Appeal No. UKEAT/0065/20/RN

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

Heard at the Tribunal (with members sitting remotely) on 17 and 18 March 2021
Judgment handed down on 17 May 2021

Before

HH JUDGE SHANKS

MR DESMOND SMITH

DR GILLIAN SMITH MBE

EMMA THOMPSON — APPELLANT

VALE OF GLAMORGAN COUNCIL — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	CHRISTINE THOMPSON (the Appellant's mother)
For the Respondent	BETSAN CRIDDLE (Instructed by Evelyn Morgan, Senior Lawyer, Legal Services, Vale of Glamorgan Council)

SUMMARY

TOPIC NUMBER(S): UNFAIR DISMISSAL – Disability Discrimination

The Claimant was a Welsh language teacher at Barry Comprehensive School. At all material times she was disabled by reason of dyslexia and a hearing impairment.

In 2013 she was placed on an informal capability procedure because of concerns about her lesson planning, classroom management and book-marking. In 2014 she was put onto the formal capability procedure. At the stage 3 review meeting in September 2015, the Claimant's trade union representative raised the issue of the possible relationship between poor performance and disability and reports were obtained from Occupational Health, Dyslexia Action and an optometrist, which made various recommendations. The Occupational Health report expressly stated that her conditions were " … causing an adverse effect on her ability to fulfil her role …" At the resumed stage 3 review meeting in November 2015 the reports were discussed but the head teacher decided to refer the case to the school's governing body with a recommendation to dismiss. The panel decided to dismiss the Claimant at a meeting on 29 February 2016 in the absence of the Claimant and an internal appeal was later rejected.

The ET found that the Claimant had been dismissed because it had been found that her teaching was not of the required standard and that the capability procedure had been carried out fairly and her claim for unfair dismissal was therefore rejected.

She also brought a claim for disability discrimination based on failure to make reasonable adjustments. That claim was rejected on the basis that there was "no satisfactory evidence that the PCPs [the capability procedure in its entirety and the requirement to achieve a good standard of teaching] placed the claimant at any disadvantage by reason of

[her disabilities]" and that it was in any event not reasonably necessary to make any adjustments.

The EAT allowed her appeal in relation to the "reasonable adjustments" claim because the ET had failed to provide in its reasons any objective assessment of the effect of the Claimant's disabilities on her work as a teacher or performance in the capability procedure during the relevant period, which ran from 2013; that failure also meant that the conclusion that it was not reasonably necessary to make any of the suggested adjustments could not be supported, and (further) there was no express assessment of the likely effect, cost, practicality etc of such adjustments.

The error in relation to the reasonable adjustments claim might itself have impacted on the unfair dismissal claim so the appeal was also allowed in relation to the rejection of the unfair dismissal claim to that extent. A free-standing ground of appeal that the ET had failed to properly consider whether the timing of the dismissal rendered it unfair was rejected.

The EAT remitted the "reasonable adjustments" and unfair dismissal claims to a fresh ET.

HH JUDGE SHANKS

Introduction

1. The Appellant, Ms Thompson, taught Welsh as a second language at Barry Comprehensive School from September 1999 until she was dismissed on capability grounds on 29 February 2016 with notice expiring on 31 August 2016. She was disabled by reason of dyslexia and a hearing impairment. After her dismissal she brought complaints in the Employment Tribunal against the Vale of Glamorgan Council alleging unfair dismissal and disability discrimination (including discrimination by failing to make "reasonable adjustments").

2. There was a 13-day hearing ending on 13 December 2018 in Cardiff before Employment Judge S J Williams, Mr W Davies and Ms T Lovell. Ms Thompson was represented by her mother (who we shall refer to as Mrs Thompson) as she was before us. There was a 12-page agreed list of issues and a bundle running to 1,806 pages; 13 witnesses including Ms Thompson gave evidence; the witness statement of Mr McNamara, the Head Teacher, itself ran to 65 pages. In a judgment sent out on 30 January 2019 all Ms Thompson's claims were all dismissed.

3. On 13 December 2019, following a Rule 3(10) hearing at which Ms Thompson was also represented by her mother and which lasted a whole day, Mr Mathew Gullick sitting in the EAT as a Deputy High Court Judge allowed Ms Thompson's appeal to proceed in so far as it challenged the Employment Tribunal's decisions rejecting her claim under Section 20 of the Equality Act 2010 (reasonable adjustments) and aspects of her unfair dismissal claim on the basis set out in paras 27 to 43 of his judgment handed down on that date.

