) a provision, criterion or practice (PCP) that is discriminatory in relation to a relevant protected characteristic of B's. Subsection 19(2) provides that a PCP has this effect if A applies or would apply a PCP to persons with whom B does not share the relevant protected characteristic; the PCP puts or would put persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share the characteristic; the PCP puts or would put B at that disadvantage, and A cannot show it to be a proportionate means of achieving a legitimate aim.

183 In the case of *Bilka-Kaufhaus GMB H v Weber von Harz* [1987] ICR 110 ECJ, the Court held that to justify an objective which has a discriminatory effect, an employer must show that the means chosen for achieving that objective correspond to a real need on the part of the undertaking, are appropriate with a view to achieving that objective in question, and were necessary to that end. To be proportionate, a measure has to be both an appropriate means of achieving the relevant legitimate aim and reasonably necessary to do so. The decision as to whether the PCP is justifiable or not is not one for the employer. It is one for the tribunal to make after intense scrutiny of the evidence *(Mba v Mayor and Burgesses of the London Borough of Merton* 2013 EWCA Civ 1562).

Failure to make reasonable adjustments

184 Section 20 EA imposes on the employer a duty to make adjustments where a PCP (provision, criterion or practice) of the employer puts a disabled person at a substantial disadvantage in relation to relevant matter, in comparison with persons who are not disabled. Section 20(2) provides that the duty comprises the following three requirements.

185 Subsection (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 were not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. The employer is not under a duty to make adjustments if the employer does not know and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the substantial disadvantage.

186 Section 212(1) EA defines a substantial disadvantage as something that is more than minor or trivial. An employer who fails to comply with the first, second or third requirement has failed to comply with the duty to make reasonable adjustments and discriminates against that disabled person.

187 In the case of *Project Management Institute v Latif* [2007] IRLR 579 the EAT decided that the claimant must show evidence from which it could be concluded that there was an arrangement or a PCP causing a substantial disadvantage and that there was some apparently reasonable adjustment which could have been made. If the claimant does this the burden shifts. Once the burden has shifted, the claim will succeed unless the employer is able to show that it did not breach the duty.

188 We were referred by both parties to the case of *Griffiths v Secretary of State for Work & Pensions* [2015] EWCA Civ 1265. In that case the Court of Appeal confirmed that a failure to comply with the section 20 duty to make reasonable adjustments amounts to an unlawful act of discrimination. The section 20 duty required affirmative action in certain situations. (see also *Archibald v Fife Council* [2004] ICR 9454 HL and the Equality and Human Rights Commission Code of Practice on Employment (2011) para 6.2). This was not about expecting the claimant to have set out particular obligations that he had asked the respondent to address, it is a duty on the employer to take reasonable steps to remove the disadvantage.

189 The Court stated that in order to engage the duty to make reasonable adjustments, there must be a PCP which substantially disadvantages the appellant when compared with a non-disabled person. *Griffiths* concerned the application of a sickness management procedure and the correct formulation of the PCP was held to be that the employee must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions. That was the provision breach of which may end in warnings and ultimately dismissal. Therefore, a disabled employee whose disability increases the likelihood of absence from work on ill-health grounds, is disadvantaged in more than a minor or trivial way. That group of disabled employees whose disability results in more frequent and perhaps longer absences will find it more difficult than non-disabled employees to comply with the requirement relating to absenteeism and therefore will be disadvantaged by it. The Court also referred to the judgment in *Archibald* where the substantial disadvantage was that the employee was at risk of dismissal. The purpose of the reasonable adjustment was to prevent the terms of her contract from placing her at that substantial disadvantage.

190 The claimant referred to the case *of Leeds Teaching Hospital NHS Trust v Foster* UKEAT/0552/10/JOJ in which it was stated that if there is a real prospect of an adjustment removing a disabled employee's disadvantage, that would be sufficient to make the adjustment a reasonable one; but that does not mean that a prospect less than a real prospect would not be sufficient to make the adjustment a reasonable one.

191 In the case of *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ. 640 CA the Court of Appeal held that the duty to comply with a reasonable adjustment requirement under section 20 begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage.

Provision, Criterion or Practice (PCP)

192 The claimant relied on 15 PCPs.

193 The respondent disputes that the alleged PCPs were all applied, that the claimant experienced substantial disadvantage or that the respondent was always aware of the disadvantage she suffered. The respondent disputed that a failure to refer to OH could be a failure to take a reasonable step. It referred to the case of *Spence v Intype Libra Ltd* All ER (D) 261 Apr in which the court held that an appropriate assessment of the employee's condition might have involved obtaining information from the employee, consulting with him and obtaining medical reports. Those were all part of the procedures which an employer would sensibly adopt when determining what adjustments, if any, were reasonable. But, there is no separate and distinct duty of a reasonable adjustment on an employer to consult the disabled employee about what adjustment might be made. The only question is, objectively, whether the employer has complied with his obligations or not (even though it will always be good practice for the employer to consult and it will potentially jeopardise the employer's legal position if he does not do so because the employer cannot use the lack knowledge that would have resulted from consultation as a shield to defend a complaint that he has not made reasonable adjustments). *Tarbuck v Sainsburys Supermarkets* [2006] IRLR 664.

194 The EAT in *SoS for the DWP v ALam* [2010] IRLR 283 outlined the questions to be asked as follows:- (i) Did the employer know both that the employee was disabled and that his disability was likely to affect him in the manner set out in the Act. If the answer is not then, (ii) ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in the Act.

195 The Tribunal was assisted by the *Equality and Human Rights Commission Code of Practice on Employment (2011) (CoP)*. Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments (CoP paragraph 5.20). An employer must do all it can reasonably be expected to do to find out whether an employee has a disability which places him at a substantial disadvantage *(CoP paragraph 5.20).* What is reasonable will depend on the circumstances. If an employer has failed to make a reasonable adjustment which could have prevented or minimized the unfavourable treatment, it will be very difficult for it to show that the treatment was objectively justified. *(CoP para 5.21).* Even where an employer has complied with a duty to make reasonable adjustments in relation to the disabled person, they may still subject a disabled person to unlawful discrimination arising from disability. This is likely to apply where, for example, the adjustment is unrelated to the particular treatment complained of.

196 The duty to make reasonable adjustments is an objective duty which therefore does not depend on the employer's subjective decision as to whether or not it considered that it was under a duty or as to the steps that could be taken. The Code of Practice at para 68 suggests the following factors may be taken into account:

(a) Whether taking any particular steps would be effective in preventing the substantial disadvantage;
(b) The practicability of the step
(c) The financial and other costs of making the adjustment and the extent

of any disruption caused;

(d) The extent of the employer's financial and other resources;

(e) The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

(f) The type and size of the employer

Burden of proof

197 The burden of proving the discrimination complaint rests on the employee bringing the complaint. However, it has been recognised that this may well be difficult for an employee who does not hold all the information and evidence that is in the possession of the employer and also, because it relies on the drawing of inferences from evidence. Section 136 of the Equality Act 2010 was introduced to address that and follows on from the cases of *Igen v Wong* and other authorities dealing with shift in the burden of proof. Section 136 provides that:

> *"(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."*

198 The reverse burden of proof applies to all claims: – direct discrimination, disability -related discrimination, reasonable adjustments and victimisation.

199 In the case *Laing v Manchester City Council* [2006] IRLR 748, tribunals were cautioned against taking a mechanistic approach to the proof of discrimination in following the guidance set out above. In essence the claimant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination. The tribunal can consider all evidence before it in coming to the conclusion as to whether or not a claimant has made a prima facie case of discrimination (see also *Madarassy v Nomura International plc* [2007] IRLR 246).

200 In every case, the Tribunal has to determine why the claimant was treated as she was. This will entail, looking at all the evidence to determine whether the inference of unconscious or conscious discrimination can be drawn. As Lord Nicholls put it in *Nagarajan "This is the crucial question"*. It was also his observation that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator. 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.

201 Inferences can also be drawn from surrounding circumstances and background information. The Tribunal must consider the totality of the facts.

202 The Claimant relied on the case *of Shamoon v Chief Constable of the Royal*

Ulster Constabulary [2003] UKHL 11. In that case the House of Lord said that:

> *"The test that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment must be applied by considering the issue from the point of view of the victim. If the victim's opinion that the treatment was to his or detriment is a reasonable one to hold, that ought to suffice. While an unjustified sense of grievance about an allegedly discriminatory decision cannot constitute "detriment", a justified and reasonable sense of grievance about the decision may well do so".* It is not necessary to demonstrate some physical or economic consequence.

Time limits

203 The tribunal was conscious that the time limits in employment tribunals must be strictly applied and where claims have been issued outside of the time limit, the discretion to extend time should only be applied where the claimant has shown that it would be just and equitable to do so.

204 Section 123 of the EA states that a complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act to which a complaint relates, or such other period as the tribunal thinks just and equitable. If a complaint is issued outside of the three-month period, the tribunal has to consider whether there was an act extending over a period. If not, then the claimant submitted that the tribunal should extend time on a just and equitable basis to allow it to consider all complaints in the case.

205 The respondent submitted that the claimant's complaints which relate to the period before she went on leave in November 2018, were out of time and that there was no continuing act which could enable the tribunal to be able to determine each of his allegations. It was the claimant's case that there was a continuing act. In determining whether there was *"an act extending over a period"* rather than a succession of unconnected or isolated specific acts as the respondent submitted, the tribunal was aware of the principles set out in the case of *Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96. The effect of *Hendricks* is that a claimant would not have to prove that the incidents referred to in the claim indicate some sort of general policy or practice but rather that they are inter-linked, are discriminatory and that the respondent is responsible for the continuing state of affairs. The court stated that tribunals should focus on the substance of the complaints and whether the respondent *"was responsible for an ongoing situation or continuing state of affairs. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, from which time should begin to run from the date when each specific act was committed"*.

206 In the case of H*utchinson v Westward TV* [1977] IRLR 69 it was held that the words '*just and equitable'* give the tribunal discretion to consider any factor which it judges to be relevant. In the case of *Robertson v Bexley Community Centre* [2003] IRLR 434 the Court of Appeal held that *"time limits must be exercised strictly in employment cases, and there is no presumption that a tribunal should exercise its discretion to extend time on a 'just and equitable' ground unless*

it can justify failure to exercise the discretion; as the onus is always on the Claimant to convince the tribunal that it is just and equitable to extend time 'the exercise of discretion is the exception rather than the rule''.

207 In *Abertawe* referred to above, the Court of Appeal made the following points: -

(a) The reference to (such other period as the Employment Tribunal thinks just and equitable) indicates that Parliament chose to give the tribunal the widest possible discretion;

(b) There is no prescribed list of factors for the tribunal to consider in determining whether to use its discretion. However, factors which are almost always relevant to consider (and are usually considered in cases where the Limitation Act is being considered) are the length of and the reasons for the delay and whether the delay has prejudiced the Respondent.

(c) There is no requirement that the tribunal has to be satisfied that there was a good reason for the delay before it could conclude that it was just and equitable to extend time in the Claimant's favour.

