RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENTS**
MRS A GRANT-RYDER	**V**	**THE GOVERNING BODY OF THE MAELOR SCHOOL (1) WREXHAM COUNTY BOROUGH COUNCIL (2)**

HELD REMOTELY ON: 8 – 12 FEBRUARY 2021

BEFORE: EMPLOYMENT JUDGE S POVEY
MRS M WALTERS
MR S HEAD

REPRESENTATION:
FOR THE CLAIMANT: MR THAKERAR (COUNSEL)
FOR THE RESPONDENTS: MR ALI (COUNSEL)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is:

Unfair Dismissal

1. The claim for unfair dismissal against the First Respondent is upheld.

Discrimination Arising From Disability

2. The First Respondent contravened section 39(2)(c) of the Equality Act 2010 by dismissing the Claimant for something arising out of her disability.

3. The First Respondent did not contravene section 39(2)(d) of the Equality Act 2010 by putting the Claimant through the absence management procedure.

RESERVED JUDGMENT

4. The First Respondent did not treat the Claimant unfavourably because of things arising from her disability (per section 15 of the Equality Act 2010) by failing to provide a safe working environment, by moving her around classrooms or by removing her subject from the curriculum.

Indirect Discrimination

5. The First Respondent did not contravene section 39(2)(d) of the Equality Act 2010 by putting the Claimant through the absence management procedure.

Reasonable Adjustments

6. The First Respondent contravened section 39(2)(d) of the Equality Act 2010 by failing to comply with its duty to take reasonable steps to avoid the disadvantage to the Claimant arising from a physical feature, namely the use of aerosols within classrooms.

7. The claim that the First Respondent contravened section 39(2)(d) of the Equality 2010 by failing to comply with its duty to take reasonable steps to avoid the disadvantage to the Claimant arising from a physical feature, namely the use of aerosols within classrooms, constituted conduct extending over a period and was brought in time (per section 123 of the Equality Act 2010).

8. The First Respondent did not contravene section 39(2)(d) of the Equality Act 2010 by applying the Repetitive Absence Formula to the Claimant or in how and when it removed her from the relevant classrooms and renovated them.

The Second Respondent

9. None of the claims against the Second Respondent were upheld nor did the Second Respondent contravene the provisions of the Equality Act 2010.

REASONS

1. These are claims brought by Alison Grant-Ryder ('the Claimant') against her former employer, The Governing Body of the Maelor School ('the First Respondent') and the local education authority, Wrexham County Borough Council ('the Second Respondent').

Background

2. By way of a brief background to the claims:

   2.1 The Claimant was employed as a drama teacher by the Respondents from 1 September 1991. She was dismissed with

notice on 24 June 2019, with an effective date of termination of employment on 31 December 2019.

2.2 In late 2013/early 2014, the Claimant developed symptoms indicative of asthma. She suffered the first of a number of asthma attacks on the First Respondent's premises and during the working day in May 2014. The Claimant was subsequently diagnosed with late-onset asthma. The Claimant consistently averred that her working conditions contributed to and/or caused her ill-health. In particular, she relied upon the alleged conditions in classrooms in which she was required to teach and a failure by the First Respondent to prevent the use of aerosols on its premises.

2.3 As a result of her asthma, the Claimant's absences from work increased. These were typically short-notice and short-term. The type and level of absences triggered the Managing Attendance Policy & Procedures ('the Absence Management Policy'), which was operated and applied by the First Respondent, having been developed by the Second Respondent (which also provided support to the First Respondent as to the application of the Absence Management Policy though its human resources function). The application of the Absence Management Policy culminated in the Claimant's dismissal in June 2019 (a decision which was upheld on appeal by the First Respondent).

2.4 Following a period of early conciliation (between 10 January 2020 to 10 February 2020), the Claimant issued her claims in this Tribunal on 13 March 2020, alleging unfair dismissal, disability discrimination, a failure to make reasonable adjustments and indirect discrimination. In their joint response, the Respondents resisted the claims in their entirety, although they accepted that the Claimant was disabled at the relevant times (as defined by section 6 of the Equality Act 2010).

2.5 On 19 May 2020, the Tribunal conducted a preliminary case management hearing with the parties. This resulted in the Case Management Order of Judge Jenkins ('the CMO').

The Hearing

3. The hearing was conducted remotely. We heard oral evidence from the Claimant and from her union representative, Colin Adkins. For the Respondents, we heard oral evidence from Simon Ellis (the First Respondent's Head Teacher), Andy Heron (the First Respondent's Business Manager), Simon Ayee (the Second Respondent's Public Protection Specialist Officer), Tina Jones (the Second Respondent's Human Resources Officer) and from James Wagstaffe and John Prichard, both governors of the First Respondent. All witnesses provided and adopted written statements as their evidence in chief.

4. We were also provided with a paginated and indexed digital file of documents to which were referred. We also received helpful and cogent oral and written submissions from Mr Thakerar for the Claimant and from Mr Ali for the Respondents.

5. At the outset of the hearing, there was some discussion as to what the issues were for determination by the Tribunal. The CMO purported to set out in some detail what those issues were. Paragraphs 11 and 12 of the CMO stated as follows:

> 11. The issues between the parties to be determined by the Tribunal are as set out below. For the avoidance of doubt, it is noted that the first nineteen paragraphs (up to the commencement of the 2017/18 academic year) of [the Claimant's] Grounds of Claim provide only background to her claims.
>
> 12. If the parties consider that the summary does not fully reflect the relevant issues they must write to the Tribunal, copied to each other, by 2 June 2020, setting out the wording of their proposed amendments and/or additions.

6. Thereafter, Paragraphs 13 to 19 of the CMO set out the issues to be determine in respect of each of the heads of claim.

7. It was not in dispute that none of the parties sought to amend the issues in accordance with Paragraph 12 of the CMO. However, Mr Thakerar for the Claimant took issue with the second sentence of Paragraph 11, stating that, contrary to what was recorded, the issues to be determined engaged with events and allegations which occurred pre-2017. To that end, it was not right to describe those aspects of the Claimant's case as "*background to her claims."*

8. Mr Ali explained that the Respondents had prepared their cases on the basis that all the issues to be determined relied upon claims and evidence which post-dated September 2017. However, Mr Ali helpfully indicated that, subject to revising aspects of his examination of the both the Claimant's and Respondents' witnesses, he did not envisage that this would cause the Respondents particular difficulties or result in the trial timetable being adversely affected.

9. After considering the CMO and the parties submissions, the Tribunal took the view that Paragraph 11 of the CMO was inconsistent with the detail of the issues in dispute that followed. In particular, Paragraphs 16(a)(iii), 18(a)(i) and 18(d)(i) of the CMO were expressly premised upon allegations and evidence which predated the 2017/18 academic year. We proposed (and the parties agreed) that we should be guided by the issues as detailed at Paragraphs 13 to 19 of the CMO and, to the extent that there was inconsistency with Paragraph 11 of the CMO, we found Paragraph 11 to be erroneous.

The Issues

10. On that basis, the issues to be determined by the Tribunal were agreed as being those set out at Paragraphs 13 to 19 of the CMO, reproduced in full below:

> 13. Time limit/limitation issues
>
> > a. Were the Claimant's complaints of discrimination on the ground of disability presented within the time limits set out in Sections 123(1)(a) & (b) of the Equality Act 2010 ("EqA")?
> >
> > b. Dealing with this issue may involve consideration of subsidiary issues including: when the treatment complained about occurred; whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "just and equitable" basis; etc.
> >
> > c. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 11 October 2019 is potentially brought out of time, so that the Tribunal may not have jurisdiction to deal with it.
>
> 14. Unfair dismissal
>
> > a. What was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The Respondents assert that it was capability or “some other substantial reason”.
> >
> > b. Was the dismissal fair or unfair in accordance with Section 98(4) ERA? Was the decision to dismiss a sanction within the "band of reasonable responses" for a reasonable employer?
>
> 15. Remedy for unfair dismissal
>
> > If the Claimant was unfairly dismissed and the remedy is compensation, if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would have been dismissed had a fair and reasonable procedure been followed?
>
> 16. EqA, section 15: discrimination arising from disability
>
> > a. Did the Respondents treat the Claimant unfavourably as follows (no comparator is needed):
> >
> > > i. by being dismissed by the Respondents based on absences related to her disability and allergen triggers within the work environment;

ii. by being put through the Respondents' absence management procedure because of absences related to her disability and allergen triggers within the work environment;

iii. by the Respondents' failure to provide a safe working environment and act quickly to resolve both the classroom and aerosol triggers, resulting in the Claimant suffering numerous asthma attacks on the school premises, putting both her health and life at danger;

iv. by being moved around classrooms, leaving her to teach Drama in unsuitable practical environments;

v. by her subject being removed from the Respondents' curriculum in the midst of the on-set of her asthma condition; it was subsequently re-instated after she had been dismissed.

b. Did the following things arise in consequence of the Claimant's disability:

i. short and sporadic periods of sickness absence following sudden on-set asthma attacks;

ii. experiencing sudden on-set asthma attacks and respiratory difficulties that require treatment and First Aid in the working environment;

iii. requiring a safe working environment to ensure that no allergens or materials trigger her respiratory difficulties and asthma whilst she is at work?

c. Did the Respondents treat the Claimant unfavourably because of any of those things?

d. If so, have the Respondents shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

17. EqA, section 19: indirect disability discrimination

a. A "PCP" is a "provision, criterion or practice". Did the Respondents have or apply the following PCP:

i. The Respondents' 'Repetitive Absence Factor' formula contained within its 'Managing Attendance Policy and Procedures' document?

b. Did the Respondents apply the PCP to the Claimant at any relevant time?

c. Did the Respondents apply the PCP to persons with whom the Claimant does not share the characteristic?

d. Did the PCP put persons with whom the Claimant shares the characteristic at one or more particular disadvantages when compared with persons with whom the Claimant does not share the characteristic, in

that they are more likely to take short and sporadic periods of sickness absence, and therefore to have higher Repetitive Absence Factor scores?

e. Did the PCP put the Claimant at that disadvantage at any relevant time?

f. If so, have the Respondents shown the PCP to be a proportionate means of achieving a legitimate aim?