4. The Full Hearing of the Appeal took place with Judge Shanks, Ms Thompson, Mrs Thompson and Ms Criddle for the Council present at the Rolls Building in London and Mr Desmond Smith, Dr Gillian Smith MBE and Ms Criddle's instructing solicitor attending remotely by Microsoft Teams from their respective homes. The Tribunal considered that hearing the appeal in this way was just and equitable. Mrs Thompson describes herself as an Employment Law Consultant and Tribunal advocate; she was an articulate and determined advocate for her daughter but unfortunately the written material she put before us was far too long and was very difficult to follow and her oral submissions were also at times rather disorganised and unfocussed. We afforded her considerable leniency and time in addressing the Tribunal.

Facts

5. We have taken most of the facts set out below direct from the Employment Tribunal's judgment, sometimes verbatim. We note at the outset that the Tribunal's findings of fact were influenced by its doubts as to the reliability of Ms Thompson as a witness as explained in para [83] of the judgment in particular; that assessment was pre-eminently one for the Employment Tribunal and is not open to challenge in this Appeal Tribunal.

6. It was common ground that at all material times Ms Thompson was disabled for the purposes of the Equality Act 2010 by reason of dyslexia and a hearing impairment and that the school were aware of this.

7. When she started teaching Welsh in September 1999 the Head teacher was David Swallow. He retired on 31 December 2011 and Jennifer Ford was Acting head until September

2012 when Gerard McNamara took over. The Tribunal found on the basis of evidence from Mr Swallow and Ms Ford that there were weaknesses in Ms Thompson's teaching which had been identified long before the end of 2011. Mr Swallow had stated that she " … struggled to manage classes and pupils who were not engaged in the subject. She had difficulty organising herself and her classroom in order to teach those pupils effectively. My memory of her classroom is that it always appeared in a disorganised state …" (see: judgment para [20]).

8. On 12 March 2012 Ms Thompson was involved in a road traffic accident which led to her being off work until 22 October 2012 when she returned on a phased basis. On her return Mr McNamara was the head teacher. He introduced a new informal procedure known as the Individual Support Programme which would precede and hopefully obviate the need for formal capability procedures in relation to teachers. Because of concerns which had arisen about her teaching Ms Thompson was placed on this programme from 25 April 2013 with three identified improvement targets in relation to lesson planning, classroom management and book-marking quality. In March 2013 there had been an inspection by Estyn, the Welsh inspectorate, and in May 2013 they published a report which was critical of the school in many ways, in particular in the area of Welsh as a second language and Ms Thompson was one of four teachers singled out for criticism.

9. In 2012 Ms Thompson had brought proceedings in the employment tribunal alleging disability discrimination against the Barry YMCA. There was a preliminary hearing before Employment Judge J Thomas on 4 June 2013 on the issue whether she was disabled which resulted in a judgment sent out on 21 June 2013. The judge found that Ms Thompson was an accurate and truthful witness. He concluded that she was disabled by reason of dyslexia and hearing difficulties; it was part of her case (and seems to have been accepted by the judge) that

the injuries suffered in the road accident in March 2012 had worsened the hearing difficulties; the judge also recorded that she suffered from tinnitus and that the need to concentrate hard caused her to become tired; there was a reference to some steps which had been taken by the School to assist her. The employment tribunal do not record (but it was an important feature of the case presented to us by Mrs Thompson) that on 24 June 2013 Mrs Thompson wrote to Mr McNamara at the school enclosing a copy of the judgment of 21 June 2013. In the letter she introduced herself as an "Independent Employment Legal Advisor Consultant and Advocate for Employment Tribunals." The letter referred to on-going problems within the school relating to adjustments on Ms Thompson's return to work after the accident; it stated that she suffered a head injury and PTSD as a consequence of the accident; and it asked the head teacher to consider these factors in not increasing unnecessary induced stress in order to avoid further harm to her and delay to her recovery.

10. On 17 January 2014, after several class observations involving Mr McNamara, he determined that Ms Thompson's progress on the informal procedure was not satisfactory and that she should be placed on the formal capability procedure and a first written warning was issued to commence stage 1. The specific matters set out as matters of concern were again lesson planning, classroom management and marking.

11. There were further classroom observations in March and April 2014 which were judged unsatisfactory at a review meeting on 28 April 2014. Ms Thompson was absent from work because of stress and anxiety between June 2014 and March 2015. On 1 May 2015 Mr McNamara issued a second written warning which started stage 2 of the formal procedure. After further unsatisfactory observations and a review meeting on 15 June Mr McNamara

issued a third written warning on 22 June 2015. An appeal against the decision to move to stage 3 was rejected by a panel of governors on 15 July 2015.