208 It was also said in that case that there are 2 questions to be asked when considering whether to use this discretion*: 'the first question …… is why it is that the primary time limit has not been met; and insofar as it is distinct the second question is (the) reason why after the expiry of the primary time limit the claim was not brought sooner than it was'.*

209 The tribunal was also aware of the principles set out in the case of *British Coal Corporation v Keeble* [1997] IRLR 336 and section 33 of the Limitation Act 1980.

Applying law to facts

The Tribunal will now refer to the items in the revised list of issues presented to us by the Claimant on the final day.

Items 1 and 2 in the list of issues: - Time – Jurisdictional Issues

210 The claimant makes complaint about alleged acts of discrimination from 3 September 2018, her first day at work, to the submission of the referral form to OH in July 2019. Her initial ACAS contact was on 23 May 2019. It is likely that any acts complained of that predate 24 February 2019 are out of time.

211 It was the respondent's submission that the claimant's leave from November to January marks a break in the continuity and that it would not be just and equitable to extend time to include the allegations that predate 24 February 2019.

212 In our judgment, the claimant makes complaint about the respondent's failure to make the same reasonable adjustments throughout her employment. She complains that the respondent's failure to remove her from break duty during

the first term of her employment, between September and November; as well as in the second term. Her complaints about the respondent's use of its Absence Management Procedure spans the whole period of her employment.

213 The claimant complains about the same actors throughout her complaint, who are Mark Balaam, Stuart Roberts and Ayesha Jamal-Deen. The issues are the same throughout the period of time covered by the claim, which are whether the respondent had a duty to make reasonable adjustments and failed to comply with it; whether the claimant was treated unfavourably because of something arising in consequence of her disability; along with her complaints of harassment and victimisation.

214 It is correct that the claimant was away from the school between 23 November 2018 and 7 January 2019. Some of that period would have been Christmas holidays. She was absent from school for approximately three weeks. There is a complaint in relation to her return to work day, 7 January 2019.

215 It is this tribunal's judgement that the complaints form a continuing act from 3 September 2018 to July 2019. It is this Tribunal's judgment that the three-week period in November/December 2018 does not break continuity as the respondent made no attempt to put any adjustments in place in preparation for the claimant's return to work or to find out whether there were any adjustments that ought to be put in place; especially considering the issues she raised in her resignation letter and in her meeting with Dr Olukoshi. Although there are no specific complaints of a failure to make reasonable adjustments during that period, this is background information that we take into account in considering whether there was a continuing act.

216 It is also this tribunal's judgment that it is just and equitable to extend time to enable us to consider the complaints in this claim. This was the claimant's first teaching job and she relied heavily on the respondent to train, support and equip her with the skills needed to become a good teacher while having a life changing disability. It is our judgment that although the claimant presented as an outspoken young woman she was not outspoken in any of her meetings with the respondent's witnesses but instead was polite, cooperative and willing to do whatever it took to keep her job and complete her NQT year. The claimant was in a vulnerable position in her time with the respondent. She usually backed down when she was refused a request or when the respondent persuaded her that she did not need the adjustment that she asked for. Whenever she received a letter of invitation to a sickness absence meeting or a letter warning her of the respondent's processes, she would return to work before her treatment finished or while still sick. She did not seek legal advice as her focus was on coming to terms with the MS and qualifying as a teacher. Although she considered taking up a grievance, she was advised not to do so and did not really have union assistance until later. Although she asked the union to attend the first Stage II meeting with her, she did not have a union companion until the March 2019 and at the time, she was still trying to get the respondent to make adjustments so that she could continue with her job.

217 When the claimant started her employment, she had recently been diagnosed with a life-altering, chronic, progressive condition and did not know how it would affect her ability to teach or to live. She was coming to terms with all

of that during her employment and in their November meeting, Dr Olukoshi appeared to appreciate this. The claimant was not someone who knew all her rights including her right to complain to the employment tribunal, where to get help, or how to go about doing so, throughout the period under consideration. The claimant's decision to resign in November shows that, given her experiences at the respondent to date, she felt she had no other choice but to do that. She did not consider legal action at the time.

218 It is therefore this tribunal's judgment that the matters complained of in this case are part of a continuing act and that is also just and equitable to extend time to enable us to consider all the claimant's complaints.

219 The Tribunal will now consider the claimant's complaint of a failure to make reasonable adjustments in breach of section 20(3) Equality Act 2010 and indirect disability discrimination in breach of section 19 Equality Act 2010.

Indirect Disability Discrimination and Failure to make reasonable adjustments

Item 11 in the list of issues: - Did the following amount to Provision, Criterion or Practices (PCPs) that placed a disabled person at a substantial disadvantage compared to a non-disabled person:

(1) *The requirement that staff must attend all hospital appointments outside of work hours*. In this tribunal judgment the respondent required all staff to attend hospital appointments outside of work hours. Mr Balaam confirmed that this was the respondent's preference. If staff had to attend appointment during school hours they would need to follow a procedure by completing a Green Form in advance, to seek approval, before been able to do so.

(2) *Triggering Stage I of the respondent's Absence Management Procedure (AMP) on the second day of sickness absence*. It is our judgment that the respondent triggered Stage I of the AMP without waiting for the time period set out in the policy to elapse. When the procedure was triggered that first time, the claimant was on the first day of her ill-health. She was off sick on 10 September 2018 and was sent an invitation to stage I AMP meeting on the 11 September. Mr Roberts confirmed that he would have done so no matter what reason the claimant gave for her absence. In our judgment, he confirmed that this was the respondent's practice.

(3) *Setting staff off sick a target of no further absences*. Mr Roberts confirmed that it was the respondent practice to set staff who are off sick a target of no further absences.

(4) *Requiring all staff to cover break duty on the break duty rota*. It is our judgment that the respondent did require all staff to cover break duty on a rota. The respondent considered it part of a teacher's job to cover break duty.

(5) *Triggering Stage II of the AMP on the third day of sickness absence.* It is this tribunal's judgment that the respondent triggered Stage II of

the AMP on two occasions. On the first occasion in February 2019, she had been off sick for 2 days. On the second occasion, the Stage II of the AMP was triggered within 3 working days of the claimant being sick. it is likely that this was the way in which the procedure was applied to all staff as Mr Roberts confirmed that he did not look at sick certificates or check on the reason given for absence before sending out the invitations to the AMP meetings. He wrote the letters on being notified of sickness absence.

(6) *The requirement to attend a Stage II AMP meeting on the date set by the respondent.* In our judgment, the respondent would not agree to change the date of the meeting even though the claimant's asked for this. She did not ask for the meeting to be cancelled but simply for it to be postponed so she could prepare for it. That request was refused and the meeting was brought forward to her first day back at work. The claimant was required to attend this meeting. The respondent's practice was that meetings are held on the date set and are not to be postponed.

(7) *The requirement to return to work without a phased return and/or the requirement that teachers always fulfil their full timetable.* In our judgment, the respondent's expectation and practice was that teachers would return to work to their full timetable without a phased return. The respondent's senior management team expected the claimant to return to her full timetable and without a phased return. Ms Qureshi had made other arrangements with the claimant and it is likely that she spoke to Dr Olukoshi about it but nevertheless, the expectation was that the claimant would not have a phased return. We heard about another teacher whose phased return had been cancelled. This also supports the premise that the respondent's practice is for teachers to return to work without a phased return and always fulfil their full timetable. There was no communication with the claimant before her return date and no discussion between Mr Roberts, Mr Balaam and Dr Olukoshi as to whether there should be a phased return or whether the claimant wanted to come back full-time/to a full timetable or whether some other arrangement was appropriate. There was simply the requirement to return to work without a phased return and to teach a full timetable. Ms Qureshi tried to make an adjustment to that but the respondent decided to stick to their practice and rescinded it.

(8) *Subjecting staff to formal class observations at any time.* This was not disputed by the respondent. In our judgment, the respondent operated a PCP that staff would be formally observed teaching, at any time and without notice; especially if they were NQT teachers.

(9) *Putting staff through formal observations without considering their current state of health.* In our judgment, the respondent applied this PCP. The practice was to deal separately with the management of an employee's ill-health and absences and her performance. This meant that no account was taken of the state of an employee's health at the

time that they are formally observed and assessed. It is likely that this was the way the respondent dealt with all members of staff. The practice was to conduct formal observations without taking anything else into account. Once they were at work and teaching, the practice was to conduct these formal observations.

(10) *The requirement that teachers always fulfil therefore timetable.* It is our judgment that this was a practice that the respondent followed.

(11) *Not making an occupational health referral for staff regularly seeing a medical specialist.* Mr Roberts confirmed that he was aware that he could make a referral to occupational health but that he chose not to do so. He considered that the claimant was able to say what reasonable adjustments she needed. It is our judgment that the respondent had a practice of not referring members of staff who are regularly seeing medical specialists for an occupational health referral. The claimant was only referred when the respondent was pressed to do so by the claimant's trade union representative in the March meeting.

(12) *Placing staff on performance management and/or requiring them to submit lesson plans in advance of all lessons, without considering their current state of health*. It is our judgment that the respondent required members of staff to submit her lesson plans in advance of their lessons, with no discussion as to how that might be impacted by their state of health. It is our judgment that the respondent applied the PCP of placing staff on performance management and/or requiring them to submit lesson plans in advance of all lessons, without considering their current state of health and did so to all staff.

(13) *Sickness absence and sick pay policy: 'teaching staff must provide work to be carried out in their classes (on the first day of absence)*'. This was one of the respondent requirements. The claimant was always asked to provide work for the pupils in her classes to carry out. In March 2019, she spoke to her manager, Miss Davies who agreed that she did not need to provide cover work but Mr Roberts still brought up the issue with the claimant in the meeting and told her off for failing to do so. This was because this was part of the respondent's criterion for being a teacher at that school.

(14) *Placing staff on stage II formal absence review without considering the impact of any disability.* It is our judgment that this is not neutrally formulated. This was not a PCP as it refers to disability.

(15) *Threatening stage III of the AMP and/or disciplinary proceedings to staff during sick leave if they do not return at the end of their certified medical sickness period*. It is our judgment that the respondent did this in Mr Roberts' letters to the claimant following their meetings on 13 November 2018 and 14 March 2019. The letters stated that they were in compliance with the respondent's AMP procedure. It is our judgment that the respondent made this threat to all staff, whether

disabled or non-disabled, if they did not return to work at the end of their certified period of sickness.

Item 12 on the list of issues: It is this Tribunal's judgment that apart from item 14, the other PCPs were applied by the respondent to disabled and non-disabled employees, both neutrally and equally.

It is also the Tribunal's judgment that the respondent did apply these PCP's as set out above.

220 Where the PCPs were expressed in the alternative (i.e. and/or) such as items 2, 5, 12, and 15, we have explained above which version of the PCP we judge had been applied.

Item 13 on the list of issues: Did the application of each PCP put the claimant at a substantial disadvantage in relation to the following allegations in comparison with persons were not disabled? Did the respondent know or should the respondent have known that the claimant was placed at such a substantial disadvantage? If so, from what time? (The numbering in brackets follows the numbering in the revised list of issues).