18. EqA, sections 20 & 21: reasonable adjustments (for disability)

a. Did the Respondents have or apply the following PCPs/physical features:

i. allergens present within the workplace due to extensive repair work and the condition of her classroom;

ii. permitting the use of aerosols within classrooms;

iii. the Respondents' Repetitive Absence Factor formula?

b. Did any PCP/physical feature put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that she suffered asthma attacks at work and absences from work following these attacks subsequently led to her dismissal?

c. If so, did the Respondents know or could they reasonably have been expected to know the Claimant was likely to be placed at any such disadvantage?

d. If so, were there steps that were not taken that could have been taken by the Respondents to avoid the disadvantage? The burden of proof does not lie on the Claimant, however it is helpful to know what steps the Claimant alleges should have been taken and they are identified as follows:

i. Removing her from the relevant classroom and renovating it at an earlier stage and to a higher standard;

ii. Prohibiting the use of aerosols;

iii. Discounting asthma related absences when applying the Repetitive Absence Factor.

e. If so, would it have been reasonable for the Respondents to have to take those steps at any relevant time?

19. Remedy

If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the Claimant is awarded

compensation and/or damages, will decide how much should be awarded.

The Relevant Law

Unfair Dismissal

11. By reason of section 94 of the Employment Rights Act 1996 ('ERA 1996'), an employee has the right not to be unfairly dismissed.

12. Section 98(1) of the ERA 1996 requires that in deciding whether a dismissal was unfair, it is for the employer to show the reason for that dismissal. That reason must either be for "*some other substantial reason of a kind such as to justify the dismissal of any employee"* (per section 98(1)(b)) or fall within a list of potentially fair reasons to be found within section 98(2) of which so far as relevant states:

> A reason falls within this subsection if it –
>
> (a) relates to the capability…of the employee for performing work of the kind which he was employed by the employer to do…
>
> …

13. Section 98(3) of the ERA 1996 further defines 'capability' as being assessed by reference to an employee's "*skill, aptitude, health or any other mental of physical quality."*

14. The Tribunal must consider the reasonableness of the employer's decision to dismiss and, in judging the reasonableness of that decision, the Tribunal must not substitute its own decision as to what was the right course to adopt for the employer. Rather, the Tribunal must consider whether there was a band of reasonable responses to the conduct within which one employer might reasonably take one view whilst another quite reasonably takes a different view. Our function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted.

15. Section 98(4) also requires a consideration of whether the procedure by which an employer dismissed an employee is fair. If an unfair procedure has been followed the Tribunal is not allowed to ask itself, in determining whether a dismissal was fair, whether the same outcome (i.e. dismissal) would have resulted anyway even if the procedure adopted had been fair (per Polkey v AE Dayton Services Ltd [1987] IRLR 503HL).

Discrimination

16. Section 39(2) of the Equality Act 2010 ('EqA 2010') states:

An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

17. Section 6 of the EqA 2010 defines disability for the purposes of the Act.

18. Section 15 of the EqA 2010 defines discrimination arising from a disability as follows:

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

19. Section 19 of the EqA 2010 defines indirect discrimination as follows:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it 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 it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

20. Section 20 sets out the duties to make reasonable adjustments in respect of disabled persons. So far as relevant, section 20 states:

> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature 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 take to avoid the disadvantage.
>
> …

21. Schedule 8 to the EqA 2010 provides more details as to the duty to make reasonable adjustments. In addition, section 212 EqA 2010 defines "substantial" as "*more than minor or trivial."*

22. If a person fails to comply with the duty to make reasonable adjustments, that person discriminates against the disabled person (per section 21 EqA 2010).

23. In considering a claim that an employer had discriminated against an employee by failing to comply with the duty to make reasonable adjustments, the Tribunal must identify: (i) the provision, criterion or practice applied by or on behalf of an employer; (ii) the identity of non-disabled comparators, where appropriate; and (iii) the nature and extent of the substantial disadvantage suffered by the claimant (Environment Agency v Rowan [2008] ICR 218).

24. Section 123 of the EqA 2010 requires that proceedings under the EqA 2010 may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks just and equitable. By reason of section 123(3), conduct done over a period of time is treated as being done at the end of the period, for the purpose of calculating the three month time limit for bringing proceedings.

Findings of Fact

25. In order to understand the context in which the claims were brought, we were presented with detailed evidence which went back as far as 2013, when the Claimant first began experiencing asthma-related symptoms. In order to provide that context, and as some of the events alleged by the Claimant were in dispute, we have included findings that were not

directly relevant to the issues identified but assisted us in understanding the chronology and history of the matters before us.

26. Many of the relevant facts were not in dispute between the parties. In setting out our findings, we have indicated those which were disputed and explained how we resolved them. Where relevant, we have also included page references from the joint hearing bundle ('the Bundle').

27. We found it beneficial to group our findings of fact under the following headings, reflecting the key factual matters which informed the claims and allowing for a broadly chronological approach:

- The Absence Management Policy
- Classroom C10
- Classroom TC5
- Aerosols
- Stage 3 Hearing & Dismissal
- The Appeal
- Drama Classrooms & Curriculum

<u>The Absence Management Policy</u>

28. As referred to above, the First Respondent operated the Absence Management Policy. The version adduced in evidence was from December 2017 but we did not understand it to be in issue that the material aspects had remained broadly the same in earlier versions.

29. The Absence Management Policy was adopted by the First Respondent's Governing Body, reviewed by the Second Respondent's Human Resources ('HR') Service and implemented by the First Respondent's head teacher and other designated members of staff. The Second Respondent also provided HR support to the First Respondent in the operation and application of the Absence Management Policy (Section 3 at [H3] – [H4] of the Bundle).

30. The Absence Management Policy distinguished between short-term, persistent or frequent absences (Section 4.7 at [H9]) and long-term absences, defined as those in excess of a continuous period of at least four weeks and/or attributable to an underlying medical condition (Section 4.8 at [H10]).

31. The Absence Management Policy included the Repetitive Absence Formula (also referred to in evidence as the Bradford Factor). This was a mathematical calculation which enabled the Respondents to monitor and identify what would be considered as unacceptable levels of absence. One such tool was a score of 300 points under the Repetitive Absence Formula, at which point there should be a review of the employee's attendance record (Paragraph 4.7.5 at [H10]).

32. The Repetitive Absence Formula was weighted against short-term, persistent or frequent absences. It was not in issue that such absences were the most difficult to manage for the First Respondent, causing particular upheaval to the school day and having an adverse impact upon lessons and learning.

33. The Claimant's absence record throughout the material periods was not in dispute nor were the associated scores she attained under the Repetitive Absence Formula. They were as follows:

School Year	Occasions	Working Days	RAF Score
2013/14	13	69.5	11,745
2014/15	5	20.6	515
2015/16	14	28.7	5,625
2016/17	8	28.5	1,824
2017/18	14	47.8	9,368
2018/19	4	60.0	960
2019/20	0	0	0

34. The 2019/20 record was only for the first term, as the Claimant's employment ended with effect from 31 December 2019.

35. It was not in dispute that the figures for 2013/14 to 2017/18 were short-notice, short-term absences, caused by or related to the Claimant's asthma. It was also not in dispute that 52 of the 60 working days absent in 2018/19 were by reason of a planned operation on the Claimant's shoulder (and was therefore long-term absence under the Absence Management Policy). The other absences in 2018/19 related to accidents at work and stress. There were no recorded absences relating to the Claimant's asthma in 2018/19.

Classroom C10

36. As recorded above, the Claimant commenced her employment with the First Respondent on 1 September 1991 as a teacher of drama.

37. At the start of the 2013/14 school year, the Claimant was based in classroom C10 (as she had been for a number of years). The room had recently been renovated as it was planned to be used as a computer room. The Claimant was to be moved to another classroom, TC5 but that also required some renovation and repair work. As such, and until TC5 was ready, the Claimant continued to be based in C10.

38. However, early into the 2013/14 academic year, the Claimant noticed a problem with the floor in C10 which began to rise and split. She raised this with Mr Heron on a number of occasions during the autumn and spring terms.

39. During October and November 2013, the Claimant began to experience conjunctivitis and rhinitis, conditions she had not previously suffered from. She did not report these symptoms to First Respondent nor was she absent from work as a result. However, the Claimant continued to suffer with these types of health problems, which did eventually lead to periods of sickness absence (the first occurring in March 2014).

40. On 6 May 2014, the Claimant suffered her first asthma attack whilst at work (recorded at [B7] of the Bundle), which resulted in an ambulance being called and the Claimant being treated at the local hospital. This led to a short period of absence and, on 8 May 2014, a meeting between the Claimant and Mr Ellis, which was also attended by Mr Heron who took notes (at [G4]). The meeting had been requested by the Claimant, on the advice of the consultant who had treated her at hospital. At that meeting, the Claimant provided Mr Ellis with further information regarding her current health issues and her belief that the same were caused by the flooring problems in C10. In response, Mr Ellis advised the Claimant that the problems with the floor in C10 had been referred to, and were being addressed by, the Second Respondent.