12. At a review meeting on 2 September 2015 it was noted that three further observations had been deemed unsatisfactory with regard to pupil progress and teaching. Ms Thompson's trade union representative (Mr Geraint Davies) referred to Welsh government guidance on the possible connection between poor performance and disability and asked for an occupational health appointment for her. Mr McNamara agreed to this course although querying why disability had not been raised at earlier occupational health appointments (it occurs to us that the reference by the Tribunal to "occupational health appointments" may be an error for capability meetings).

13. A request form was completed dated 3 September 2015; it is not referred to in the judgment but was provided to us by Mrs Thompson; it asked for advice as to whether Ms Thompson's disability was " … likely to have a substantial adverse effect on her ability to meet [certain] specific professional standards for [teachers]" including planning and providing clearly structured lessons. Ms Thompson saw Dr Joanna Lever the OH doctor with the Council on 24 September 2015 and Dr Lever reported the following day. She stated:

> **It is my opinion that Miss Thompson's conditions are causing an adverse effect on her ability to fulfil her role although certainly any capability procedures and observations will increase her anxiety which may impact on her level and quality of teaching.**

She then made some recommendations, including that Ms Thompson be allowed adequate time to prepare lessons and have extra time for marking, she be given extra time to prepare in advance for capability meetings and that she be provided with voice-activated software and a computer screen for the classroom. She also suggested a referral to Dyslexia Action Cymru and

made reference to a report that was being provided by an optician specialising in dyslexia with regard to visual disturbances that dyslexia can cause.

14. Ms Rees of Dyslexia Action Cymru attended the school on 8 October and produced a report on 22 October 2015. Ms Rees reported that Ms Thompson " … did not feel that her dyslexia had an impact on her teaching although she felt it made some administrative tasks more difficult" and she mentioned writing lesson plans in English and writing reports as areas of difficulty and identified a range of problems that may be exacerbated by dyslexia in relation to the capability process itself (e.g. lesson observations and meetings). She told Ms Rees that she was badly affected by stress when her lessons were observed and also reported some issues related to the time taken to prepare lessons and mark pupil's work. Ms Rees wrote:

> **Stress seems to be contributing to some of Emma's difficulties; people with dyslexia are often affected by stress, which can cause them to make more mistakes than usual.**

The report recorded that Mr McNamara was concerned about Ms Thompson's performance in the classroom and the progress made by pupils but said that he was not concerned with accurate spelling or report writing. Ms Rees identified a number of adjustments which she said had been made (although at our hearing Mrs Thompson challenged whether a number of them had in fact been made, in particular the provision of an in-school mentor, and the tribunal do not appear to have made any express findings about this). Ms Rees then made eight specific recommendations including the provision of text-to-speech software, a virtual coloured screen, agenda and meeting documents well in advance, shorter lesson observations carried out by someone with Welsh language experience, and audio-recording of meetings. Her final comment was:

> **It is important to note that different solutions work for different people; it is helpful to keep an open mind and try a variety of strategies and adjustments to find out which ones work best for Emma.**

15. Also obtained was an Optometric Vision Report from a Mrs Nyhan dated 15 September 2015, which the tribunal recorded " … was scarcely referred to before us" (para [33]). The report consisted of six closely typed pages. We set out a few quotations which give a flavour. Mrs Nyhan stated:

> **… [Ms Thompson] has for a prolonged spell felt under considerable pressure at work and finds that her ability to organise her thoughts to speak and write coherently and her ability to absorb content when reading, even small amounts, is significantly hampered when under stress. She finds it extremely difficult to participate effectively in meetings, particularly stressful meetings, if she is not given written documentation in advance so that she can take her time to properly absorb and process the content.**
> **…**
> **Emma feels that she has come to realise that her previous head teacher had been extremely supportive of her difficulties and the potential disability that they might cause in the workplace … The stress of her accident, the lack of support for her visual difficulties and the feeling of constant scrutiny at work has, however, resulted in a marked increase in visual perceptual symptoms.**
> **…**

Under the heading Recommendations she stated:

> **….**
> **A significant contributory factor in the flare up of Emma's visual perceptual symptoms is stress and any workplace adjustments that can be made to compensate for her difficulties would improve visual performance allowing her to work more effectively. Suggestions might (sic) minimising distractions where possible, allowing plenty of time to read important documents, software to alter the background colour and reduce the contrast on the computer screen, supportive seating, regular breaks during prolonged meetings …**
>
> **… Regular breaks, if possible involving movement, will aid bilateral integration and teaming giving optimum visual control throughout work.**
> **…**

16. After several further adjournments the 2 September review meeting was reconvened on 5 November 2015. We were referred to the full minutes of this important meeting. It was attended by Mr McNamara, Ms Thompson, Mr Davies, a personnel officer and a note taker. There was a discussion about the points raised by the Dyslexia Action Cymru and some reference to the optometrist's report. After an adjournment Mr McNamara decided that he would refer the case to the disciplinary and dismissal panel of the school's governing body and said he would be recommending dismissal. According to the minutes, Ms Thompson asked why the Dyslexia Action report was being ignored and Mr McNamara replied, "that reasonable adjustments had been made throughout".

17. Following a meeting of the governing body panel on 9 December, they announced on 17 December 2015 their decision that the policy and procedures had been followed correctly but said that they wanted further information before reaching a decision and that the stage 3 process should be extended by four weeks from 4 January 2016 to enable a number of steps to be taken; in particular: two further lesson observations in the presence of a specialist Welsh second language teacher; two visits to a "pathfinder" school (Teorci Comprehensive), to include lesson observation in a Welsh class; a new link person to be identified by Ms Thompson; at least two regular timetabled meetings with the head of department with agreed notes being taken; appropriate support by a Welsh language teacher to be provided. The panel considered the OH, dyslexia and optometry reports and considered that the provision of extra preparation and planning time was a reasonable adjustment relevant to lesson planning and capability assessment. 11 February 2016 was provisionally fixed as the date for the reconvened meeting.

18. There were problems over the arrangements for the two visits to Teorci Comprehensive which culminated in Mr McNamara hand-delivering a letter to Ms Thompson's home address on 18 December 2015. Ms Thompson claimed that opening the door to him had caused her to suffer a nervous breakdown, but the Tribunal rejected her evidence on this. Thereafter Mrs Thompson became more closely involved and started to write what the Tribunal described as "lengthy, oppressive, onerous and extravagantly worded correspondence" to the school and officers of the Council. On 6 January 2016 she stated in a phone call with an occupational health advisor that her daughter's life was at risk. The Tribunal found that by early January 2016 it was becoming extremely difficult for the school and Mr McNamara in particular to manage Ms Thompson's expectations and satisfy her demands.

19. On 21 January 2016 Mr McNamara suspended Ms Thompson on medical grounds; he had been advised that "taking account of information provided by [her] and [her] mother together with the lack of available information from Occupational Health and [her] GP … it [was] felt that it [was] not appropriate for [her] to remain in the workplace ...". She was certified unfit by her GP initially from 20 January to 11 February 2016. The panel meeting scheduled for 11 February 2016 was refixed for 29 February 2016 and Ms Thompson was warned that the panel would have to make their determination then on the basis of the information available. There was reference in the panel's letter to a disagreement as to medical advice and the fact that Ms Thompson had not allowed Occupational Health to contact her GP. She remained certified unfit thereafter.

20. The panel met on 29 February 2016, but Ms Thompson did not attend. Mr Davies applied for a postponement of the meeting to allow Ms Thompson to return to full health and return to work and complete the envisaged four-week extension to stage 3 of the procedure. However, the application was turned down on the basis that Ms Thompson had not co-operated with the release of Occupational Health's guidance and there was no indication as to when she would be fit. The panel then heard from two lesson observers and decided to dismiss her on the following grounds, as set out at para [49] in the judgment:

> **a. Consistently unsatisfactory judgments on teaching capability;**
> **b. Lack of medical information to determine a return to work date;**
> **c. Lack of engagement since the meeting on 16 December 2015;**
> **d. Requirements of the school and the Welsh department in particular highlighted in an Estyn inspection as requiring additional support;**
> **e. The four-week extension period had been agreed in order to provide additional support, however there had been a lack of engagement, a refusal to provide detailed occupational health information and [Ms Thompson] was currently on sick leave with no return date known.**

She was in due course told that her employment would terminate on 31 August 2016.