221 (1) The respondent refused to allow the claimant to leave work half an hour early on the INSET day on 3 September so that she could attend an urgent blood test for her MS medication. The claimant spoke to three members of her line management on her first day at work and had to repeatedly explain this personal matter to each one. Mr Roberts, Mr Balaam and Dr Olukoshi knew of her disability before she started work. She proved to Mr Balaam that she had been asked by the hospital to come in. She told him that she needed to have the blood test done to get her medication for her MS. She had attended the INSET day. Her request was to be allowed to leave half hour early. Instead of allowing her to go, the respondent attempted to persuade her that she was wrong and that she did not need to leave early. She was not allowed to go. She resigned herself to the situation. There should not have been an expectation that she would argue with Mr Balaam before she could be allowed to leave early. We were not told that if she left early she would have missed important training that she would not have been able to get on another occasion or another way.

222 It is our judgment that Mr Balaam and the respondent were aware that this appointment was for medication that the claimant needed for her MS. He stated at the beginning of their conversation that he was aware that she had MS. She explained why she needed to go to the hospital on that day and at that time.

223 It is also our judgment that the claimant was put to substantial disadvantage by the application of this PCP to her that day. Firstly, she was intimidated by this conversation with a senior manager, at their first meeting. Secondly, she was anxious and concerned for the rest of the day as to whether she would make it on time and how she would get there. Thirdly, she was so upset by the prospect of arriving late and missing her appointment that Ms Qureshi offered her a lift to the station, which assisted her in getting there, just in time. Fourthly, when she got to the unit they were about to close as she got there just before 4pm. She had to plead with the staff to do the blood test. All those factors were more than trivial

and unnecessarily caused the claimant anxiety, stress and worry. The claimant's condition of MS is one that is adversely affected by stress.

224 A non-disabled employee would be able to make their hospital appointments outside of school hours, in accordance with the respondent's PCP, without being put to a substantial disadvantage. If the appointment had to be in school hours, they could make their appointments well in advance and follow the respondent's Green Form scheme. As a disabled person who needed to have her medication reviewed that day, the claimant was unable to do any of those things. The application of the PCP caused the claimant substantial disadvantage as increased stress, worry and anxiety for someone with MS is not a minor consequence.

225 (2) On 11 September 2018, the respondent applied the PCP - Triggering Stage I of the AMP - to the claimant. At the time the invitation letter was written, the claimant had been sick for 1 day. She was told that she had reached the Stage I trigger for absences but in fact she had not yet reached the trigger set out in the policy as that was 2 days absence. Mr Roberts confirmed that it was his practice to send out the invitation letters at this stage.

226 It is our judgment that the respondent knew that the claimant's absence was connected with her disability. In her email to Ms Qureshi the claimant had outlined the full history of the matter, including that it was related to her MS that she had been put on steroids and that her vision had started to deteriorate. Even before the invitation to the Stage I AMP meeting had been written, the respondent would have been aware that the claimant's one-day absence was related to her MS. It was Mr Roberts' choice not to look at the email to Ms Qureshi before sending out the letter of invitation.

227 Mr Roberts confirmed that he was aware that he could hold a meeting with the claimant to find out more about her sickness absence without invoking the AMP and the threat of warnings and disciplinary action that it contained but chose instead to trigger the procedure. Mr Roberts had no training on how to manage a member of staff with a disability yet he was the manager put in charge of managing the claimant's illhealth. Mr Balaam was in the same position. These were the managers making decisions on the claimant's requests for adjustments and on the appropriateness of the AMP to her situation.

228 *Did it put the claimant to a substantial disadvantage?* The respondent submitted that it did not because there was no sanction imposed on her. However, in our judgment the invitation frightened the claimant so much that she went back to work when she was not well enough to do so. She was a conscientious young woman who wanted to do well in her chosen profession. She was unfamiliar with the respondent's AMP process but was concerned about how the process might affect her and her future. Even though she was still suffering from her relapse and had a few more days to go with the steroids, she returned to school on Wednesday 12 September out of fear for her career and not because she felt well enough to do so. The triggering of the AMP process at this stage caused the claimant stress, anxiety and worry which were all the more serious because MS is a condition that can be worsened by stress.

229 The respondent did this before it had had any conversations with the claimant about this recent flare up and before it was able to make any assessment as to whether the AMP process was required. By its nature the AMP process is designed to encourage/motivate the sick employee to get well and return to work. This can work with a non-disabled employee. With a disabled employee who is sick with their condition; the application of the AMP process after 1 day's absence after she explained in detail why she was absent and how it related to her condition, is likely to cause her to despair. That was how it affected the claimant. That is a substantial disadvantage.

230 (3) On 13 September setting a target of no further absences. By the time that the respondent set the claimant that target, she had already discussed her condition with Mr Roberts and told him that although she was not expecting any further absences, because she had MS she could not guarantee that the symptoms would not flare up again. She had also explained the details of her optic neuritis to Ms Boakye who had noted it down and also noted that her vision had been affected and that these were all symptoms typical of an MS sufferer. The respondent knew or ought to have known that given the claimant's disability, the imposition of the target would cause the claimant anxiety, stress and worry and was unlikely to improve her attendance. She was cooperating with the doctors and taking her medication as prescribed. She was doing all she could to help her condition stabilise. The respondent had no medical opinion that advised it that setting her a target of no absences with the threat of disciplinary action would ensure no further absences. By setting that target, the respondent implied that her attendance at work was in her control and that such a target would motivate her to attend work when it had nothing to say that that was the case.

231 As a disabled employee whose disability increases the likelihood of her absence from work on illhealth grounds, she was substantially disadvantage by being set a target of no further absences or else there will be further application of the AMP which would lead to her being subject to disciplinary sanctions.

232 It is likely that such a target would motivate a non-disabled person who had been off sick to maintain good attendance at work. In contrast, the effect of the respondent imposing this target on the claimant was to cause her stress, worry and anxiety about what would happen if she had another relapse, which was out of her control. It is therefore out judgment that the imposition of the target put the claimant at a substantial disadvantage.

233 (4) The respondent refused the claimant's request to be removed from duty. It was part of the respondent's criteria that a teacher must do break duty. The respondent indicated that this was non-negotiable.

234 The claimant made it clear on more than one occasion – in her conversations with Mr Roberts and Mr Balaam, in her letter dated 17 October - that she wanted the respondent to make an adjustment to remove her from the break duty rota and to excuse her from break duty because of her condition, because she suffered from fatigue that did not respond to sleep, sharp pins and needles in her feet and blurred vision. The respondent stated that this was not possible. It stated that it was part of her job as a teacher. The respondent never engaged with the claimant's request and instead, treated it like a request from someone who just

wanted an easier duty. It is our judgment that the claimant never asked to be let off break duty because she was cold or because she needed to take medication.

235 The respondent knew that to apply this PCP to the claimant would cause her substantial disadvantage. The respondent asked the claimant what adjustments she required in order to support her to attend school and do her job. The claimant told them on at least 3 occasions that she needed to be relieved from break duty as an adjustment. She explained the particular symptoms of her MS that flared up or were exacerbated by not having a break during the school day. The respondent refused to give her this adjustment and decided that she did not really need it or that even though they had no expertise in her condition and had not sought medical advice, they knew better than her what she needed. That was why Mr Roberts and Mr Balaam suggested that she should do break duty in the library, quad or on different days. She accepted the different days and the library duty under duress but continued to ask to be let off break duty altogether.

236 *Did she suffer a substantial disadvantage*? It is our judgment that the application of this PCP meant that she had no relief from her symptoms during the school day. What she needed was a real break. Doing break duty in the library was not a real break – as outlined in the findings above. Applying the PCP to the claimant so that she had to continue to do break duty increased her fatigue, the likelihood of her going into a relapse and worsening her condition. That could have contributed to her having time off sick and triggered the next stage of the AMP which carried with it the threat of disciplinary action and eventual dismissal. By applying this PCP, the respondent was putting her at a substantial disadvantage.

237 Also, it is likely that she lost all faith in the respondent's ability to listen to her requests for reasonable adjustments and to make those adjustments, as she needed. By the time the October half-term arrived, the claimant was extremely exhausted and upset. The respondent's refusal to make this adjustment, to issue her with the target of no more absence and to institute Stage I of the AMP made her doubt herself, feel marginalised and incapable of doing her job. She felt that she had to constantly defend herself and that it was unlikely that she would be able to survive in the profession. She decided to resign as soon as she could.

238 A non-disabled teacher would be able to do break duty without any issue. If that person felt cold or was tired then allowing them to do their duty in the library or in the quad would have been suitable and would have enabled them to continue in their job as a teacher and not question their ability to do the job or that they were being heard. The employee with the back issue was able to do their break duty in the Quad. We were not told that that person had a disability. There was little or no possibility that the application of this PCP to a non-disabled person would increase the chances of them facing disciplinary action and possible dismissal.

239 (5) It is our judgment that the first Stage II meeting under the respondent's AMP was triggered on 12 November 2018. The claimant had called in sick on 12 November and had emailed the respondent to explain what exactly was wrong. She sent in cover work. Nevertheless, the respondent triggered the process on the same day. This was Mr Roberts' and the respondent's practice.

240 The respondent knew that the claimant had MS and that she had experienced a relapse in September. They knew, from her email to Ms Qureshi

on 12 November the reason for the claimant's absence. She was experiencing visual problems and was so worried about it that she was going to get a CT scan to check whether things had got worse in her brain. She had to get blood tests and collect medication. They knew that this absence was connected to her MS.

241 *Did it cause her substantial disadvantage?* The application of the procedure would have caused her stress and anxiety. She stated that she broke down into tears at the hospital when she received the letter. This was another thing to worry about in addition to coming to terms with the condition and the implications for her life. It was also something that she could do nothing about. The respondent triggered the formal part of the AMP without having first investigated to find out whether the claimant's condition was worsening or coming under control or any other factor that might be relevant. The respondent's evidence was that the AMP meetings were the claimant's opportunity to tell them such things but as the claimant was not a medical expert, she would not have been able to do so. The respondent did not advise her that she needed to bring a letter with her from her specialist to advise them. The invitation to the AMP meeting simply stated that Mr Roberts would consider her sickness absence in line with the respondent's procedure. That meant that consideration would be given to issuing warnings and starting disciplinary proceedings.

242 The substantial disadvantage caused to the claimant was that she went to school the next morning fearful of the trigger meetings and the possibility that she could be facing disciplinary action. She was worried and concerned about what was going to happen. This contributed to her being constantly worried and anxious as to whether she was going to complete her NQT year, whether she would be disciplined and/or dismissed from the school. She doubted herself and her abilities.

243 In response to the letter and the meeting, a non-disabled person would be able to address their absence from school and maintain their attendance so that there was no fear of Stage II of the AMP process leading to Stage III and disciplinary action by the Respondent which would jeopardise their job and career.

244 It is our judgment that by triggering Stage II of the AMP on 12 November, the respondent applied a PCP that put the claimant to a substantial disadvantage.