41. In Paragraph 4 of her Grounds of Claim (at [A15]), the Claimant alleged that at the meeting on 8 May 2014, Mr Ellis had sought to deny any liability for her health conditions. In her witness statement, the Claimant went into more detail, claiming that Mr Ellis told her that the First Respondent would not accept liability and that the Claimant was not in a position to suggest that C10 had caused her ill health. Mr Heron's notes of the meeting did not record this as being said by Mr Ellis. His notes did, however, contain a record of the following exchange between the Claimant (referred to as AGR) and Mr Ellis (referred to as SE):

> SE asked AGR "How she was today?"
> AGR replied. chest still sore
> AGR stated at this point that she placed "no liabilities on the school whatsoever"
> AGR informed SE that as her chest was still sore and it would be Monday before she returned.
> AGR stated that the massive asthma attacks she was experiencing were as a result of C10.

42. In his oral evidence, Mr Ellis was unable to recall the details of the meeting, given that it had occurred almost seven years previously Similarly, Mr Heron's evidence was based upon the notes he made rather than his own recollections. However, they were both of opinion that Mr Ellis would not have said what had been alleged by the Claimant regarding liability. It was also accepted that Mr Heron's notes were not an exhaustive record of everything that was said.

43. The Tribunal preferred the Claimant's recollection of the meeting on 8 May 2014. She remained consistent in her recollection throughout these proceedings. Whilst Mr Heron's notes did not explicitly support her allegation, the reference to liability in the passage reproduced above appeared somewhat out of context to the conversation that was recorded. It was, in our view, more likely than not that the Claimant was in fact responding to the issue of liability and we found that the same had been raised by Mr Ellis, as claimed.

44. Following the meeting, the Claimant was moved from C10 to classroom TC5, whilst further work was carried out to C10 (which was undertaken over the summer half-term holiday).

45. However, before the work was undertaken, two relevant events took place. First, the Claimant suffered another asthma attack at work on 14 May 2014. She reported at the time that the attack had happened after she received a number of folders that had been in C10. It was the Claimant's view that the folders had contained the same irritants from C10 which she claimed had caused the attack on 6 May 2014 (per her email of 15 May 2014 to Mr Ellis at [G5]).

46. Secondly, on 22 May 2014, C10 was inspected by Mr Ayee, the Second Respondent's Health & Safety Officer. He provided a written report to the First Respondent via email on 16 June 2014 (at [D4]). In summary, Mr Ayee conducted a visual examination and found no evidence of dust or other contaminants. He also recorded no odours of damp, mould or chemicals. He pulled back one of the carpet tiles where the floor had begun to rise but did not report any dust being released.

47. The Claimant returned to C10 on 2 June 2014. On 4 June 2014, she suffered another asthma attack, required treatment from her GP and was deemed unfit for work until 23 June 2014. On 27 June 2014, the Claimant asked Mr Heron for any reports or correspondence regarding the issues with C10, as well as a copy of Mr Heron's notes of the 8 May 2014 meeting. The Claimant explained that she had a forthcoming appointment with her consultant regarding the management of her asthma and wished to "*talk to him from an informed point of view"* (at [G10]). Mr Heron discussed the request with Mr Ellis and on 30 June 2014, emailed the Claimant to state that her request had been raised with the governing body and that Mr Ellis had asked for an urgent meeting to be convened between himself and the Claimant (along with her union representative) to discuss both her request for information and her absence record (at [G9]).

48. That meeting took place on 17 July 2014 but no record or note was made of it, no details of the meeting were contained in any of the witness statements and none of the witnesses were questioned about the meeting. However, whether at the meeting or otherwise, it was agreed that the First Respondent would refer the Claimant for Occupational

Health ('OH') advice. The referral was made by Mr Ellis on 22 July 2014 and countersigned by the Claimant on 23 August 2014 (at [G19] of the bundle). The Claimant also added a number of her own clarifications and additional information to the referral form (at [G20]). She re-stated her belief that the condition of C10 had "*resulted in the chronic deterioration of my health."*

Classroom TC5

49. The Claimant began the 2014-15 academic year in TC5. However, the condition of TC5 was far from ideal, suffering from damp and water ingress. The Claimant's evidence was that TC5 deteriorated through the autumn term.

50. On 8 October 2014, the Claimant met with OH and saw Dr P. Oliver. On 9 October 2014, Dr Oliver wrote to Mr Ellis and responded to the questions raised in the referral documents. In particular, Dr Oliver reported the following (at [C8] – [C9] of the bundle):

    50.1. The Claimant's symptoms were continuing despite being in TC5 rather than C10.

    50.2. The Claimant had reported that TC5 was damp due to a leaking roof.

    50.3. He commented that *"…it would be prudent to undertake a health and safety review to determine if there has been any potential exposure to respiratory irritants or allergens as suggested by her history. Possible exposure to fungal spores in a damp carpet or walls could cause respiratory symptoms she is describing."*

    50.4. Question 4 was answered as follows:

> 4. Are there any work modifications, which would alleviate the condition or allow rehabilitation?
>
> Undertake H&S review of workplace conditions

51. On 10 October 2014, Mr Ellis asked the Claimant to attend what was referred to as a Stage 1 informal review meeting regarding her absence record. That meeting took place on 21 October 2014 and was minuted (at [E1] of the bundle). According to those minutes, the First Respondent had yet to receive Dr Oliver's report of 9 October 2014. At the end of the meeting, Mr Ellis was recorded as stating the following:

> [Mr Ellis] discuss that if attendance didn't improve then he would move to stage 2, five days notice would be given and her union rep should attend this meeting. Governors have said that if attendance doesn't improve then terminations of employment would follow.

52. The record in the minutes was consistent with the Claimant's own recollections of that meeting (at Paragraph 34 of her statement) and, importantly, contemporaneous correspondence between the Claimant and her trade union representatives (at [G37] – [G38] of the bundle).

53. However, Mr Ellis denied that the last sentence of that passage was an accurate record of what he said. He claimed that he had not discussed the Claimant's circumstances with the governors. Rather, and in accordance with HR advice, he was simply informing the Claimant that the Stage 2 process could result in the ultimate sanction of dismissal.

54. The Tribunal preferred the record contained within the minutes and the recollections of the Claimant in this regard. We placed considerable weight on the contemporaneous records and recollections of what was said at the meeting (both in the minutes and the Claimant's subsequent correspondence in the immediate aftermath). Mr Ellis not only failed to correct this alleged mis-recording in his witness statement, he failed to mention the meeting at all. In addition, the minutes of the meeting were presumably sent to Mr Ellis (as they were to the Claimant) and yet he failed to clarify or amend what he was recorded to have said, until the same was put to him in cross-examination over six years afterwards.

55. It followed that Mr Ellis did tell the Claimant that unless her attendance improved, she would be dismissed. That was in breach of the Absence Management Policy (in particular, the stated purpose of the Stage 1 informal review meeting, at [H11] and the subsequent escalation process through Stages 2 and 3, at [H12] – [H13]). However, despite what he said to the Claimant, she was not dismissed at either of the Stage 2 meetings she subsequently attended (in March 2018 and March 2019, discussed further below).

56. On 3 December 2014, the Claimant's head of department, Sue Hatton-Jones, reported the condition of TC5 to Mr Heron in the following terms (at [F104] of the bundle):

> …All walls and ceiling had a great deal of condensation on them. The carpet was saturated in places. It is clearly an unfit environment for the pupils and [the Claimant].

57. In response, Mr Heron informed Ms Hatton-Jones on 4 December 2014 that he was awaiting a quote from a roofer and that "*TC5 is off timetable for the foreseeable future and therefore should not be used"* (at [F104]). In his evidence to the Tribunal, Mr Heron explained that the school caretaker and maintenance staff had carried out patch repairs to the roof of TC5 but without apparent success.

58. Work was undertaken to TC5 between January and March 2015. The flat roof was re-felted, the carpets were cleaned and mould removed (at [D1]

– [D3] of the bundle). The Claimant returned to teaching in TC5 in April 2015 and had no further asthma attacks until November 2015 (when she suffered attacks on 16 and 25 November, followed by another on 7 December). The Claimant alleged that the condition of TC5 had begun to deteriorate again and this was causing the attacks.

59. As a result of these further attacks, the Claimant asked Mr Ellis to refer her back to OH. That referral was made on or around 18 December 2015 (see [G68] – [G72]). In addition, on 11 December 2015, the Claimant emailed Mr Heron to state that she did not wish to continue working in TC5 (per Paragraph 40 of the Claimant's statement and as recorded in her diary extract at [E72] of the bundle). At some point in December 2015, Mr Heron contacted Mr Ayee and arranged for him to inspect TC5.

60. Upon returning from the Christmas break, the Claimant was allocated classroom TC6. On 8 January 2016, Mr Ayee inspected TC5. On 10 February 2016, the Claimant met with Dr Oliver again. During the course of 10 February, Dr Oliver spoke to Mr Ayee, who provided him with a verbal report of his findings regarding TC5. Dr Oliver wrote his report on the same day (at [C15] – [C16] of the bundle). Mr Ayee's written report on the condition of TC5 was completed on 4 April 2016 (at [D7] – [D10]). In the course of his inspection, Mr Ayee took temperature, humidity and moisture readings of the walls and floor.