21. An appeal was submitted by Mrs Thompson on behalf of her daughter on 10 March 2016. The appeal letter extended over 37 pages. The basic theme was that the whole process leading to dismissal was a sham and the consequence of a conspiracy orchestrated by Christopher Elmore MP (who had been a member of the board of the Barry WMCA when she made her claim against it and was a governor of the school), which even included Mr Davies. In a letter dated 13 April 2016 the union's Assistant General Secretary protested about the wild allegations and gratuitously offensive language being used. Mrs Thompson stated in a letter of 14 April 2016 that she was " … now officially taking over from the unions as Ms Thompson's Legal Representative …".

22. An appeal hearing was in due course fixed for 29 April 2016 but Ms Thompson did not attend because her mother took the view that it was time-barred because it had not been arranged within the time contemplated by the procedure and that Ms Thompson had therefore won the appeal by default. The Appeal proceeded and evidence was heard from Mr McNamara among others; he said that before September 2015 Ms Thompson had never requested any aids or adaptations to carry out her role. He said that the greater amount of reading Ms Thompson had to do was reading and marking students' books and that voice-activated software would not have helped her to improve her teaching. The Appeal was dismissed and the dismissal decision upheld.

The tribunal's decision and the issues on the appeal

23. The Employment Tribunal roundly rejected the allegation that there was a conspiracy against Ms Thompson, saying that there was not "one shred of credible evidence" to support it. They found that the reason for the dismissal was that her teaching was found not to be to the required standard after "… an exhaustive capability procedure which was scrupulously honest

A and fair" and that it gave her ample opportunity to improve her performance and that she was warned that a failure to do so might result in her dismissal. They also dismissed Ms Thompson's complaints of direct disability discrimination and harassment. None of these matters are open to challenge on this appeal.

B

24. However, Mr Gullick allowed the appeal to proceed on certain limited grounds relating to the reasonable adjustments complaint which he considered to raise arguable points of law. The grounds as they appear from his judgment of 13 December 2019 following the Rule 3(10) Hearing can be summarised as follows:

C

(1) that the Employment Tribunal failed to have regard to relevant evidence when deciding whether Ms Thompson's disability put her at a substantial disadvantage in relation to her performance as a teacher subject to the capability procedure and/or failed to give adequate reasons when deciding that issue against her;

D

(2) that the Employment Tribunal's failure in relation to substantial disadvantage meant that the conclusion that there were no reasonable adjustments that should have been made which were not made could not be maintained and/or that no adequate reasons were given for this conclusion in any event;

E

(3) that, if the Tribunal erred in its conclusions on the duty to make reasonable adjustments, its conclusion that the dismissal was fair could not be maintained;

F

(4) that the Tribunal failed to consider properly whether the dismissal was rendered unfair having regard to its timing, in particular that the decision was taken before the steps contemplated at the meeting of the panel in December 2015 had taken place.

G

25. After the rule 3(10) judgment Mrs Thompson submitted amended grounds of appeal in accordance with Mr Gullick's order and at pages 32-35 in the bundle is a four page document

H

(though in very small type) which appears to be the document for which Mr Gullick granted leave on 5 March 2020. Unfortunately this document, like Mrs Thompson's other documents, is difficult to follow and it appears to range over many aspects of the case, including, it seems, the question of whether Ms Thompson was in fact underperforming, which is clearly not a matter which Mr Gullick intended her to be able to maintain on the appeal. The relevant themes we take from the document so far as it is comprehensible are that Mrs Thompson contends (i) that the failure to make reasonable adjustments covers the period 25 June 2013 until the end of Ms Thompson's employment, (ii) that the effects of her disability should include the aggravation caused by the road accident in 2012 and (iii) that she challenged the evidence given by Mr McNamara at paras 159 et seq of his witness statement concerning the capability procedure after September 2015.

26. We have kept these themes in mind in deciding the appeal but do not feel able to address the Grounds of Appeal in her notice in a more methodical or comprehensive way. Rather we have adopted the approach maintained by Council of considering the issues on the appeal by reference to Mr Gullick's decision.

The relevant legal principles

Reasonable adjustments

27. A failure by an employer (A) to make reasonable adjustments in accordance with the duty imposed by section 20 of the Equality Act 2010 is an act of discrimination against a disabled employee (see: section 21(2) and 39(5) of the Act). The relevant requirement of the duty is that specified in Section 20(3) as follows:

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

A Para 20 of Schedule 8 to the Act provides that the duty does not apply if A does not know and could not reasonably have been expected to know that the disabled person was likely to be placed at such a disadvantage.