245 (6) The respondent's action in refusing to grant the claimant's request to postpone the Stage II AMP meeting and insisting that it went ahead was the application of the PCP to her. When she got the invitation, the claimant felt too unwell and was too tired and scared to attend a meeting in 2 days, on 14 November. She tried to get a trade union representative to attend with her. In the meantime, the claimant asked for an adjustment which was to re-arrange the Stage II AMP meeting to another day. The respondent refused. The claimant had returned to work so the meeting was not required to get her to come back to work. There seemed to be no urgent need to have the meeting.

246 The respondent would have known that the claimant would be caused a substantial disadvantage when she was pressed to attend a meeting on 13 November, when she had clearly stated that she did not feel ready to deal with this on 13 November. The Tribunal did not understand how the respondent could consider that bringing forward this meeting, when the claimant had clearly stated

that she did not feel up to it and it was known that she had been at hospital the day before; could be seen as supportive or pastoral. *What was the substantial disadvantage?* The claimant felt intimidated, pressurised and like she did not have a choice but to agree to the meetings that morning. It felt like she had been ambushed. A meeting with three managers was not part of the AMP, must have felt like a disciplinary meeting and left her feeling completely overwhelmed. The fact that the respondent did not issue her with a warning at the end of the meeting would have been little comfort to her after that experience.

247 In our judgment, the respondent's decision to reject the claimant's request to postpone the Stage II AMP meeting and instead bring it forward was a failure to make a reasonable adjustment to a PCP and put the claimant to a substantial disadvantage.

248 A non-disabled person returning to work from sick leave who is invited without warning to an AMP meeting might be unhappy about that but it is likely that they would be able to attend the meeting and participate fully. The claimant was adversely affected because she has a disability which can be worsened by stress, anxiety and worry.

249 (7) The respondent applied the PCP of requiring the claimant to return to work with no phased return. Ms Qureshi, told the claimant that she would have a phased return from 7 January. In accordance with that, the claimant had not prepared lesson plans. She was hoping to ease herself back into her job. In doing so, Ms Qureshi acknowledged that the claimant was a disabled person and would need the opportunity to gradually increase her activity at work before she was back teaching a full timetable.

250 The respondent was aware of how ill the claimant had become during the previous term and that she had complained of fatigue and exhaustion, and had suffered a relapse. The respondent would have been aware that the claimant was likely to suffer a substantial disadvantage if her expectation of a phased return, which had been created by her manager, was not realised.

251 A non-disabled employee could be assumed to be ready and able to take up all aspects of their job on their return from leave. Especially as this had not been sick leave. There would be no question of them expecting a phased return.

252 The claimant was a disabled person and her disability and the fact that her needs around it had not been met, were all part of the reasons why she resigned in November. The respondent would have been aware of the need to get it right on her return to work so that that did not happen again.

253 In addition, Ms Qureshi had already told her that she was to have a phased return.

254 The respondent's decision to cancel the phased return and require the claimant to teach a full timetable from the following day put her at a substantial disadvantage. She had to remain at school late at night every evening that week and work on the weekend to be able to prepare lessons, bring herself up-to-date with the pupils' work, the new scheme of work for KS3 and meet with the teachers who had been teaching the classes in her absence. It is likely that the stress, long

days and worry contributed to a flare up of the claimant's MS symptoms on the weekend of 12 January 2019.

255 It is this Tribunal's judgment that on 7 January 2019, the respondent applied the PCP of returning to work without a phased return to the claimant and cancelled her phased return. That put her to a substantial disadvantage – both physically and mentally.

256 *(8) Subjecting the claimant to formal class observations on 15 January 3 days after a relapse.* In this Tribunal's judgment, the claimant was an NQT teacher and the respondent was responsible for ensuring that she was properly trained in classroom management, teaching and all the other skills necessary to pass her NQT and to be a good teacher. The claimant expected to be observed and had been since the start of her employment. This was not simply a complaint about being observed.

257 The respondent's practice of conducting formal classroom observations at any time, put the claimant at a substantial disadvantage on this occasion. As the claimant had suffered a relapse only 3 days earlier, about which the respondent was aware.

258 On 15 January, she was suffering from a blindspot in her vision, she was having difficulty walking and having hearing issues. Ms Davies knew that she was having difficulty walking because she had offered to collect the claimant's pupils from the lineup. The respondent knew that the claimant was unwell when they decided to do the observation. There was another observation on 22 January but Ms Jamal-Deen was adamant that she had not observed the claimant on 25 January.

259 The claimant was entitled to have an opportunity to be at her best when been observed so that her teaching skills could be properly assessed.

260 It would not be necessary to consider the health of non-disabled person who had just returned from sick leave because of the flu or another short-term illness before conducting a class observation. In that case, the school would be entitled to assume from their attendance at work that they are well enough and able to perform their duties. In contrast, even though she was at school on 15 January, the claimant had been demonstrating signs of debilitating ill-health. The respondent knew that she was a disabled person by reason of her MS. She had also told the respondent about her relapse on the weekend of 12 to 13 January. She had asked HR for a crutch. She spoke to Ms Jamal-Deen and Ms Qureshi about her relapse. It was because she saw her struggling to walk that Miss Davies offered to collect the claimant's pupils from lineup. It is the respondent's way of treating the claimant's performance as something completely separate from ill-health which led them a few moments later, to consider that it was appropriate to conduct the class observation. That put the claimant to a substantial disadvantage as because she was still unwell, she was not able to do her best.

261 *(9) Subjecting the claimant to a formal class observation on 25 January after she was in hospital for two days.* Ms Jamal Deen disputed that she had observed the claimant on 25 January. We did not have independent evidence of an observation on that day.

262 *(10) Putting the claimant through around three formal observations a week and being unnecessarily critical in each observation*. In our judgment, as an NQT teacher, the claimant expected to be observed. She did not object to being observed. It is our judgment that the issue is twofold. Firstly, the respondent appeared to escalate the observations at the end of January 2019 and secondly, there was no discussion on her state of health and how/if this affected her ability to perform well in her in the classroom and if so, what allowances or adjustments could be made to enable her to be assessed fairly and to do her best.

263 The respondent was aware of the claimant's disability. The respondent was also aware that the claimant had resigned in November because the respondent had failed to support her and make reasonable adjustments that she had asked for. She told the respondent about the relapse on the weekend of 12 January. She was clearly unwell while she was at work. The claimant asked for a crutch and had been seen walking with difficulty around school. She tried to engage Ms Jamal-Deen and Ms Qureshi in a discussion about her health but no one asked her if she was well enough to observed.

264 By observing the claimant so closely and frequently during this time, the respondent put additional stress on an individual who was dealing with a life altering, chronic disability without any consideration of the impact that it could have. The claimant was suffering severe and unrelenting symptoms in January 2019. The claimant's expectation had been that she would have a few observations over the entire academic year but the increase in observations put her on high alert and in constant fear of someone walking into her classroom and criticising her.

265 The respondent should have considered the effect of these observations on a person with the claimant's disability and state of health. The respondent was managing a person with a chronic disability and it had to take that into account in doing so.

266 *(11) Ignoring the claimant's request on 24 February 2019 for a reduced timetable*. It is our judgment that on 24 February 2019, the claimant emailed her managers and asked for a reduced timetable. This would have been an adjustment to the respondent's requirement that teachers always teach their full timetable. In her request, the claimant explained her health situation in in detail, including the treatment that she was going to have over the next period and the likely effect that it would have on her ability to teach a full timetable. It is our judgment that the respondent received and read the letter on the evening of 24 February. It is also judgment that the respondent decided to effectively ignore or not address the claimant's request and instead escalate its focus on her performance. The respondent never gave a substantive response to the claimant's letter. She was asked to attend a meeting.

267 *Did that put the claimant at a substantial disadvantage?* In our judgment, it did. The letter of 24 February was a cry for help. The claimant asked the respondent to address the way in which her current state of health was affecting her ability to do her job and to plan for further disruption that might be caused by her treatment. Rather than having to deal with it on an ad hoc basis when she called in sick, the claimant wanted to have a plan in place. That would take away the stress of having to attend AMP meetings, receive letters from the respondent

warning her about her absence or sickness and having to discuss these matters every time something happened or she attended hospital for treatment. If there was a plan in place and her upcoming treatment was noted and diarised then it would reduce her stress while allowing her to still continue teaching and complete the qualification process. She also set out in that letter how the adjustment of reducing her timetable would assist her and would alleviate the substantial disadvantage that the full timetable placed on her. By ignoring her request or failing to address it, the respondent indicated to her that this was not a priority for it. During her employment Mr Roberts and Dr Olukoshi had asked the claimant to let the respondent know if there were any adjustments that she required. This was another time when the claimant asked the respondent for an adjustment and they failed to respond to her request.

268 We were told in the hearing that Mr Balaam/Ms Davies was asked to gather information about the claimant's request and that this would be taken back to Mr Roberts for further meetings and discussion about it. This was effectively shelving the claimant's request. The claimant was never told about this plan but was simply invited to a meeting. At the same time, the respondent immediately put the claimant on performance management. It did so in isolation of any consideration of her health. This also put the claimant at a substantial disadvantage as the two things were intertwined and needed to be considered together rather than in isolation. The claimant was a person who had MS which affected her life and was also a person who needed support with her teaching.

269 It would be appropriate for the respondent to consider a non-disabled teacher's request for flexible working or for reduced timetable separately from considerations about their performance and for it not be treated as an urgent matter. It is unlikely that a non-disabled teacher's request for a reduced timetable would be linked to their performance in the way that the claimant's request was. The respondent's decision to effectively ignore her request for a reduced timetable and instead focus on performance management contributed to a deterioration in the claimant's symptoms during the day and an MS flareup. The claimant was off sick on the following days. That was a substantial disadvantage.

270 *(12) The respondent failed to refer the claimant to occupational health at various stages in her employment, until the meeting in March*. The respondent submitted that this could not be a failure to make reasonable adjustments because the case law says that a referral to occupational health in itself, cannot be a reasonable adjustment. It is our judgment, that the respondent had a number of opportunities to seek further advice and assistance from medical professionals in managing the claimant's performance and her attendance at work and failed to do so.

271 The claimant is correct that a referral to OH would have been a reasonable step to take in the circumstances as the respondent had no knowledge or expertise in managing someone with any disability, not just MS. We were told that there was another member of staff with MS but were not told anything more about that person. The claimant's situation was unique in that she had only recently been diagnosed with MS before she started employment at the respondent, which meant that she was personally not fully aware of the different facets of her condition, how it might be affected by stress or teaching a full timetable, the various types of

medication available and even, what a relapse felt like. The claimant learnt all these things while she was working for the respondent.