61. Dr Oliver reported the Claimant's concerns regarding the condition of TC5 and her asthma. He was aware of the work undertaken to TC5 and made reference to his discussion with Mr Ayee, as follows:

> As you are aware I have undertaken some breathing tests in the past which have shown a deterioration at work. I have contacted Simon Ayee, H&S adviser, today and he has verbally reported that recent temperature and humidity measurements have been normal. However, I believe that no sampling for potential fungal spores was undertaken. In addition, Simon commented that COSHH risk assessments should be reviewed to ensure that there is no potential exposure to respiratory irritants or sensitizers in TCS.

62. As alluded to by Dr Oliver, Mr Ayee reported that temperature and humidity levels in TC5 were within expected levels. He found no evidence of mould and levels of damp were again within the expected range. He concluded his report as follows:

> The Workplace (Health, Safety and Welfare) Regulations 1992 cover a wide range of basic health, safety and welfare issues and apply to most workplaces, including schools. The regulations cover temperature and cleanliness amongst other things and TC5 was found to comply with these requirements at the time of the assessment.

63. The Claimant alleged that, despite being allocated TC6 from January 2016, she was forced to teach in TC5 until March 2016 (at Paragraph 41 of her statement). The Tribunal did not understand it to be in dispute that during this period, the Claimant conducted some lessons in TC5. The issue was whether the First Respondent had compelled the Claimant to do so.

64. In the Tribunal's judgment, there was no compulsion on the part of the First Respondent. The Claimant was not forced to use TC5 at the direction or behest of Mr Ellis or any other member of the school's management team. Rather, she took the view that TC6 was too small for a number of her lessons (particularly with her GCSE class), the hall was not made available to her and she took the decision to use TC5. We were not aware of any evidence of the Claimant, at that time, raising her concerns regarding the size of TC6 with the First Respondent. Mr Ellis explained in his oral evidence that the hall was used for holding mock exams, which were taking place at the start of year. That assertion was not challenged. The Claimant informed Dr Oliver at their meeting on 10 February 2016 that her asthma was "*currently stable as she is not working in TC5 at present."*

65. In conclusion, we found that the Claimant made the decision to use TC5. She was not compelled to do so by any act or omission on the part of the First Respondent.

66. In or around March 2016, the Claimant was moved to classroom C12.

Aerosols

67. The First Respondent prohibited the use of aerosols on school premises (whether deodorants or hairsprays). By the conclusion of the hearing, the Claimant (through her counsel) accepted that she could not maintain her claim that the First Respondent permitted their use in school. However, there was a dispute as to whether the First Respondent had done enough to enforce the policy, since, as detailed below, aerosols were being used on school premises, albeit in contravention of their prohibition.

68. On 17 March 2016, the Claimant suffered her first asthma attack triggered by exposure to aerosol. She suffered numerous further aerosol-related attacks, leading to a number of absences from work, during both the 2016/17 and 2017/18 academic years.

69. On 28 September 2017, Mr Heron conducted a risk assessment arising from the Claimant's exposure to aerosols (at [G83] of the bundle). Measures identified to manage the risks faced by the Claimant included providing her with the use of a specific toilet and displaying 'no aerosol' signage.

70. On 6 November 2017, the Claimant met with Mr Ellis for a Stage 1 informal meeting (in accordance with the Absence Management Policy).

71. The minutes of the meeting were at [G85] of the bundle. The Claimant explained that it appeared that her asthma was being triggered by the aerosols being used by pupils in school. As noted above, Mr Heron had already made arrangements for the Claimant to use a different bathroom, to minimise the risk of exposure. It was also agreed that the Claimant would be referred to OH.

72. Mr Ellis told the Claimant that the school would continue to reiterate the 'no aerosol' policy in all newsletters sent to parents. In addition, posters had been put up around the school reminding staff and students alike of the ban on aerosols.

73. The minutes then recorded the following exchange:

> [Mr Ellis] asked [the Claimant] if a target of 2 days could be set for absence for this half term. He agreed to exclude any absences brought on by aerosol related attacks in school. [The Claimant] agreed to this, however she wanted to add that she felt previously recorded absences had been wrongly recorded as her asthma had been brought on by school environment. [Mr Ellis] said he would make a note of her opinion.

74. The parties relied upon different interpretations of the above exchange. The Claimant submitted that Mr Ellis, on behalf of the First Respondent, had agreed to discard all absences brought on by adverse exposure to aerosols from the Claimant's absence record, whenever and however they occurred. In contrast, the First respondent averred that the agreement was far more limited – it applied only to deliberate spays of aerosol aimed at the Claimant and only to the half term from October to December 2017.

75. The Tribunal found assistance in determining what had actually been agreed at this meeting from an exchange of emails in March 2018 between the Mr Ellis and Mr Adkins (at [G133] – [G135] of the bundle). From those emails, we concluded that Mr Ellis' intention at the meeting of 6 November 2017 was to exclude all absences arising from deliberate sprays attacks on the Claimant (as had, on occasion, been occurring). If there was any misunderstanding as to whether the concession applied to any aerosol-related absence, we were content that such a belief could no longer be reasonably held after the exchange of emails in March 2018. However, we were unable to conclude that that concession was only limited to the period from October to December 2017. Mr Ellis did not clarify in the email correspondence that the omission of such absences was limited in time, as claimed or at all.

76. As such, we found that at the meeting on 6 November 2017, the First Respondent agreed not to include in the Claimant's absence record any absences caused by deliberate spray attacks.

77. As arranged, the Claimant met with Dr Pemberton of OH on 5 December 2017. So far as relevant to the issues in this case, Dr Pemberton answered a number of questions posed to her in the referral as follows (at [C17] – [C19] of the bundle):

> …
>
> Please specify what adjustments should be considered and how long should these adjustments continue?
>
> Given her reported symptoms in relation to the workplace environment, it would be prudent to try and minimise exposure to any potential already known triggers as much as possible. I would therefore suggest that you perform some risk assessments relating to minimising the exposure to her already reported triggers.
>
> …
>
> Is the health problem likely to recur or affect future attendance?
>
> In my opinion, if the potential triggers in the workplace have not minimised then this may affect her ability to attend work on a regular basis.
>
> Does the health problem meet the criteria of disability as defined by the Equality Act 2010?
>
> As you may be aware, this is a legal definition rather than a medical one. However, as she currently has very little in the way of a significant impact on her activities of daily living, I would suggest that she is not covered by the criteria of disability as defined by the Equality Act. The difficulty here is that when she is suffering from an acute attack that these may have an impact on her activities of daily living and it would be prudent to take legal advice before solidifying whether she would meet the criteria of disability or not.

78. Dr Pemberton went on to summarize the Claimant's condition as "*a diagnosis of late onset asthma which is exacerbated by workplace triggers"* which "*predominantly relate to flooring, mould and aerosols."* She went on to consider the possibility of occupational asthma, concluding that whilst it was a "*high possibility"*, there was "*no absolute evidence"* of its existence. She concluded her report as follows:

> I feel it is reasonable to look at potential workplace triggers. which have already been reported by [the Claimant] and eliminating these as far as is reasonably practicable. Efforts to minimise school aerosol use and risk assessing possible mould environments which appear to trigger her symptoms, I would think, are reasonably practicable adjustments.

79. On 21 December 2017, a request was made to Mr Heron on the Claimant's behalf (by Lynn Lloyd at [G105]) for a key to enable her to lock her C12 classroom during breaks and lunchtime. This arose

following a spate of aerosol sprays in the classroom during break times by the Year 10 group whose classroom it was. In her written evidence, the Claimant said that the request was never actioned and Mr Heron, in his oral evidence, could not recall the request or whether it was actioned. In the circumstances and on balance, the Tribunal accepted the Claimant's recollection that, despite the request, she was never provided with a key to lock her classroom.

80. The Claimant was absent from work for the first three weeks of term after the Christmas break. On 7 February 2018, a further Stage 1 informal meeting was held between the Claimant and Mr Ellis. The Claimant was informed that as her absence record had not improved, the First Respondent was moving to Stage 2 of the Absence Management Policy, which constituted a formal review meeting. This was eventually arranged for 14 March 2018.

81. On 12 March 2018, Mr Ellis set out in an email to Mr Adkins the steps taken by the First Respondent to address the Claimant's concerns and health issues (at [G118] of the bundle). Save that the email did not indicate when a number of these steps had been taken (albeit that they had been undertaken by the date of the email), the Tribunal had no reason not to accept that it was accurate and reproduce the relevant extracts below:

> Our records show that so far we have-
>
> a. Arranged immediate and temp cover for lessons on numerous occasions whenever [the Claimant] has displayed any illness including accompanying her by another member of staff.
>
> b. Insisted [the Claimant] has gone home early when distressed or feeling under the weather (not recorded as absence)
>
> c. Ensured first aid support has been provided asap on ail occasions that [the Claimant] has displayed illness when we were aware
>
> d. Removed [the Claimant] from tutor duties to allow extra time to prepare for lessons (30 mins less per day)
>
> e. Moved teaching room three times due to perceived issues with Mould, Cold, Paint
>
> f. Moved tutor group away from [the Claimant's] teaching classroom to remove potential risk of aerosol use by a tutor group
>
> g. Created and then displayed "No Aerosol" notices in teaching classroom
>
> h. Discussed directly with teaching groups condition and expectations of no aerosols

i. Run assemblies to all year groups regarding aerosols

j. Included rules containing no aerosols in newsletters alerting parents

k. Followed up on known incidents of Aerosol use including detentions and being banned from the classroom

l. Display “no aerosols” in female staff toilets, designated toilet area so [the Claimant] does not come in to contact when she uses the toilet

m. Altered duties on "activities day" and other trip days so that [the Claimant] has a sedentary role

n. Provided [the Claimant] with an alternative toilet area and key to avoid having to walk to the staff toilet

o. Responded to concerns re moult [sic], paint etc using specialist materials

p. Allowed use of disabled car parking space

q. Allocated deputy headteacher to liase [sic] 1 to 1 to discuss any issues.