B

28. The issues whether a disabled person has been put at a substantial disadvantage by a PCP and what steps are required to be taken by virtue of the duty to make reasonable adjustments must be objectively assessed by the tribunal. The subjective motivation of the C parties is irrelevant, and any procedure followed (or not followed) by the employer or requests made (or not made) by the employee may be of some evidential value but are in no way determinative of the issues. The Tribunal should identify the nature and extent of the D "substantial disadvantage" caused by a PCP before considering whether any proposed step was a reasonable one to have to take (see: **Environment Agency v Rowan** [2008] ICR 218). There must obviously be some causative nexus between disabilities relied on and the "substantial disadvantage"; the tribunal should look at the "overall picture" when considering the effects of E any disabilities. There must be evidence of some apparently reasonable adjustment which could be made before the tribunal can consider it (see: **Project Management Institute v Latif** [2007] IRLR 579). In determining the reasonableness of any step regard should be had to its F likely efficacy, practicability and cost, and the extent of the employer's resources, the nature or its activities and the size of its undertaking. So far as the efficacy of any proposed step is concerned it is only necessary to establish that there was a real prospect of the step avoiding or G reducing the relevant disadvantage. A holistic approach should be adopted when considering the reasonableness of a number of proposed steps.

29. As Mr Gullick noted none of those principles derived from the case law were recorded H by the Tribunal, which simply set out the bare wording of Section 20(3) in their account of the

relevant law. However, they were mostly contained in the Council's skeleton argument before the Employment Tribunal and, as set out below, such an omission does not in itself give rise to a successful appeal.

List of issues

30. The Council rely on the contents of the agreed list of issues in this case in relation to one issue on the appeal. The status of a list of issues was considered by the Court of Appeal in **Parekh v LB Brent [2012] EWCA Civ 1630**: it is a "useful case management tool" designed to bring a semblance of order, structure and clarity to proceedings where the requirements for formal pleadings are minimal. An agreed list of issues will generally limit the issues at the substantive hearing. But the tribunal is not required to "stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence" and it can be revisited and reconsidered if circumstances require.

Tribunal reasons

31. The employment tribunal is obliged to give reasons which are proportionate to the significance of the issue they are deciding (see: Tribunal Rules of Procedure 62(1) and (4)). The reasons must be sufficient to tell the parties why they have won and lost and to enable the EAT to see whether any question of law arises (see: **Meek v Birmingham DC** [1987] EWCA Civ 9). They do not have to set out every factor and every piece of evidence that has weighed with the tribunal and the general assumption will be that they had relevant factors and evidence in mind (see: **RSPB v Croucher** [1984] ICR 604). In a judgment the reasons should include a statement of the relevant findings of fact and a concise account of the relevant law (see: rule

62(5)), but a failure to set out the relevant law does not provide a free-standing ground of appeal (**Simpson v Cantor Fitzgerald** [2020] EWCA Civ 1601).

32. We turn to consider the Grounds of Appeal as identified by Mr Gullick in the light of the relevant legal principles.

Ground (1): "Substantial disadvantage"

33. The relevant PCPs were identified in the list of issues as "the capability procedure *in its entirety*" (our emphasis) and "requiring teachers to achieve a good standard of teaching"; the disadvantage identified was the "… alleged stress induced breakdown on 18 December 2015." At para [87] of the judgment the tribunal state that they were not satisfied that Ms Thompson suffered a breakdown at all or that, if she did, the PCPs or her disability had any part in causing it. On that basis, which clearly cannot be challenged on appeal, the tribunal rejected the "reasonable adjustments" claim as recorded in the list of issues.

34. But at para [88] the Tribunal went on to say this:

> **We do not think the drafting of the issues on this point properly reflected one strand of [Ms Thompson's] case before us. One of the arguments put forward by [her] was that the PCPs, without any adjustment, made it more likely that she would fail the procedure and therefor some adjustment would have been reasonable.**

Having referred to what they described as an "obvious tension" between this argument and the allegation that she was a good teacher against whom there had been a conspiracy, the tribunal considered the question of disadvantage at para [89]. They stated:

> **There was no satisfactory evidence that the PCPs placed the claimant at any disadvantage by reason of her dyslexia or her hearing impairment. [She] told Dyslexia Action … that dyslexia did not affect her teaching … but that writing lesson plans in English and writing reports caused some difficulty. This rings true because the claimant had been teaching with dyslexia (and her hearing impairment) since 1999 and did not ask for any adjustments till mid-2015. There was nothing required by the capability procedure which was not part and parcel of the claimant's ordinary teaching load.**