272 Ms Bewley, counsel for the respondent was also correct when she submitted that the duty on the employer is to take all reasonable steps in the circumstances, to determine whether the employee faces a substantial disadvantage and to be informed of what reasonable steps might need to be taken to alleviate that disadvantage and that a referral to OH per se, is not a failure to take a reasonable step. It is our judgment, however, that in this case, in the absence of any other action, a referral to OH would have been a reasonable step. This was a case in which the respondent needed some medical advice and assistance in managing the claimant. There was no knowledge about the claimant's condition in the management team. The respondent was not prepared to take any advice from the claimant about what she required. In the circumstances, it would have been reasonable for the respondent to seek advice from somewhere else, such as a medical professional, as to what would be reasonable in the claimant's circumstances.

273 In the absence of such a referral, even though it had asked the claimant to request any adjustments that she needed, when she did so, such as:- removing her from break duty, reducing her timetable, allowing her to send in her lesson plans slightly later in the day, allowing her to leave work half an hour early on an INSET day, not putting her through the AMP trigger meetings, confirming her phased work return, postponing formal class observations until she felt better, delaying performance management procedures, and excusing her from providing cover work for her classes when off sick; the respondent refused to give her those adjustments on the basis that they were only asking her to do what all teachers are required to do. In so doing they demonstrated a lack of understanding of their duty towards her as their employee. Their duty is to treat her more favourably if that is what is required to remove the substantial disadvantage caused by the application of a PCP.

274 It is our judgment that the respondent's failure to take the reasonable steps to investigate what the claimant needed to enable her to perform well in her job and to attend work, including failure to refer her to occupational health until March, put the claimant to substantial disadvantage. The claimant was constantly dealing with criticism of her by managers and colleagues that she was trying to get out of deadlines, get out of doing break duty, marking or attending work by referring to her disability. She was assessed in isolation and without due consideration of the effect that her disability had on her ability to perform, especially when she had only a few days earlier been hospitalised and/or suffered a relapse. All of which was to her disadvantage as by the time she left, she was into the formal part of the AMP.

275 (13) It is our judgment that the respondent placed the claimant on performance management and required her to submit all her lesson plans by 8 AM the day before each lesson. It is our judgment that the failure to make a reasonable adjustment was to do this without considering her current state of health and the impact of any disability. The respondent applied the PCP of placing staff on performance management to the claimant, in isolation of any other consideration. The claimant tried to have a discussion with managers about the way in which her health was affecting her ability to perform but they insisted that the two things were

separate, were being managed by different managers and had no bearing on each other.

276 *Did this put the claimant to a substantial disadvantage?* It is our judgment that it did. When the claimant was assessed at the start of her employment, there were things that she needed to improve on such as classroom management but overall, her performance was as expected of a new NQT. There were no serious concerns expressed in Ms Jamal Deen's early assessments of the claimant. In her assessment of the claimant in January, she gave the claimant positive feedback. Later she commented that the claimant's lesson plans were good. Ms Kaiser's assessment of the claimant at the end of January 2019, was that she was making satisfactory progress towards meeting the teaching standards. There were some strengths and some weaknesses which were identified.

277 There was also the claimant's meeting with Ms Qureshi and the meeting between Mr Balaam and Mr Roberts where they discussed three teachers whose performance they were concerned with, one of whom was the claimant.

278 If there was a deterioration claimant's performance in January and February 2019, there was no assessment by the respondent of how her relapses, steroid treatment, the stress of being required to attend AMP meetings and returning to work while ill, affected her performance; despite the claimant telling the respondent that it was likely that it had. Treating the claimant performance as separate and apart from the serious consequences of a chronic illness was to her disadvantage.

279 If a non-disabled person has absences from work due to having the flu or for any period of sickness, it is unlikely that this will affect their performance to any great extent. There would be no issue with the respondent placing that person on performance management if they were not making progress as expected, or in requiring them to submit lesson plans in advance of all lessons; if there were concerns about their preparation for those lessons. It would be appropriate to apply the PCP to a non-disabled person in that situation. There would be no substantial disadvantage to them.

280 By contrast, the application of this PCP to claimant put her to substantial disadvantage as there is no awareness as to how her state of health and the impact of disability affected her performance and whether she was being judged fairly having poor performance at the time. Taking the claimant's ill-health into consideration when assessing her would not have meant lowering standards and it would not have automatically adversely affected the pupils.

281 (14) The respondent applied this PCP to the claimant. She was expected to provide cover work for all her classes when off sick, in accordance with the respondent's sickness absence and sick pay policy. As stated above, even when Ms Davies said that she would cover the claimant's classes, the claimant was still criticised for not providing cover work.

282 The application of this PCP to the claimant put her at a substantial disadvantage as when she was in hospital and receiving treatment or suffering a relapse, she still had to prepare and send in work to be carried out in her classes. She still had to work. Sometimes, the claimant was able to do so and at other times this would have been an onerous requirement, which caused her additional stress,

anxiety and worry. Also, her inability or difficulty in doing so raised the possibility of additional disciplinary action for failing to comply with the requirements of the job.

283 (15) The respondent placed the claimant on Stage II of the formal AMP. This put the claimant at a substantial disadvantage. It brought her closer to disciplinary proceedings and dismissal. This was so even though the Respondent did not issue her with a warning at the end of the meeting.

284 (16) It is our judgment that on two occasions, the respondent applied the PCP of threatening the claimant with the application of Stage III of its AMP if she failed to return to work at the end of her sick certificates. She was also told that this could lead to her dismissal. This was stated in the letters of 13 November 2018 and 14 March 2019.

285 *Did this subject the claimant to substantial disadvantage?* In our judgment it did. The claimant was a person with a serious, chronic, disabling condition. She had no control over the progression of her condition. Rather than working with her to see what could be done to assist and support her, the respondent threatened her with escalating the AMP procedure if she did not return to work the day after her medical certificates expired. There was no awareness that there may be further medication or further treatment required, that the medication she was on may not work, may take longer to work, that the dosage might need to be changed or that she might continue to suffer the after effects of the relapse and need further time off. Although there were no disciplinary warnings issued to the claimant under the AMP process, because she was a disabled person who was aware that her condition could result in further absence, these threats of the application of further stages of the AMP process which could lead to her dismissal; caused her more distress, anxiety and worry which had an adverse effect on her health, that she could do nothing about.

286 *It is our judgment that the application of each PCP to the claimant put the claimant at a substantial disadvantage in comparison with persons were not disabled. It is also our judgment that the respondent knew or should have known that the claimant was placed at such a substantial disadvantage.*

287 *Item 14 on the list of issues: Did the Respondent make adjustments that were reasonable to avoid/reduce that disadvantage?*

288 The respondent made some adjustments for the claimant. It gave her a lift key and moved some of her classes to the ground floor. The claimant was told to do break duty in the library.

289 It is our judgment that the respondent had no independent opinion that these were all the adjustments that the claimant needed. She asked for others and they were refused. It is also out judgment that the respondent failed to make the adjustments listed at paragraph 14.1 – 14.11 and then 14.13 – 14.16. In relation to item 14.16, the referral to OH, it is our judgment that the respondent failed to make reasonable investigations into the claimant's health and how it interacted with her ability to do her job and instead down played things like the optic neuritis by referring to it as an eye infection. While at the same time as telling her that it was up to her to ask for adjustments, it then disregarded what she said. At the Stage I

meeting, she told Mr Roberts that it was likely that she would have further absence. He issued her with a no further absence target. She asked to be relieved from break duty, the respondent stated that this was not possible and refused to grant it. she asked to be allowed to hand in her lesson plans half hour later than requested but this was also refused. Her request for a reduced timetable was not properly considered or responded to. In those circumstances, some investigation was necessary, if the respondent was not prepared to take her word and a referral to OH was one way of doing that. The respondent failed to do any investigations.

290 In the claimant's circumstances, there were real prospects of these adjustments removing the substantial disadvantages as outlined above, from the claimant. These would have been reasonable adjustments.

291 The adjustments outlined at 14.1 – 14.16 in the list of issues would have allowed the claimant to perform at her best in the classroom and would have allowed her to feel supported and enabled by the school. The respondent would still have been able to manage the claimant, and train and support her to provide good teaching to its pupils and achieve the level of attainment that it had every right to expect for its pupils.

Item 17 in the list of issues: - Were the PCPs a proportionate means of achieving a legitimate aim? Section 19(2)(d) EA

292 The respondent submitted that it had to manage its teachers' attendance carefully. It had to maintain regular attendance of staff during term time on school days for the well-being of its students and for their education. Absence during term time needed to be limited and if there were valid reasons for absence, these needed to be addressed with the teacher concerned so that it could be managed or accommodated effectively and minimised where reasonably possible.

293 It was also submitted that the school had to ensure that all its staff including those who are disabled, teach up to the expected standard of the school for all students as this was how the school maintained their success for those students. No teacher should be allowed to teach below the expected standard as this will affect each pupils' education and that the future prospects of the school, which must be safeguarded. It was submitted that the respondent's policies and their implementation were directed to meeting that aim. The respondent submitted that it was important for all teachers and especially NQT teachers to provide a good level of education for also pupils and that it had a duty to ensure that it trained the new teachers to pass their NQT.

294 The claimant did not dispute this but submitted that the way the respondent went about that was not proportionate.

295 In our judgment, the education of its pupils to achieve at the highest level and ensure their success and the success of the school are legitimate aims for the respondent. It is legitimate for the school to want its teachers to attend school and to perform at their best. Every child is entitled to the best education that the school can give. Every new teacher is entitled to be supported and trained so that they can become the very best teacher possible.

296 However, applying *Bilka-Kaufhaus* as set out above, it is our judgment that the means chosen for achieving those objectives were not proportionate or appropriate in the circumstances. If the respondent had made the adjustments set out above, they would still have been able to train the claimant to get the best teaching out of her, to support the pupils and to support her. The respondent's submission suggests that the school has to either choose between supporting the teacher or prioritising its pupils' education and achievement. The tribunal did not accept that the respondent had to choose between those two positions.

297 The claimant wanted to perform well. She too wished to be a good teacher. The respondent was not being asked to lower its standards or to expect less from the claimant than it did from other teachers.

298 In our judgment, the means by which the respondent chose to achieve its objectives were discriminatory or had a discriminatory effect on the claimant. They were not necessary to achieving particular aim. As Mr Roberts agreed, he could have held meetings with the claimant to discuss her health, her sickness and the medical treatment that she was undergoing without doing it under the AMP process. There was no evidence that the claimant was have taken the issue of her absence any less seriously than she did when it was done under the AMP process. The invitations to the meetings was sent out to the claimant before the times stated in the written AMP procedure. There is no evidence that the AMP process was required to get her to take her attendance at school seriously. It was not a necessary process to achieving the respondent's stated aim of managing the claimant's attendance at school.

299 An adjustment to allow the claimant to leave the INSET day early would not have adversely affected the pupils' education or the quality of the claimant's teaching. We were not told of any vital information that she would have missed in the last half-hour of the day that would have had that effect.

300 Excusing the claimant from break duty would not have adversely affected the pupils' education or the quality of the claimant's teaching. We were not told that there would be an insufficient number of teachers in the school to cover break duty, if the claimant was released from it. The claimant was proposing to teach a full complement of classes. From what Mr Balaam said to her, it is likely that the respondent was concerned about how other teachers would react if the claimant was not required to do break duty but even if that was a legitimate concern, there were ways to manage that which did not require the request to be refused.