82. Given that her first asthma attack triggered by aerosols had been in March 2016, the Claimant’s concerns were more around the speed and effectiveness of the First Respondent’s response.

83. The Claimant was accompanied by Mr Adkins at the Stage 2 meeting on 14 March 2018. A number of action points were agreed upon, the aim of which was to try and improve the Claimant’s attendance. These included considering any reasonable adjustments suggested by OH and an action to be taken by the Second Respondent’s HR department, as follows (recorded in the minutes of the meeting at [E8]):

> HR to contact OH on behalf of the school to obtain advice on workplace injuries as per the Burgundy Book[1] and to seek advice on increasing the Bradford factor as a reasonable adjustment.

84. On 25 April 2018, the Claimant suffered another aerosol-related asthma attack. There had been a number of attacks before this one but it appeared from the evidence that this was the last asthma attack suffered by the Claimant which occurred on, or was linked to, the school premises.

85. In a report dated 8 June 2018, Dr Pemberton provided her opinion on a number of issues pertaining to the Claimant, her health and her working

[1] The Tribunal understood “*the Burgundy Book”* to be a reference to the Conditions of Service for School Teachers in England and Wales.

conditions. The Claimant did not attend upon Dr Pemberton for the purposes of this review. However, that appeared to be consistent with the actions agreed at the Stage 2 meeting of 14 March 2018.

86. Dr Pemberton advised the First Respondent to consider seeking the opinion of the Claimant's treating medical practitioners as to the cause of her asthma and offered to do that on their behalf once they had obtained the Claimant's consent. Dr Pemberton then expressed the following view regarding the management of the Claimant's asthma-related absences:

> Retrospectively, one could argue that it would be reasonable to discount sickness absence relating to the asthma and extend trigger points regarding the asthma as a practicable adjustment. This would be more reasonable under the Equality Act which you may wish to consider applying for this purpose but as I highlighted in my previous report, this is a legal definition rather than a medical one.

87. It appeared to the Tribunal that Dr Pemberton was arguably suggesting that the Claimant's asthma-related absences to date should be discounted by the First Respondent (indicated by use of the adverb 'retrospectively') and, moving forward, trigger points under the Absence Management Policy should be extended (described as a practical adjustment, singular). However, on any reading, Dr Pemberton's view was guarded and it was ultimately for the First Respondent to determine how to manage the Claimant's health-related absence record.

88. In respect of whether the Claimant was disabled for the purposes of the Equality Act, Dr Pemberton proposed the following approach:

> Given the uncertainty and complexity arising from managing this lady's case, my advice is that it would be wise to manage this case on the basis that the disability provisions of the Equality Act are likely to apply. She clearly has symptoms of a significant and enduring nature and it is wise to adopt a precautionary approach whenever an employee has been established on some long term treatment because the legal definition of disability requires consideration of the employee as they would be it the effects of ongoing treatment were disregarded (i.e. the employee cannot be taken as they are found, rather it must be postulated how they would be without treatment).

89. A Stage 2 Absence Review meeting was scheduled for 10 July 2018. In advance of that meeting, and at his request, the Second Respondent's HR department provided some of the details of Dr Pemberton's report to Mr Adkins (see the email of 25 June 2018 at [G158] of the bundle). Specifically, HR explained the need for the Claimant's consent to enable Dr Pemberton to contact her doctors. It was proposed that this be discussed at the meeting on 10 July 2018.

90. No record of what occurred at the meeting on 10 July 2018 was in evidence. The Claimant did not detail what occurred at the meeting in her witness statement (at Paragraph 67). Neither Mr Adkins nor Mr Ellis

made any reference at all to meeting in their respective statements. As such, there was no evidence before the Tribunal of what occurred at the Stage 2 Review meeting on 10 July 2018.

91. Other than indicting that Dr Pemberton had suggested contacting the Claimant's medical practitioners, for which consent was required (per the email of 25 June 2018), there was no evidence of what view the First Respondent took of Dr Pemberton's report. In particular, what view did they take of the proposed adjustments to the recording and managing of the Claimant's asthma-related absences? Mr Ellis made no reference to the report in his witness statement. There was no evidence from the HR officer in post at the time (Tina Jones did not become involved in the Claimant's case until February 2019). However, Mr Ellis did confirm in cross-examination that he had not asked for the Claimant's consent to obtain further medical evidence and accepted that there was nothing in his statement regarding any conversations he had had with HR about obtaining consent.

92. As such, the Tribunal was driven to conclude that neither Respondent took any material action in response to Dr Pemberton's report of June 2018.

Stage 3 Hearing & Dismissal

93. From September 2018, the Claimant was based in classroom B4 with a Year 7 form group. The Claimant had a separate history of medical issues with her shoulder and at the beginning of term, informed the First Respondent that she was scheduled for a shoulder operation in October 2018. This would necessitate a lengthy absence from work to recuperate. The operation was performed on 4 October 2018 and the Claimant remained off work until a phased return in January 2019. She was off work for a total of 52 days.

94. There were two other short periods of absence during the Autumn and Spring terms, when on separate occasions the chair the Claimant was sitting on collapsed (on 11 September 2018 and on 30 January 2019). These accidents resulted in the Claimant being off work for a total of four and half days.

95. On 13 February 2019, Mr Ellis invited the Claimant to a meeting on 8 March 2019. According to the letter of invitation, it was a Stage 2 Review Meeting, the purpose of which was to "*discuss the progress towards meeting the targets that were previously set at stage 2"* (at [E10] of the bundle).

96. According to the minutes of the meeting on 8 March 2019 (at [E11]):

96.1. The Claimant confirmed that her asthma was "*fine"* and that having a Year 7 tutor group and using classroom B4 had helped with aerosol exposure.

96.2. The Claimant reported that her shoulder was improving following the operation in October 2018.

96.3. The Claimant asked to move to part-time working (three days per week) from September 2019, which Mr Ellis agreed to look in to.

96.4. As the Claimant had been absent for 76 days during the previous year, Mr Ellis was of the view that her attendance had not improved and would be moving the process to Stage 3.

97. Under the Absence Management Policy, Stage 3 required a formal hearing presided over by a committee from the First Respondent's governing body. The purpose of the Stage 3 Hearing was as follows (per [E12] and [H13] of the bundle):

- Consider the employee's attendance record, including any medical reports
- Review the action taken to date and hear the employee's response
- To agree an action plan for improvement if appropriate including any reasonable adjustments, or consideration of other suitable alternative employment
- Reach a decision about appropriate action, this may include further medical report, final warning or dismissal

98. The Stage 3 Hearing took place on 21 June 2019. The Claimant was accompanied to the meeting (as she had been at the Stage 2 Review meeting) by Mr Adkins. It was presided over by a committee of the Governing Body, comprising of Mr Wagstaffe (who was also chaired the hearing), Sian Jones and Roz Benney, both parent governors ('the Committee').

99. A report was prepared and presented by Mr Ellis on behalf of the First Respondent. The Claimant submitted a written response and also addressed the hearing, along with Mr Adkins. The Tribunal had sight of the minutes of the meeting (at [E139]) as well as Mr Wagstaffe's handwritten notes (at [E131]). After hearing from both sides and asking a number of questions, the Committee retired to deliberate. The only contemporaneous record of those deliberations appeared in the minutes, as follows (at [E144] of the bundle):

> The Governors considered all of the information that had been presented in the meeting and considered the options available.

RESERVED JUDGMENT

> Options:
>
> - Further Medical Report
> - Final Warning
> - Dismissal
>
> Outcome:
>
> The governors unanimously agreed to dismiss. The decision was based on the factual evidence that was presented today, in particular the sickness record which was presented and was not undisputed.

100. By a letter dated 24 June 2019, the Claimant was informed of the Committee's decision. The following explanation was given for the decision to dismiss (at [E145] – [E146]):

> The purpose of the hearing was to consider your overall absence, the action taken to date, and to reach a decision regarding your future employment. At the hearing the panel considered the school's report and your verbal and written submissions. The panel discussed your levels of attendance and the factors that have been causing your absence from work. The panel considered that you have had a high number of occasions of absences during the past year, and that this pattern has been occurring for a number of years and is disruptive to the school. it was agreed by all parties that you have been supported for a long period of time by the School and that all possible reasonable adjustments have been made. Your attendance record was undisputed.
>
> As you are unable to achieve and sustain an acceptable improvement to your high levels of sickness absence, it is regrettable that your contract of employment must be terminated. You are entitled to two month's paid notice, terminating at the end of a school term, therefore your last day of employment will be 31 December 2019.
>
> The panel made their decision based on the factual evidence presented to them and were unanimous in their decision. In arriving at their decision the Committee gave careful consideration to all the circumstances but concluded that your levels of absence could no longer be sustained and that termination of employment was now the only appropriate course of action.

101. Further details of how the Committee reached its decision were provided by Mr Wagstaffe, in both his witness statement (at Paragraphs 33 to 45) and in his oral evidence. The Tribunal also heard from Miss Jones, who was present during the Stage 3 Hearing and during the Committee's deliberations.

102. Mr Wagstaffe explained that the Committee based its decision on the Claimant's absence record for the 2018/19 academic year. The previous history of absences provided context but on a number of occasions in his oral evidence, Mr Wagstaffe stated that it was the absence record in the current school year which was determinative of the Committee's

decision. He had also re-stated the same at the subsequent Appeal Hearing (at [F232] of the bundle and considered further, below).