35. The reasoning in that paragraph is not very satisfactory and, in the context of a case like this, it looks on the face of it insufficient. As Mr Gullick noted in his Rule 3(10) Judgment, the Lever Report in fact expressly stated that Ms Thompson's disabilities were " … causing an adverse effect on her ability to fulfil her [teaching] role" and there were indications in the other two reports that the writers considered that her disabilities were putting her at a disadvantage in relation to teaching generally and aspects of the capability procedure; the Tribunal does not engage with what is said in the reports in this context. It was true to say that Ms Thompson told Ms Rees of Dyslexia Action that she did not feel that her dyslexia was having an impact on her teaching but there are several other statements she is reported as making in Ms Rees's report which are inconsistent with that self-assessment (e.g. that it took her longer than her peers to prepare lessons and mark work; that she found it difficult to write lesson plans in English; that she was badly affected by stress when her lessons were being observed) and it was recorded that her initial dyslexia assessment from 1996 had identified weaknesses in working memory and processing speed. The fact that she may not have asked for adjustments till mid-2015 was of limited relevance given that the question of whether reasonable adjustments are necessary is an objective one for assessment by the tribunal and that the capability procedure had started in 2013.

36. The main submission relied on by Ms Criddle in relation to this Ground of Appeal was that the only disadvantage recorded in the list of issues was the alleged breakdown in December 2015 and that, having lost on that disadvantage, it was not open to Ms Thompson to complain about the way the tribunal dealt with a different disadvantage. We do not accept this submission. A list of issues is a "useful case management tool" but it is plain from the **Parekh** decision referred to above that, even if a list of issues is agreed, the tribunal is not required to stick to it slavishly if justice otherwise requires. Although the list of issues in this case was

A agreed we cannot overlook the relative legal resources of the parties or the fact that the "disadvantage" relied on in the list of issues did not make much sense and that the wider disadvantage considered by the tribunal was really inherent in the overall case Ms Thompson was making on disability. Further, it is clear that the Tribunal decided to consider the matter on the wider basis which they accepted as being part of the case being advanced by Ms Thompson; we consider that they were entitled to take that course and, in any event, there has been no cross-appeal by the Council against the decision to do so.

37. On the wider "substantial disadvantage" case, Ms Criddle submitted that, regardless of the adequacy of the Tribunal's reasons, it is plain that they had regard to all the evidence and accepted that Ms Thompson was underperforming for reasons unconnected with her disability. In her oral submissions Ms Criddle took us through the history of the capability procedure, emphasising the primary case that Ms Thompson and her mother were making (i.e. that the whole process was a sham) and their conduct in late 2015 and early 2016, and referred us in detail to paras 169 to 182 of Mr McNamara's witness statement where he addressed the Occupational Health and Dyslexia Action reports and the meeting of 5 November 2015. It was clear, she submitted, that the Tribunal accepted Mr McNamara's evidence on the issue of reasonable adjustments.

38. It is true that in his statement Mr McNamara gave his reasons for rejecting each of the recommendations in those two reports and that in some cases this was because he did not consider that the proposal was of any relevance to his assessment of Ms Thompson's capability as a teacher. However, the Tribunal did not refer to or endorse Mr McNamara's evidence on this topic expressly and, save in a limited way at paras [66] and [67], the judgment contains no independent objective assessment of the effect of Ms Thompson's disabilities on her work as a teacher or her performance in the capability process during the relevant period, which ran from

2013. We would normally have expected to see such an assessment in a case like this and we consider that it was particularly necessary in this case: Ms Thompson was relying on substantial medical reports obtained very shortly before a decision was made to dismiss her; all the recommendations in those reports were rejected by Mr McNamara in the course of one meeting at the conclusion of which he immediately referred her case to the disciplinary and dismissal panel with a recommendation to dismiss; and the panel then decided, having considered the reports itself, that the process should be delayed for various steps to be taken (although in practice, because of the way Ms Thompson and her mother behaved in late 2015/early 2016, nothing came of the panel's decision in this regard). Taking this background into account we consider that Ms Thompson was entitled to a more detailed and systematic analysis from the tribunal by way of reasoning before they concluded that she was not put at a substantial disadvantage by her disabilities.

39. We have therefore reached the view that the Tribunal either failed properly to consider the evidence of substantial disadvantage and/or that they gave inadequate reasons on the issue.