301 It is our judgment that setting the claimant the target of no further absences was particularly stressful and painful for her. it indicated to her that the respondent presumed that her absence was in her control and that she needed this target to motivate her to attend school. This was not the claimant's situation. The claimant's condition was not in her control. This warning was given as the conclusion to a meeting within which she told Mr Roberts that she was likely to have absences while her condition settled down. The respondent had no medical or other evidence that challenged that or that suggested that such a target would have the desired effect of getting the claimant to maintain her attendance at work. The evidence was that the claimant returned to school early from her sickness when she received the letters inviting her to meetings. That would indicate that she was keen to attend work but that her condition was making it difficult for her to do so. It was not

necessary and reasonably appropriate in this claimant's circumstances for these PCPs to be applied to her without adjustment.

302 The claimant returned to school on 7 January was agreed. A phased return had been agreed with her line manager. There was no evidence that giving her a phased return would have adversely affected the pupils, lowered the standards of the school or affected the success of the pupils or the school. Although we were told that the school could not accommodate a phased return we had no further evidence on it and could not assess whether this was because the school had never had a phased return and had never tried it/tried to work out how it could happen, or otherwise.

303 The respondent had been monitoring the claimant's performance since her employment began. The evidence in Ms Kaiser's objective assessment and in Ms Qureshi's and Ms Jamal-Deen's written assessments was that the claimant was making good progress but that there were aspects of her classroom management that required improvement. It is expected that a newly qualified teacher who is still in training will need support and training in some skills. It was not clear to us why her performance had suddenly deteriorated in January to such an extent that performance management needed to be instituted in February in order to get her to improve. If it was necessary, then it would have been appropriate to do so. But why did this need to be done in a vacuum and with no assessment of how her performance was affected by the MS and the relapses, the changes in medication, infusion of steroids etc that she had experienced in January? Mr Balaam refused to discuss her health when she tried to talk to him about it. Mr Roberts would not discuss her health and her performance in the same meeting. they insisted that the two were separate and yet those managers did discuss their management of the claimant between them. The claimant was not party to those discussions. Taking those matters into account would not automatically mean that the standard of teaching would be reduced or that the pupils would get a reduction in the quality of education that they were entitled to receive.

304 It is our judgment that the application of the PCPs to the claimant without reasonable adjustment was not a proportionate means of achieving the legitimate aim of maintaining standards of education for its pupils and success for the school. The respondent has failed to prove that the reasonable adjustments that the claimant needed and asked for would prevent the respondent from achieving its legitimate aim or thwart its efforts to do so. In this Tribunal's judgment, the respondent's legitimate aim could be achieved while making the adjustments in accordance with the duty placed on the respondent and as the claimant requested.

305 It is this Tribunal's judgment that the respondent discriminated against the claimant by applying PCPs to her which were discriminatory in relation to her disability contrary to section 19(2) of the Equality Act 2010.

Discrimination arising from disability (section 15(1) EA 2010)

Item 3 of the list of issues: - did the claimant's sickness absence on various dates, fatigue and/or her need to attend hospital for blood tests and treatment arise in consequence of her disability?

306 The respondent did not challenge this.

307 The claimant's absence, fatigue and her need to attend hospital for blood tests and treatment all arose in consequence of her disability. The respondent had been aware at the start of her employment that the claimant was newly diagnosed as a person with MS and that there would be a period of uncertainty while the treatment and condition settled. The claimant made it clear to the respondent in the email dated 14 April 2018 and in the Stage I meeting on 13 September that she had little control over her condition and that the symptoms may well flareup lead to periods of absence.

308 The Tribunal will now follow the steps set out in *Pnaiser* above.

Item 4 in the list of issues: - Was there unfavourable treatment? By whom? What caused the treatment i.e. what was in the mind of the alleged discriminator? Did the 'something' that caused the unfavourable treatment have a significant or more than trivial influence on the unfavourable treatment and so amount to an effective cause or reason for it? Did the alleged discriminator know of the claimant disability? And, are there links between the 'something's' and the claimant's disability?

166 The respondent refused to allow the claimant to leave work half an hour earlier on the INSET day on 3 September 2018 so she could attend an urgent blood test for her MS medication. The respondent was aware that this request was for a reason related to her disability. Mr Balaam confirmed in the conversation with the claimant that he knew that she had MS. He checked the email from the hospital and so had independent verification of the purpose of the visit.

167 The unfavourable treatment was the refusal to allow her to leave early. Instead, he told her that he did not consider that she needed to leave at the time that she requested and told her that he thought she could get there on time if she remained at school until the end of the INSET day. There was no further discussion. It is our judgment, that Mr Balaam effectively refused the claimant's request for permission to leave the school early and at the time he did so, he was fully aware of the reason why she made the request. This was unfavourable treatment because the claimant spent the rest of the training session worried whether she would make it in time. She got there just in time and got the blood test done but had to plead with the staff to do it. It caused her stress, worry and anxiety when it was necessary that it do so.

168 The unfavourable treatment was done by Mr Balaam, on the respondent's behalf. He had the claimant's disability in his mind and the fact that she needed to leave the INSET day early to attend hospital for blood tests and treatment because of it. These facts were a significant influence on his refusal to allow her the time off. It is our judgment that was also why he told her during the same conversation that she should consider carefully whether she wanted her MS to be on her employment records with the school.

169 The refusal to allow her to leave school early to go to hospital for blood tests was an act of discrimination arising from disability.

170 The unfavourable treatment here was Mr Roberts's decision to put the claimant on Stage I trigger of the AMP on 11 September 2018 and invite her to a

meeting after 1 day's absence. When he wrote the letter, Mr Roberts was aware of the claimant's disability and that she had been absent on 10 September. Mr Balaam confirmed in his conversation with the claimant on 3 September that it was Mr Roberts who told him about her condition.

171 The claimant completed the return to work procedure with Ms Boayke. The return to work form confirmed the reasons for her absence and that it was related to her disability. Mr Roberts confirmed in the hearing that he was aware that he did not need to trigger the AMP in order to speak to the claimant about her absence and the reasons for it.

172 Mr Roberts' case was that he had not read the return to work forms before meeting with the claimant or subsequently. We would expect a senior manager to do so before triggering the AMP. Even if he had not, given the claimant's conversations with Ms Boayke and Ms Qureshi, it is our judgment that he knew that the reason for her absence was because of sickness related to her disability. He certainly knew at the end of the meeting with the claimant and before he wrote the letter dated 13 September.

173 The respondent never considered modifying the AMP for the claimant, even though they knew that her absences were related to her disability. Instead, the respondent decided to subject the claimant to the AMP triggers even though the likelihood of flareups, meant that it was likely that she would breach triggers and find herself being progressed through the AMP potentially up to and including dismissal.

174 The tribunal agrees with the claimant that the AMP was used to place her under pressure to meet respondent's various PCPs, even though the respondent knew that the claimant was a person with a disability. The reason for doing so was her disability related sickness absence.

175 This was an act of discrimination arising from disability.

176 The unfavourable treatment was Mr Roberts' decision following the meeting of 13 September, to set the claimant a target of no further absences. Mr Roberts decided to do this after the claimant told him that it was likely that she would have absences in the near future because of her condition and the likelihood of flareups. She told him that she had suffering from optic neuritis which he deliberately minimised to an eye infection.

177 It is our judgment that the claimant's absence on 10-11 September was because of sickness, which had a significant influence on Mr Roberts' decision to issue her with the target of no further absences. He did so when he knew that the claimant was unlikely to be able to comply. It is our judgment that the claimant's recent sick absence and the real likelihood of future absences linked her disability were all in Mr Roberts's mind at the time that he issue her with this target.

178 This was an act of discrimination arising from disability.

179 The respondent refused claimant's request to be removed from break duty. The claimant had been clear of the reasons for her request to be removed from break duty. She spoke to Mr Roberts and Mr Balaam about this. She also emailed

Dr Olukoshi about it and he referred it back to Mr Roberts to action. The respondent was clear that her reasons for requesting break duty was because of the many symptoms that she outlined in her conversations with her managers and in the email dated 17 October 2018.

180 The respondent refused to consider removing the claimant from break duty despite the fatigue, pins and needles in her feet and other symptoms she outlined in her email. The refusal was something arising in consequence of her disability. The claimant needed to have a break during break time and doing break duty in the library or the Quad would not give her a break. The respondent concluded in the absence of any medical or any other advice, that the symptoms that the claimant outlined could be alleviated by its own proposals and that the claimant was obliged to try out these options first before they would consider her request.

181 The respondent also decided that despite her request and her setting out quite clearly her reasons for it, the claimant could not have this adjustment because a teacher must do break duty and because they were concerned about what other teachers would think. It is therefore our judgment that what was in Mr Roberts' and Mr Balaam's mind at the time that the claimant's request was refused and what caused the treatment were a number of factors including the claimant's sickness absences from work, the fact that this was not a short-term illness and that any arrangements were likely to be in place for a while; and because they had a belief that a teacher had to do break duty and that claimant had to try out these other suggestions first.

182 As Mr Roberts made most of the decisions related to managing the claimant's health, it is our judgment that Mr Roberts made the decision to refuse the claimant's request regarding break duty and when he did so, he had the claimant's sickness absences and the other factors mentioned above in his mind. The absences had a significant and more than trivial influence on his decision to refuse her request.

183 In our judgment, this was an act of discrimination arising from disability.

184 Mr Roberts put the claimant on Stage II trigger of the AMP on 12 November 2018. Was this unfavourable treatment? In our judgment, it was unfavourable treatment because the respondent was aware that the claimant's absence was because of her disability. Also, Mr Roberts chose not to consider whether medical evidence was required and any adjustments the respondent could take to facilitate the claimant's return to work, which the AMP included as part of the procedure at Stage II. As soon as she got the letter, the claimant returned to school. This would have indicated to the respondent that the claimant was keen to attend school and that her absences were due to sickness related to her disability and not within her control.

185 It is this tribunal's judgment that the respondent put the claimant on the Stage II trigger knowing that her absence had been caused by her disability and the need to attend hospital. The treatment was caused by the claimant's absence for those reasons. In Mr Roberts's mind was the fact that the claimant had been off sick again despite the target he had set her in September of no further absences. He knew however that the absences were related to her disability. Putting the claimant on Stage II of the AMP procedure was unfavourable treatment

because it was the next stage in managing the claimant to disciplinary action and dismissal. It is our judgment that this treatment occurred because of the claimant's absence which was clearly and directly linked to her disability.

186 This was an act of discrimination arising from disability.

187 Mr Roberts' decisions to reject the claimant's request to postpone the Stage II trigger meeting scheduled for 14 November and to bring it forward by one day to 13 November 2018 were unfavourable treatment. The claimant specifically told the respondent in her email that she felt unable to cope with the trigger meeting. The claimant was stressed. The claimant had just been off sick, including being in hospital. The respondent was aware of all of this and that it all related to her disability. The respondent was also aware or should been aware that MS is a condition that can be adversely affected by stress.