103. The parties agreed that the Claimant's dismissal was for a potentially fair reason. Mr Thakerar submitted that the reason was one of capability. Mr Ali submitted that it was either capability or some other substantial reason ('SOSR'). This was important, since a dismissal founded on capability would be expected to have considered the Claimant's future health prospects as well as her performance to date. In contrast, the weight to be given to the future may well be reduced where SOSR is relied upon.

104. In this regard, Mr Wagstaffe's evidence was central, reflecting as it did the mindset of the Committee which reached the decision to dismiss. Whilst there were no concerns regarding the Claimant's abilities as a teacher, Mr Wagstaffe appeared to confirm in his oral evidence that the decision was one of capability, given the Claimant's level of absences. As discussed in more detail below, Mr Wagstaffe also confirmed that the Committee had particular regard to whether or not the Claimant's future attendance would improve. As recorded above, the letter of 24 June 2019 relied upon a finding that the Claimant was unable to "*achieve and sustain an acceptable improvement"* in her absences. This was in line with Mr Wagstaffe's evidence that the Committee was considering the future as well as the past, an approach also consistent with dismissal by reason of capability.

105. In addition, in his evidence at the Claimant's Appeal Hearing (discussed further, below), Mr Wagstaffe was recorded in the minutes, after explaining a little more about the Committee's decision-making process, stating that they "*could not see an improvement in attendance and had therefore come to their decision* [to dismiss the Claimant]".

106. For those reasons, we found that the First Respondent dismissed the Claimant by reason of capability.

107. Mr Wagstaffe confirmed in his evidence that the Claimant had told the Committee that her asthma was under control and she had been discharged from the care of her consultant (at Paragraph 22 of his statement). He went on to explain that, if the Claimant's asthma was under control, the Committee would have expected to see improvements in her absence record. The Committee was also of the view that, notwithstanding the apparent resolution of the Claimant's history of asthma attacks, her attendance was unlikely to improve (at Paragraph 41 of his statement).

108. The Tribunal had a number of difficulties with this:

    108.1. If the decision to dismiss was mainly based upon the Claimant's absence record in 2018/19, it was not, as a matter of fact, based

upon her asthma-related absences. It was not in dispute that during 2018/19, almost all of the Claimant's absence from work was caused by her post-operative recovery from shoulder surgery. This was, on any level, a manifestly different category of absence when compared with her history of short-term, short-notice, asthma-related absences.

108.2. The Claimant had not been absent by reason of asthma in the 12 months immediately prior to the decision to dismiss.

108.3. The Committee's opinion that improvement in attendance was unlikely was not informed by any up to date medical evidence. As recorded above, there was an express option open to the Committee to obtain further medical evidence. The OH reports available to them were of no assistance on the likely impact of the Claimant's shoulder on her future absence record, as they all pre-dated the operation.

108.4. In any event, when questioned by the Tribunal, Mr Wagstaffe was of the view that any further medical evidence would have either confirmed an existing condition or a resolved condition. Either way, in his view, such evidence would have reinforced the Committee's decision to dismiss. A continuing condition would have told the Committee that attendance would not improve into the future. A resolved condition would have told the Committee that attendance to date should have improved better than it had.

108.5. In summary, it appeared that Mr Wagstaffe, and by extension the Committee, conflated the Claimant's asthma-related absences of previous years with the shoulder-related absence in 2018/19. In our judgment, this adversely impacted upon the Committee's ability to objectively consider either whether the level of absence in 2018/19 warranted dismissal or whether the Claimant's attendance record was likely to improve.

109. The understandable importance of future absence management was also reflected in the advice provided to the Committee by HR. In her evidence, Miss Jones similarly confirmed that a relevant factor in the Committee's decision to dismiss was that "*there was little assurance that* [the Claimant's] *attendance would improve in future to the level required by* [the First Respondent]" (at Paragraph 23 of her statement).

110. Some further insight into the Committee's reasoning was provided by an email exchange between Mr Wagstaffe and Miss Jones, following the decision to dismiss and ahead of the Claimant's subsequent appeal against dismissal. On 8 October 2019 and in anticipation of the forthcoming Appeal Hearing, Miss Jones emailed Mr Wagstaffe with details of the hearing and to tell him that he would be required to explain

at that hearing the Committee's decision to dismiss (at [G197] of the Bundle). In that regard, Miss Jones advised as follows:

> The grounds for appeal have been presented as follows ..
>
> 1) The decision is unfair (because her absence was both disability related and due to injuries at work)
> 2) The decision is perverse {because she was at work at the time of dismissal)
> 3) The decision is probably discriminatory (because adjustment should have been made due to her 'condition')
>
> On this basis, I think you should in your summary explain that the Panel took into consideration that the School has provided support and made all possible reasonable adjustments. Also that the decision was based on the balance of probability of her achieving and sustaining an acceptable level of attendance.

111. Mr Wagstaffe responded as follows:

> Your final paragraph summary is what I was thinking the other day in that she was treated fairly and justly over quite a long period, with now the probability that sustained attendance will not be provided by the appellant.

112. In concluding that the Claimant's future attendance was unlikely to improve, there was insufficient consideration of the following material factors:

112.1. That the Claimant's asthma, which was known by all parties to have been the cause of the overwhelming majority of absences up to but not including 2018/19, was under control and she had been discharged by her consultant.

112.2. The impact, if any, on the Claimant's future attendance record as a result of the shoulder operation of October 2018, the recovery and recuperation of which had been the cause of almost all of the absences in 2018/19.

112.3. The likely impact of the Claimant moving to part-time hours from September 2019.

113. There was also some confusion over whether the Committee's stated approach of focussing on 2018/19 (per Mr Wagstaffe's evidence) was consistent with the dismissal letter and the position adopted by the First Respondent in defending these proceedings. As recorded above, the dismissal letter made reference to the Claimant's absence levels having occurred over a number of years. The First Respondent accepted (in Mr Ali's written submissions at Paragraphs 33 & 34 in respect of the disability discrimination claims) that the Claimant's dismissal constituted unfavourable treatment which arose in consequence of her disability.

That similarly supported a view that the Claimant's history of asthma-related absences had played a material role in the decision to dismiss.

114. If the Committee did consider pre-2018/19 absences, there was no evidence that they considered, in detail or at all, the meeting on 6 November 2017, where Mr Ellis agreed not to include in the Claimant's absence record any absences caused by deliberate aerosol spray attacks. At the very least, the Committee was aware (or ought reasonably to have been aware) that the Claimant alleged that such a concession had been agreed upon. It was incumbent upon the Committee to engage with the issue, since the same was material to any analysis of the Claimant's absences pre-2018/19.

115. There also appeared to be a tendency on Mr Wagstaffe's part (and we presumed, by extension, the Committee, in the absence of anything to the contrary) to either accept the evidence on behalf of the First Respondent without question or simply assume that it had taken appropriate actions, even in the absence of any evidence to that end. In his oral evidence, Mr Wagstaffe confirmed that it had been assumed that the First Respondent had acted upon recommendations in OH reports from December 2017 and June 2018, when in fact they had not. Mr Wagstaffe referred to his knowledge of working, as a governor, with the First Respondent's senior management team and his belief that the First Respondent would always be striving to provide a safe environment for staff and pupils alike.

116. In addition, at the Stage 3 Hearing, Mr Ellis stated that the First Respondent believed that it had taken all reasonable steps to address the issues which had arisen from aerosol use on school premises. The Committee asked Mr Ellis to expand on this statement, which Mr Ellis declined to do, citing potential prejudice to an unexplained "*future case."* The Committee accepted Mr Ellis' response and moved on. In his oral evidence, when questioned as to why the Committee did not explore the issue further, Mr Wagstaffe stated that, despite asking for further details, he in fact did not now believe that further expansion of the steps taken by the First Respondent was necessary. Rather, he believed what Mr Ellis had told him was correct (that the First Respondent had taken all reasonable steps).

117. The decision letter also failed to explain how the Committee had approached, considered and dismissed the options short of dismissal which were available to them (and recorded in the minutes at [E144], reproduced above). Given that the Committee were imposing the most severe sanction, it was essential that their reasons for doing so were clear and cogent. Whilst the decision was theirs alone, they were obliged to explain that decision in more detail than they actually did. With regret, even after hearing from Mr Wagstaffe, the Tribunal remained far from clear as to how the Committee had reached its decision.

118. The Claimant was afforded a right of appeal, which she exercised in a letter from Mr Adkins to the First Respondent dated 3 July 2019. The Claimant returned to work at the start of the 2019/20 academic year, as agreed and on a part-time basis, until her dismissal became effective on 31 December 2019.

The Appeal

119. The scope of appeal hearings was set out in the First Respondent's Disciplinary Policy at Paragraph 5.4 ([H46] of the Bundle). It required the Claimant to set out her grounds for appealing and include any evidence in support (referred to as "*the appeal notification*"). The Disciplinary Policy goes on state as follows:

> Appeal hearings will focus on the issues set out in the appeal notification, therefore the appeal process may not always take the form of a complete hearing. However, under certain circumstances, e.g.. where new evidence comes to light or the first hearing process was flawed or biased, it may be appropriate to rehear part, if not all, of the case.

120. The Appeal Hearing took place on 16 October 2019. It was chaired by Mr Pritchard, who was joined by two other governors ('the Appeal Committee'). It was not in dispute that none of the Appeal Committee had been involved in the decision to dismiss the Claimant.

121. The Claimant was afforded an opportunity ahead of the hearing to provide evidence and submissions in support of her appeal. In addition, she was provided with copies of the First Respondent's evidence and given an opportunity to make oral submissions to the Appeal Committee.