Ground (2): "Reasonable adjustments"

40. The tribunal went on to consider "reasonable adjustments" in para [90] of the judgment in these terms:

> **When adjustments were requested the respondent considered them and made some of them. Importantly, the claimant was allowed twice as much PPA […] as usual for a teacher; and when, in 2015, documents printed on blue paper were requested, this was done. Whilst we are not satisfied that the respondent was reasonably required to take any steps in this case, that additional time provision was generous. Given the nature of the claimant's work we do not think that it was reasonably necessary for the respondent to provide specialist computer software. We were satisfied that it was not reasonably necessary for the respondent to make any other of the adjustments argued for.**

41. As Mr Gullick observed in his Rule 3(10) judgment, the issues relating to substantial disadvantage and reasonableness of adjustments are inevitably closely linked and if the

Tribunal goes wrong in their consideration of substantial disadvantage that is likely to infect any decision on "reasonable adjustments". The reasons given by the tribunal in para [90] really only amount to a bare conclusion without any assessment of the likely effect, cost, practicality or other factors relevant to the reasonableness of any proposed steps. In the circumstances, we do not consider that the tribunal's reasons in para [90] are adequate; and it follows that the problems with the judgment in relation to "substantial disadvantage" cannot be rescued by the tribunal's conclusion about reasonable adjustments.

Ground (3): Reasonable adjustments and unfair dismissal

42. It seems to us that the question of unfair dismissal cannot be properly considered in this case without first deciding whether there had been a breach of the duty to make reasonable adjustments before the dismissal decision was made. We therefore allow this Ground of Appeal.

Ground (4): Timing of dismissal decision

43. It is not clear to us whether this was raised as a free-standing point during the hearing before the Tribunal but certainly it does not appear to feature in the list of issues and the Tribunal did not address it as such. At paras [91] and [92] of the judgment the Tribunal states that the reason for Ms Thompson's dismissal was that her teaching was found not to be of the required standard and that that finding followed a capability procedure "which was scrupulously honest and fair". There can be no doubt that the procedure included the decision of the panel to extend the process in December 2015 and the subsequent decision not to adjourn but to go on and make a decision on 29 February 2016. As we record above the Tribunal found that the panel heard Mr Davies's application to adjourn the hearing on 29 February 2016 and rejected it on reasonable grounds and then addressed the point in its reasons for dismissing,

which included a "lack of engagement" by Ms Thompson, a conclusion for which there was clearly evidence. Taking that into account it seems to us that the Tribunal's conclusion that the procedure was fair was not undermined by this point and, although it may have been better to have addressed it specifically (certainly if it was raised and relied on expressly) the failure to do so does not mean that the reasons are inadequate.

Disposal and concluding remarks

44. We therefore consider that Ms Thompson's appeal should be allowed in relation to Grounds (1), (2) and (3) but dismissed in relation to Ground (4). It follows that Ms Thompson's reasonable adjustments claim (including the issues of knowledge and time limits and, of course, compensation if matters go that far) must be remitted to be decided by the Employment Tribunal and the unfair dismissal claim is also remitted to the limited extent that any findings on reasonable adjustments are relevant to it. It will be for the Tribunal to give directions as to the resolution of those issues and as to the further evidence (if any) it requires. The Tribunal's findings of fact save in so far as they relate to the reasonable adjustments claim must of course stand.

45. The parties have already made submissions on whether the matter should be remitted to the same or a different tribunal. Ms Criddle rightly points out that the Hearing was long and complex and that the Tribunal which heard the case had the benefit of a detailed appreciation of the evidence. On the other hand, five years have passed so that any benefit in relation to the evidence has probably ceased to apply and our conclusions on the appeal involve a criticism of the Tribunal's approach to its duty to give reasons. We consider on balance that the matter should be remitted to a new Tribunal. Mrs Thompson also seeks an order that it is not dealt with in Cardiff: that seems to us to be asking too much.

A

B

C

D

E

F

G

H

46. We feel bound to say before concluding that we have decided to allow this appeal with some hesitation and reluctance. The judgment is in general clear and well-written and we can readily understand why the tribunal, faced with a mass of material and lacking clear and well-directed submissions from Mrs Thompson, may have felt justified in keeping its reasons very brief. Furthermore, we have no confidence that the substantial merits will ultimately favour Ms Thompson and we are pretty sure that continuing this dispute in the employment tribunal in the way it has been conducted so far, with the further time and effort that will be involved, will not do anyone any good in the end. In the circumstances we would urge the parties in this case (even more than most) to do all they can to reach some kind of settlement as soon as possible and we would strongly recommend an attempt at mediation.