188 The claimant's request was reasonable. At the time that the claimant was made to attend those meetings on 13 November, she had returned to work and was no longer off sick. There was no urgent need to meet with her that day and the respondent would have lost nothing in terms of managing her absence or ensuring favourable outcomes for the students by agreeing to postpone the meeting or at least keeping it to 14 November.

189 The treatment was caused by Mr Roberts' desire to control the situation and to pressurise the claimant to never to be absent from work again regardless of her condition and her need to attend hospital. In our judgment, the treatment was caused by her absence and her request for the meeting to be postponed. We did not have a logical and cogent explanation as to why the meeting had to go ahead that day.

190 It is this tribunal's judgment that the failure to postpone the meeting as the claimant requested was unfavourable treatment by Mr Roberts because of her absence which was a reason related to her disability.

191 This was discrimination arising from disability.

192 The respondent cancelled the claimant's phased return to work on 7 January and put her back on a full timetable with immediate effect. That decision was made by Mr Balaam with support from Mr Roberts and in consultation with Dr Olukoshi. All her managers were aware that she was a disabled person and that Ms Qureshi had informed her that she was going to have a phased return because of her disability. The respondent would have been in no doubt that the suggestion of a phased return had been made to enable the claimant as a disabled person to ease back into her job following her unpaid absence in November/December 2018.

193 The decision to cancel the phased return after it had been agreed with her line manager and she had returned to work expecting it, was unfavourable treatment because it meant that she then had to spend every evening that week preparing lesson plans, familiarising herself with the changes to the KS3 teaching scheme and speaking to the teachers who taught her classes in her absence to find out where they were in the curriculum. She also began teaching her full timetable from Tuesday 8 January. That put extreme pressure on the claimant. She suffered stress, anxiety and worry at this time, which could well have

contributed to the relapse which began during the week and escalated so that she had to attend A&E at hospital during the weekend of 12 January.

194 The claimant and her line manager had agreed a phased return. When they decided to cancel the arrangements, Mr Balaam and Mr Roberts had in their mind the claimant's disability, her recent absence from work - having earlier resigned due to lack of support and adjustments and persuaded to withdraw it - and her sickness absences in September and November 2018. It is our judgment that the respondent would have been aware that the impact of refusing to allow her to have a phased return would mean that she would have to do a lot of work in the evenings and on weekends to catch up with her preparation to start teaching her full timetable straightaway.

195 In our judgment, the respondent cancelled the claimant's phased return because of the claimant previous absences and because of the possibility of future absences with her condition. The claimant's absences in September and November 2018 had a significant or more than trivial influence on the respondent's decision to cancel the phased return.

196 In our judgment, this was discrimination arising from disability.

197 It is our judgment that the respondent effectively ignored the claimant's request on 24 February 2019 for reduced timetable. The claimant spoke to her managers, Mr Roberts and Mr Balaam a few times during the day on 25 February but they did not discuss the letter with her. When the claimant asked about the letter she was told that Mr Balaam had not yet read it when it was more likely that he had. Mr Roberts and Mr Balaam discussed the letter in their one-to-one meeting on 26 February. There was still no response to the claimant. The claimant eventually got a response after she forwarded the email but even then, it was simply to invite her to a meeting. It contained no information on what the meeting was going to be about. For instance, there was no reassurance that the respondent was going to agree to her request for a reduced timetable and all that was needed was a discussion on the details. The respondent did not reassure her that it was going to do all it could to support her with this request. Instead, the respondent spent time on Monday 25 February setting up performance management of the claimant and held a meeting with her to discuss that. This was not something that had been highlighted to her as a possibility before she sent her email of 24 February.

198 In our judgment, the respondent ignored the claimant's request for a reduced timetable because it did not want to agree to a reduced timetable even though it knew that such a refusal would continue to have the impact on the claimant that she described in her email of 24 February.

199 Although Mr Roberts and Mr Balaam's evidence was that they kept the management of the claimant's performance separate from management of her disability/ill-health, in February 2019, both managers were aware of the claimant's email and it is highly likely that they discussed their response to it at the one-to-one on the Tuesday, if not before. Mr Roberts then collated feedback from Mr Balaam on the claimant performance along with that from Ms Jamal Deen and set up the performance monitoring. Mr Roberts was the manager who dealt with the claimant's sickness absence. It is therefore our judgment that the respondent had

in its mind the claimant absences, her condition, and the likelihood of further absences; when it decided to shelve or ignore her request for a reduced timetable. The claimant absences and her MS had a significant or more than trivial influence on the respondent's decision to ignore her request for a reduced timetable and instead, focus on performance management.

200 The Tribunal did not accept the respondent's submission that there was no refusal and that the respondent were getting around to meeting with her to discuss her request for a reduced timetable but that as she did not return to work, that was why it was not progressed. The respondent had more than one opportunity on Monday 25 February 2019 to confirm to the claimant that the requested been received and that it was being looked at or to give her reassurance that they were keen to give all the support that she needed in order to attend work and to perform at her best. This did not happen. It is our judgment that the respondent had ample opportunity to let the claimant know that it had received letter and what its initial attitude was towards her request, even if it could not give her details. It failed to do so.

201 It is our judgment that the reason why the Mr Roberts and Mr Balaam did so was because of the claimant absences in September and November 2018 and the likelihood of further for future absences, as set out above. This was discrimination arising from disability.

202 It is our judgment that the respondent failed to refer the claimant to occupational health on the various dates set out in 4.9 of the list of issues. This was in the following circumstances: the claimant was a person with a newly diagnosed, chronic, life-altering condition at the start of employment; she quite openly said to the respondent just before she took up the post that she did not know what adjustments that she would require and that she expected the respondent to send her for another medical opinion so that both parties could be advised of what would be appropriate adjustments for her; when the claimant tried to engage with the respondent and requested what she thought were reasonable adjustments, the respondent refused to grant them and instead, debated with her on whether they really were what she needed and suggested instead, options that would work for them.

203 It is also true that the respondent made 3 adjustments for the claimant after she made requests. Those were: giving her the lift key, allowing her to teach in classrooms on the ground floor and even though it was not what she asked for - arranging for her to do her break in the library rather than the school playground. But the respondent did not have any expert/medical opinion that those were all the adjustments that the claimant needed. The respondent placed the responsibility on the claimant to identify the adjustments that she needed and to advocate for those in the workplace. There were no letters from the respondent to the claimant, apart from Sally Benbow's email on 16 April 2018, which informed her that the responsibility lay with her to highlight any adjustments that she needed. When she did highlight adjustments that she felt that she needed, the respondent refused to implement them or disputed that she needed them.

204 In those circumstances, it would have been appropriate for the respondent to have undertaken some investigation on what was the best way to support the claimant and what would be reasonable adjustments to enable her to produce her

best work. The respondent failed to do so. The respondent's AMP raised the possibility of a referral to OH at Stage II. Mr Roberts chose not to make such a referral but instead, chose to threaten the claimant with Stage III and disciplinary proceedings, should she not return to work once her sick certificate expired.

205 It is our judgment that he did so because of the claimant's sickness absences, and the fact that she did not abide by his warning to have no further absences. It is our judgment that those factors had a significant influence on his decision not to refer the claimant to OH until he was pressed to do so by the trade union representative in March 2019.

206 It is not in dispute that the respondent placed the claimant on performance management. It is our judgment that performance management could be a supportive measure if it is aimed at working with and supporting the claimant to be the best teacher that she could so that she could pass her NQT. If the claimant performance was below par then it would be appropriate to put her on performance management or some other supportive measure for a period of time to help her improve. However, there are facts which led us to believe that the performance management was more likely instituted because of the claimant's absences from work, her fatigue and the need to attend hospital for blood test and treatment. One of those facts is the timing of the performance management process. Up to January 2019, the claimant classroom observations had recorded that she had good teaching skills but needed support to develop management control of more challenging pupils. The report by Ms Kaiser at the end of January also confirmed that the claimant was making good progress and that her lesson plans were good. Her weak area was around setting standards of behaviour for challenging pupils. In February 2019, the claimant was given Ms Qureshi's year 11 triple class confirmed that she was considered good enough to teach those preparing for A-levels.

207 The claimant was placed on performance management process at the same time as the claimant's request for a reduction in her timetable and there is a strong possibility that it was done in response to that request. Days after Mr Balaam received her letter, he met with Mr Roberts and sent him a quick cursory assessment of the claimant's classes. The claimant was quickly called into meeting in which she was told that she would be subject to performance management. At no point in the period leading up to that had Ms Jamal-Deen or Ms Qureshi (while she was still there) or Mr Roberts highlighted to the claimant that her performance was so poor as to be in danger of being placed on performance management.

208 The conversation the claimant had with Ms Qureshi around 25 January highlighted that the pupils' achievement for the past term had been less than had been expected but she did not indicate to her that this was serious enough for performance management.

209 It is also our judgment that in placing her on performance management, any assessments that took place between January and the date when she was told of the performance management process, does not appear to have positively taken into account her relapses, attendance at hospital, need for treatment and the fact that she was unlikely to be performing at her best during those times. There was

no discussion with the claimant as to how her performance was affected by her condition.

210 In the claimant's case, performance management was not a supportive measure. It was unfavourable treatment because of the timing and the way in which it was done. The performance management process was set up in isolation of any consideration of her MS and with no discussion with her on how to support her with adjustments and follow medical advice, if necessary, to enable her to perform at her best. In our judgment, the respondent's awareness of the claimant's sickness absences and her need to regularly attend hospital for blood test and treatment were in Mr Roberts' and Mr Balaam's minds and were likely to be the reason for placing her on performance management at the time that they did. In our judgment, this was the start the respondent managing the claimant out of the school.

211 11) It is our judgment that the respondent required the claimant to provide cover work for all her classes when off sick. At all times the claimant was expected to provide, for her classes while off sick. Whether she was in hospital attached to a drip or sick at home or undergoing other treatment at hospital, the expectation was that she would provide cover work for her classes. The claimant did provide work for her classes but it caused her additional stress, anxiety and worry. There was no discussion with her about whether she could provide cover work while she was off sick or undergoing hospital treatment.

212 When the claimant was sick in March, Ms Davies told her that she did not need to provide cover work and that she would cover the claimant's classes. Even so, Mr Roberts took the claimant to task for not providing cover work. This was embarrassing and upsetting the claimant and unfavourable treatment. It is our judgment that the reason Mr Roberts so was because of the claimant's sickness absences (he asked her about it in the AMP meeting) and her need to attend hospital for treatment.

213 This was unfavourable treatment and discrimination arising from the claimant's disability.

214 12) It is not disputed that the respondent placed the claimant on Stage II of the AMP in March/April 2019 and warned her in correspondence that she may be moved to Stage III of the AMP and face disciplinary proceedings if she did not return to work at the end of her certified absence.