122. By a letter dated 17 October 2019, the Appeal Committee informed the Claimant that her appeal had been unsuccessful and the decision to dismiss was upheld (at [F237] of the Bundle).

123. Mr Pritchard explained in his written and oral evidence that he was only asked to chair the Appeal Committee when he arrived for the hearing. He also confirmed that the vast majority of the documents submitted for the hearing were only handed to him when he arrived and, by his own account, he did not have time to consider those documents in any detail (the bundle ran to 230 pages). Rather, Mr Pritchard's evidence was that he focussed on the First Respondent's polices and procedures and "*it was my opinion that they were followed."*

124. It was not suggested that any time was afforded to Mr Pritchard or the other members of the Appeal Committee to consider all the documents adduced prior to the start of the Appeal Hearing or following its conclusion or before they reached their decision. The minutes recorded the Appeal Committee going into deliberations and reaching a decision immediately after the conclusion of the hearing.

125. As noted above, Mr Wagstaffe attended the appeal hearing and was questioned by the Appeal Committee. The minutes recorded him being asked by Mr Pritchard about how confident he was in the Committee's decision. In response, Mr Wagstaffe set out what processes had been followed, what factors had been taken into account and what evidence considered. He also answered questions from Mr Adkins on behalf of the Claimant (at [F232] of the Bundle).

126. In his oral evidence, Mr Pritchard confirmed that he essentially accepted, based upon Mr Wagstaffe's answers, that the Committee had followed the correct policies and procedures when reaching their decision to dismiss. Mr Pritchard also appeared to believe, erroneously, that in addition to the absence caused by her shoulder operation, the Claimant had had other periods of significant absence during 2018/19.

127. Contemporaneous details of the Appeal Committee's deliberations were recorded in the minutes of the Appeal Hearing (at [F234] – [F235]). It was clear from those minutes and the evidence of Mr Pritchard that regard was had by the Appeal Committee to the Claimant's complete history of absences (see for example, Paragraph 11 of Mr Pritchard's witness statement and the final paragraph of the minutes at [F231] of the Bundle). The minutes recorded advice from the HR officer in attendance that "*even with the disability related absence being taken out, the absence was still high*." However, it was not clear, either from the documents before us or from Mr Pritchard's evidence, what were considered to be "*disability related absences"* and whether the HR advice related to the entirety of the Claimant's employment with the First Respondent or the period purportedly relied upon by the Committee, namely 2018/19.

128. In our judgment, the Appeal Committee's apparent focus on policies and procedures were at the expense of the evidence before it and a proper consideration of the decision under appeal. Mr Wagstaffe's opinions about the Committee's decision should not have formed any material part of the Appeal Committee's deliberations. It was difficult to understand what weight, if any, could have been placed upon those opinions. Unfortunately, however, it appeared to the Tribunal that Mr Wagstaffe's confidence in his Committee's decision played some part in the Appeal Committee's own conclusions.

129. We had some sympathy for Mr Pritchard and could understand why he chose to focus on procedure. He had been afforded insufficient time to properly consider the evidence before him. As a result, the Appeal Committee arguably failed in its primary duty under the Disciplinary Policy, namely to "*focus on the issues set out in the appeal notification."* That may well explain the erroneous beliefs referred to above. It may also explain the failure by the Appeal Committee, in our judgment, to adequately consider whether the Committee's decision was flawed. It

was not enough to simply ask Mr Wagstaffe about his confidence in that decision.

130. As a result, the errors we have identified in the Committee's decision-making process were not cured by the Appeal Committee.

Drama Classrooms & Curriculum

131. The Claimant alleged that the First Respondent moved her to classrooms which were not suitable or practical to teach drama. She also alleged that drama was subsequently removed from the school curriculum, only to be re-instated after she had been dismissed.

132. As set out above, and so far as relevant, the Claimant was moved from C10 to TC5 and then to TC6. She was subsequently allocated C12 and then B4. The Claimant argued that TC6 was too small for drama and that the First Respondent should have allowed her to use the hall or dance studio, which were both larger spaces. In his evidence, Mr Ellis explained that the hall and dance studio were made available to the Claimant when possible but were also used for holding exams. The decisions taken by the First Respondent to move the Claimant between different classrooms were in response to her requests.

133. Contrary to the Claimant's belief, we found that drama was not removed from the curriculum. There was evidence of it remaining as an option for GCSE students. However, the numbers opting for drama at GCSE were low. Whilst it had been incorporated into the English department, that did not mean that it was no longer offered at GCSE or taught within English for younger pupils.

Analysis & Conclusions

Unfair Dismissal

Substantive Fairness

134. The Claimant was dismissed because of her capability. In our judgment, it was incumbent upon the Committee to consider the following issues when reaching their decision:

    134.1. The Claimant's recent absence record and, most notably, the lack of any asthma-related absences.

    134.2. The likelihood of that pattern regarding asthma-related absences continuing into the future.

    134.3. If doubts existed, the importance of up to date medical evidence and/or prognosis.

135. As found above, the Committee failed to consider properly or adequately any of those factors. It was far from clear, even after hearing from Mr Wagstaffe, the reasoning which informed the Committee's decision. As far as we were able to ascertain, the decision was based upon an inadequate consideration of, in particular, the Claimant's recent attendance record and, importantly, her prognosis and likely attendance record going forward. Those failings were fatal to the substantive fairness of the Committee's decision to dismiss. The very issues which should have properly informed the decision were not adequately addressed.

136. Those failing were compounded by the apparent confusion between the Committee and the First Respondent as to the time frame and basis upon which the decision to dismiss was based. The First Respondent accepted that the Claimant was dismissed for something arising from her disability, namely her attendance record. No one suggested that the Claimant was disabled by anything other than her asthma. It followed that, according to the First Respondent, the Claimant was dismissed because of her asthma-related absences. For Mr Wagstaffe (and by extension the Committee) the focus was the 2018/19 academic year. Yet there were no asthma-related absences in 2018/19.

137. Following the Committee's approach to its conclusion, there was, in our judgment, an inherent unfairness in dismissing the Claimant when there was evidence that the cause of her long history of multiple, short-term absences was under control and had been for at least a year. That unfairness was compounded by the decision of the First Respondent to take no disciplinary action against the Claimant when her asthma-related absences were at their highest, only to then dismiss her when they were seemingly no longer an issue.

138. There was also a compelling case on the facts for the Committee to consider a sanction short of dismissal. Given the apparent improvement in the asthma-related absences and the changes to be implemented from September 2019 (with the Claimant reducing her hours), a reasonable employer would have applied its mind to a sanction which allowed for further monitoring of the Claimant's absences (for example, a final written warning). In this case, we were not presented with any evidence as to whether the Committee even considered alternative sanctions, still less their reasons for apparently rejecting any sanction short of dismissal.

139. At most, the Committee's reasoning was premised upon a finding that the Claimant's future attendance levels would not improve. However, for the reasons found, such a conclusion was not reasonably tenable in the face of the information and evidence available to the Committee. In the alternative, a reasonable employer would have been expected to seek to resolve any doubts which it may have had from that information, whether by way of further medical evidence or a sanction short of dismissal which

enabled future attendance to be monitored. Either way, the Committee provided no reasoning for how, if at all, it had considered and discounted any alternatives to dismissal.

140. Those failures by the Committee were not rectified or addressed, adequately or at all, by the Appeal Committee. As such, and for all those reasons, we found the Claimant's dismissal to be substantively unfair.

Procedural Fairness

141. There were also procedural shortcomings within aspects of the disciplinary process.

142. The Committee did not adequately consider all of the material evidence presented to it by the Claimant (specifically regarding her recent absence record or her improved asthma management). If it did, the Committee did not provide adequate reasons for how it had assessed it or what conclusions it had drawn. The Committee made assumptions and reached conclusions not supported by the evidence (regarding both the impact of the Claimant's health on her future attendance and the decision not to obtain or enquire about any further medical evidence). The Committee accepted aspects of the First Respondent's evidence without adequate assessment or analysis, even though the same was in dispute. Mr Wagstaffe's oral evidence also suggested that he was, to some degree, influenced by his own beliefs in the effectiveness of the First Respondent, based upon previous dealings. There was a danger that those beliefs closed his mind to the evidence presented by the Claimant and led to an uncritical acceptance of aspects of the First Respondent's evidence. If so, it was also a factor which was adverse to the Claimant and material to the decision to dismiss but of which she was not aware and therefore unable to challenge.

143. Mr Pritchard, as chair of the Appeal Committee, did not read all of the documents presented at the hearing prior to reaching his decision. It was not suggested that his lack of knowledge was supplemented or corrected by the preparedness of the other Appeal Committee members. It followed that the Appeal Committee's decision was reached without considering all of the evidence before it. As with Mr Wagstaffe's approach to the First Respondent, there appeared to be a tendency on Mr Pritchard to simply accept Mr Wagstaffe's opinion that the Committee's decision was fair and in accordance with policy and procedure. Again, there was a risk that this adversely impacted upon the Appeal Committee's impartiality and its ability to keep an open mind and consider the appeal objectively.

144. For all those reasons, the Tribunal concluded that the decision to dismiss the Claimant was procedurally unfair.

145. As such, the claim of unfair dismissal was made out.

Disability Discrimination (Section 15 EqA)

Absence Management Policy & Dismissal

146. Although identified as two distinct forms of unfavourable treatment, in reality, it was the application of the Absence Management Policy that the resulted in the First Respondent dismissing the Claimant. For the purposes of the section 15 claims, it was appropriate to consider them in tandem.