215 It is our judgment that this was unfavourable treatment. Even though it was in keeping with the respondent's AMP, it was unfavourable treatment. The respondent was not bound to manage the claimant's sickness absences through the AMP procedure or to do so without adjustments to that procedure. The claimant was a disabled person, who was in touch with the respondent, who gave it all the information it needed about her condition, her absences, how long her absences were likely to last and how they were related to her condition of MS. This was not a case of someone who was off sick and needed the threat of disciplinary action to motivate them to return to work. The claimant was not in control of her sickness or the ways in which the hospital chose to manage her condition. She kept the respondent informed at all times. There was no evidence that the threats of being moved on to the Stage III of the AMP process or of disciplinary

proceedings would cause her to not have any more sickness absences and achieve 100% attendance at school.

216 In our judgment, the respondent placed the claimant on Stage II of the AMP and in March/April 2019 warned her that she may be moved on to stage III if she did not return to work, because claimant had been off on sickness absence and because she needed to attend hospital for blood test and treatment on various days during her employment with the respondent. That was unfavourable treatment.

217 In our judgment this was discrimination arising from the claimant's disability.

Item 5 in the list of issues:- It is our judgment that the respondent's treatment of the claimant as outlined above, constituted unfavourable treatment because of something arising from the claimant's disability i.e. the claimant's sickness absence, fatigue and/or her need to attend hospital for blood tests and treatment.

Item 6 in the list of issues:- Was the unfavourable treatment a proportionate means of the respondent achieving a legitimate aim?

Justification

218 The tribunal agreed with the respondent that it is a legitimate aim to have teachers in school who can teach pupils in a structured way in accordance with their contract of employment. The respondent needed to be able to address staff absences, manage staff and ensure that pupils are taught and achieve their full potential. The respondent wanted to maintain its own success by ensuring the success of its pupils. This has to be balanced with its duties to its employees i.e. to manage them fairly, properly and in accordance with its legal responsibilities and duties.

219 As highlighted above, the test of whether this is a proportionate means of achieving the legitimate aim is an objective test and the burden of proof is on the respondent. The respondent cannot rely on mere generalisations.

220 The Tribunal considered the principles set out in *Homer* and *Allonby* above. The question for the tribunal was whether the measure/s taken by the respondent were an appropriate means of achieving its legitimate aim and reasonably necessary in order to do so.

221 The Tribunal compared the impact of the treatment on disabled people as against the importance of the aim to the respondent. In our judgment the legitimate aim of success of pupils and the school is important to the respondent and to its reputation and possibly its ability to attract the brightest pupils in the area. The impact on members of the affected group – disabled teachers – of having this treatment done to them because of their sickness absence, attendance at hospital for blood tests and treatment and fatigue is highly detrimental to their careers and lives. There were non-discriminatory alternatives open to the respondent in each of these instances.

222 As stated above the respondent could have allowed the claimant to leave early on the INSET day. This would not have adversely affected outcomes for the pupils.

223 The respondent could have met with the claimant and discussed her absences and her attendance at hospital without triggering the AMP, especially as the period of time in the procedure had not yet elapsed with Stage I was triggered. There was no urgency. The respondent could always trigger the procedure later if it became clear that the claimant was not doing all she could to cooperate with her doctors and take her treatment so that she could be as well as possible and fulfil her contract.

224 The act of setting the claimant a target of no further absences was done in the full knowledge that the claimant would not be able to keep to that and was more than likely going to be off sick again. This was not in her control. She had a chronic, life-altering disability which she was trying her best to manage and be totally honest and upfront with the respondent. She had not asked the respondent to be relieved from teaching or to lower its standards for her. She asked for adjustments to enable to her to fulfil her contract and teach, while looking after her health.

225 The respondent considered the requirement to do break duty as an integral part of a teacher's job but we were not told why that was. If it was because of the need to interact with students, it was possible for an arrangement to be made for the claimant to interact with them in a different way. The respondent has failed to prove that the requirement to do break duty without adjustment was proportionate. It was not proportionate considering the effect that having to do that duty had on the claimant's health.

226 The respondent has failed to prove that its act in cancelling the phased return which had already been agreed with the claimant's line manager and which she had prepared for was proportionate. The effect that it had on the claimant and that it would have on members of the affected group i.e. other disabled employees would be quite serious. The claimant had to spend every evening at school until late and work all weekend to get her lesson plans etc ready. She did not have the gradual ease back into work that she had planned and agreed with her line manager. We did not have sufficient evidence to show that it was necessary to do that in order to ensure the respondent achieved its legitimate aim.

227 The respondent's decision to manage the claimant's sickness under its AMP could be proportionate if the claimant's absence was out of control or if it she had not responded to informal management. In this case, the claimant always told the respondent what was happening with her, exactly what treatment she was receiving, when she expected to be back at work and what was the likely trajectory of her ill-health – as far as she was aware. In those circumstances, the Tribunal do not accept that it is proportionate to manage a disabled person who is in regular contact with her managers when sick and provides them with all the information about her health, under an absence management procedure that with threats of escalating to disciplinary proceedings and dismissal. It had a disproportionate effect on the claimant and caused her unnecessary stress, anxiety, worry and possibly contributed to relapses, sleepless nights and further sickness.

228 It is our judgment that the unfavourable treatment was not a proportionate means of the respondent achieving its legitimate aims.

Victimisation

229 In order for the claimant to come within the ambit of section 27 of the EA, she must have done a protected act. The claimant relies on her letter dated 22 November 2018 to Dr Olukoshi. However, in her submissions, the claimant did not identify the part of the letter that she says amounted to a protected act.

230 In the letter of 22 November, the claimant stated that she wished that she had been given a little support by the school in dealing with her illness. She recited her efforts to talk to Dr Olukoshi about her treatment. She stated that she wished that she had been listened to because she was aware of what the law entitled her to as a disabled person. She stated that she had made efforts such as arranging her appointments outside of school hours and at weekends to fit in with the school's demands. The only teacher the claimant named in the letter was Mr Roberts and she stated that he bypassed her attempts to speak to Dr Olukoshi. By inference, the claimant suggested in the letter that her managers, which would include Ms Qureshi, and Ms Jamal-Deen, Mr Roberts and Mr Balaam, failed to listen to her and support her to deal with her illness. Although it was a serious indictment of the way the school treated her, it is our judgment that the letter does not make allegations that the respondent, or specific people within the respondent contravened the Equality Act.

231 It is our judgment that the claimant's letter of 22 November 2018 was not a protected act. It did not provide information as stipulated in section 27 of the EA 2010.

232 The complaint of victimisation therefore fails and is dismissed.

Harassment

Item 7 of the list of issues:- Did the Respondent engage in the following unwanted conduct and was the conduct related to the claimant's disability?

233 In this Tribunal's judgment, the respondent engaged in conduct that was unwanted conduct in items 7.1 - 7.22.

Item 8 in the list of issues: it is our judgment that all these matters were related to the claimant's disability.

Item 9 in the list of issues: - it is our judgment that the matters listed at items 7.1 – 7.22 did not have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

Item 10 in the list of issues: Did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

234 In our judgment item 7.1 – had the effect of creating a hostile and intimidating environment for the claimant. She had to ask three people who she had only just met, on her first day at a new job, to be allowed to leave 30 minutes early, to go to hospital for urgent medical treatment. When she spoke to Mr Balaam he refused her request for permission to leave early and then warned her to consider carefully whether she wanted her MS to be on her employment records thereby indicating that this may be to her detriment.

235 That would have created a hostile environment for her.

236 In our judgment in relation to item 7.2 – putting the claimant on Stage I trigger of the AMP on 11 September, before the two days set out in that procedure had passed – was unreasonable and humiliating for the claimant. It had the effect of creating a hostile, intimidating and humiliating environment for the claimant.

237 In our judgment – in relation to item 7.3 – setting the claimant a target of no further absences was hostile especially as the claimant told Mr Roberts that it was likely that she would have further absences. She was being honest with him and letting him know the reality of the situation. He decided to put give her a warning which would scare and intimidate her but about which she could do nothing. He condition was not in her control. This was harassment.

238 In our judgment – in relation to 7.4 and 7.5 – the respondent's refusal to remove the claimant from break duty. The claimant repeatedly asked for this adjustment. The respondent understood her request but her managers refused to grant her this and insisted that she do it. it is also our judgment that Mr Balaam stated to the claimant that if she was unfit to do break duty, the next question would be was she unfit to teach. In his evidence Mr Balaam did not explain how it was proportionate and reasonable to put those two things together. Even though it may have been the norm for able bodied teachers to do break duty we were not told how releasing the claimant from break duty would lead one to conclude that she could not teach. This was said to intimidate the claimant and make her withdraw her request. As was the refusal to grant the request and to try to persuade her that doing her duty in the library met her request. In this Tribunal's judgment both 7.4. and 7.5 are acts of harassment as they created a hostile, intimidating and adverse environment for the claimant.

239 It was not our judgment that Mr Balaam refused to speak to the claimant and ostracised her between October 2018 and January 2019.

240 It is this Tribunal's judgment that the respondent's action in refusing to postpone the Stage II trigger meeting on 14 November and instead, bringing it forward to 13 November had the effect of making the claimant feel very unsafe and intimidated her. The claimant had no expectation that the meeting would be brought forward. In her letter asking for a postponement she had clearly set out how she was feeling and the respondent were aware that she had been in hospital and was coming back to work after being ill.

241 To bring the meeting forward, with no notice and with three managers in the room was likely to have the effect of intimidating the claimant and making her fearful. It did have that effect.

242 It is this Tribunal's judgment that the respondent harassed the claimant in the ways set out above and that the other matters at item 7 in the list of issues were not acts of harassment.

Direct Disability Discrimination

243 The respondent did subject the claimant to the treatment at 18.4 and 18.5 in the list of issues. We have already judged that the allegation at 18.6 did not happen.

244 In our judgment, a newly qualified teacher who was not disabled would not have asked to be relieved from break duty. Mr Balaam made the comment about the claimant being unfit to do break duty being evidence that she was unfit to teach in response to her request for the adjustment.

245 The request to be released from break duty at 18.4 was only made because she was a disabled person.

246 In the circumstances these allegations fail and are dismissed. A hypothetical comparator who was a NQT of the claimant's experience and length of service would be expected to do break duty as a matter of course and that is why the respondent would not have said that to them.

Judgment

247 It is this Tribunal's judgment that –

1 The respondent failed to comply with the duty to make reasonable adjustments.

2 The respondent treated the claimant unfavourably because of something arising in consequence of the claimant's disability

3 The respondent applied a provision, criterion or practice which was discriminatory in relation to the claimant's disability

4 The respondent harassed the claimant.

5 The remainder of the claimant's complaints fail and are dismissed.

6 The claimant is entitled to a remedy.

248 The claimant is to write to the Tribunal within 21 days of receipt of this judgment with a revised schedule of loss. The respondent is to write in within 21 days of receipt of the claimant's schedule with its counter schedule.

249 The parties are also to send in dates to avoid for the remedy hearing. This should be dates to avoid for the next 6 months.

250 The Tribunal will set a remedy hearing and notify the parties of the date.

251 The parties are to notify the Tribunal if the issue of remedy is resolved between them.

Employment Judge Jones
Date: 13 May 2021