147. It was not in dispute that applying the Absence Management Policy to the Claimant and the decision to dismiss her constituted unfavourable treatment because of things arising in consequence of her disability for the purposes of section 15 of the EqA (per Paragraphs 33 & 34 of the Respondents' written submissions). However, it was submitted by the Respondents that the actions taken were a proportionate means of achieving a legitimate aim.

148. The legitimate aim relied upon was that of "*having teaching staff in regular attendance at work"* (per Paragraph 35 of Mr Ali's written submissions).

149. In the Tribunal's judgment, that legitimate aim was uncontroversial and we did not understand it to be materially disputed by the Claimant. In particular, there was undoubtedly a legitimate aim in a school operating an absence policy which sought to minimise the disruptive impact of short-notice, short-term absences upon pupils' education.

150. The key issue was whether the action taken by the Respondents, most notably the decision of the First Respondent to dismiss the Claimant, was a proportionate means of achieving that legitimate aim.

151. In our judgment, the manner in which the First Respondent applied the provisions of the Absence Management Policy to the Claimant, short of dismissal, was proportionate. The Claimant's absences were not in dispute. The nature of those absences, as shown above, were invariably characterised by sudden onset and short periods of absence. To that end, and in furtherance of the legitimate aim, the points system operated under Absence Management Policy was weighted against such absences and, by extension, against the Claimant.

152. However, it was also not in dispute that the First Respondent made a number of concessions and adjustments to the Absence Management Policy as it applied to the Claimant (and in accordance with Paragraph 3.7 of the Absence Management Policy at [773] of the Bundle):

152.1. Despite the Claimant exceeding 300 points under the Absence Management Policy in every year since 2013/14, the First Respondent delayed taking action.

152.2. This was despite in some years, the Claimant's scores exceeding the 300 point trigger by some distance (for example, her Bradford score was 11,745 in 2013/14 and 9,368 in 2017/18).

153. However, we were unable to reach the same conclusion regarding the First Respondent's decision to dismiss the Claimant. The fact that the Respondents accepted that dismissing the Claimant constituted unfavourable treatment because of things arising from her disability is important. To the extent that the focus was on 2018/19, the Claimant's absences by reason of her disability were nil. The vast majority of her time off work was for recuperation following the shoulder operation in October 2018.

154. The Claimant argued that it was open to the First Respondent to have taken action short of dismissal, which would have allowed time to monitor her absence levels. This was all the more pertinent given the following facts, known to the First Respondent at the time of the decision to dismiss:

154.1. The Claimant's asthma had improved to such an extent that she had been discharged from her consultant.

154.2. This was, to a degree, reflected in there being no asthma-related absences in 2018/19.

154.3. The Claimant was moving to part-time hours from September 2019 and additional staff had been recruited.

155. The Tribunal concluded that, for the purposes of section 15 of the EqA, the decision to dismiss the Claimant was disproportionate. The First Respondent was in receipt of information which suggested that there had been or was likely to be an improvement in the Claimant's asthma-related absences. It would have been more appropriate for the First Respondent to impose a sanction short of dismissal, with the option of further sanction (including dismissal) if those improvements did not materialise.

156. Our conclusions on this were reinforced by the First Respondent's failure to consider options short of dismissal (or if it did, its failure to provide any explanation for its conclusions) and the focus placed by the Committee at the Stage 3 Hearing on the absence levels in 2018/19. As explored above, there was a lack of clarity in the decision-making process, with the Committee (based upon Mr Wagstaffe's evidence) focussing on the absences in the 2018/19 academic year, whilst the First Respondent's

defence to these proceedings was premised upon an acceptance that the Claimant had been dismissed for asthma-related absences.

157. For all those reasons, we found that the decision to dismiss the Claimant was a disproportionate means of achieving the legitimate aim of having teaching staff in regular attendance at work. It follows that the decision to dismiss the Claimant constituted disability-related discrimination for the purposes of section 15 of the EqA.

Safe Working Environment

158. The Claimant alleged that the Respondents failed to provide her with a safe working environment and failed to act quickly enough to address her concerns regarding the condition of classrooms C10 and TC5. As a result, the Claimant alleged that the resulting adverse impact upon her health from the airborne allergens constituted unfavourably treatment and thereby discrimination arising form her disability (per section 15 of the EqA).

159. The Tribunal were of the view that, in respect of C10, the First Respondent acted relatively promptly once the Claimant had raised concerns regarding the condition of the classroom and alleged impact upon her health. The First Respondent was not aware of any alleged link between the condition of C10 and the Claimant's health until March 2014 at the earliest (when the Claimant was first absent from work for asthma-related illness). However, the Claimant's asthma attack at work on 6 May 2014 rightly prompted investigation by the First Respondent, resulting in the meeting on 8 May 2014, the involvement of the Second Respondent and the temporary transfer of the Claimant out of C10. As found above, the Claimant returned to C10 after the summer half term and suffered another attack shortly thereafter. From September 2014, the Claimant was transferred permanently to TC5.

160. In our judgment, there was, perhaps understandably, greater focus on alleged failures by the First Respondent in respect of its management and use of TC5. Problems were first reported in Autumn 2014 and the First Respondent was provided with, for the first time, OH evidence (the report of Dr Oliver of 9 October 2014). In response, the First Respondent took TC5 off timetable from 4 December 2014 and works were undertaken. The Claimant did not return to TC5 until April 2015 and suffered only one asthma attack between then and November 2015. In respect of their initial response to the issues raised by the Claimant regarding the condition and effect of TC5, the Tribunal found that the First Respondent had acted appropriately and in a timely manner.

161. However, given those experiences, it was arguable that the First Respondent should have acted with more haste when similar concerns arose in November 2015. Instead, the First Respondent did not move

the Claimant out of TC5 until the end of the autumn term in December 2015.

162. For the avoidance of doubt, the Tribunal found that the Claimant's use of TC5 after January 2016 was not at the compulsion of the First Respondent.

163. However, and irrespective of any criticism which might be levelled against the First Respondent for how it managed C10 or TC5, we found force in Mr Ali's submission that even if there was unfavourable treatment for the purposes of section 15 of the EqA, it was not for reasons arising out of the Claimant's disability. Any failures to address the Claimant's concerns regarding the conditions of C10 and TC5 (whether by undertaking effective remedial work, carrying out more rigorous inspections or moving the Claimant to alterative classrooms more quickly) were not driven in any sense by the fact that the Claimant suffered from asthma (unlike the decisions to instigate the Absence Management Policy and ultimately to dismiss her, which were linked to the effects of the Claimant's disability).

164. Similarly, the things identified by the Claimant as arising in consequence of her asthma (and recorded in Judge Jenkins' CMO at Paragraph 16(b)) played no part in the how or why the First Respondent managed C10 and TC5 in the way it did. In our judgment, save for the Claimant's belief that she had become an irritant to the First Respondent as a result of her ill-health, there was no material evidence to support a causal link between the actions taken by the First Respondent (and any omissions or failures to act) and the things identified as arising from the Claimant's disability. In contrast, the evidence of Mr Ellis and the actions taken by the First Respondent, even if open to criticism regarding timeliness and even if constituting unfavourable treatment, did not disclose that the decisions taken regarding addressing and managing the conditions of the classrooms and their alleged impact upon the Claimant were informed by anything arising in consequence of her disability.

165. In short, the consequences of the Claimant's asthma were not an effective cause of any unfavourable treatment arising from the use and management of C10 or TC5.

166. The other limb of the alleged failure by the Respondents to provide a safe working environment related to the use and impact of aerosols. It was again alleged that the Respondents failed to provide a safe working environment and failed to act quickly to resolve the impact of aerosol exposure on the Claimant's asthma.

167. Whilst we have found some areas of concern regarding how the First Respondent managed the aerosol issue (for example, the failure to take any action in response to Dr Pemberton's report of June 2018), the Tribunal was unable to accept that any failings or shortcomings by the

First Respondent, to the extent that they amounted to unfavourable treatment, were because of any of the identified things arising in consequence of the Claimant's disability. Our reasoning was the same as that set out above in respect of C10 and TC5. Any failings on the part of the First Respondent and any resultant unfavourable treatment occasioned upon the Claimant as a result, were not because of decisions and actions which were informed by the consequences of the Claimant's disability.

168. For those reasons, the claim of disability discrimination in respect of a failure to provide a safe working environment is not made out and is dismissed.

Classroom Moves & Curriculum

169. We did not find that the classrooms allocated to the Claimant and the subsequent impact upon her teaching of drama constituted unfavourable treatment for the purposes of section 15 of the EqA. C10 and TC5 were, we understood, of adequate size for the teaching of drama. The Claimant was moved from them at her own request. The First Respondent has a finite resource of classrooms in which to accommodate a varied and wide range of lessons and subjects. The Claimant averred that she should have been allocated or allowed to use either the hall or the dance studio. We did not understand that the Claimant was prohibited from teaching drama in either of these venues. Rather, she contended that they should have been made more available to her. However, we found force in Mr Ellis' explanation of the use of these spaces for exams and there were no doubt other demands upon them.

170. In our judgment, it could not be said that the decisions taken regarding the allocation of these or other spaces and classrooms within the school was unfavourable to the Claimant. There was force in Mr Ali's submissions that the First Respondent was seeking to respond to the Claimant's concerns regarding first C10 and then TC5, in circumstances where it had a limited number of classrooms and competing demands for the hall and dance studio. We did not understand the Claimant's case to be that she was unable to teach drama in the rooms provided. Rather, her preference was for larger rooms.

171. In the alternative, if the allocation of classrooms to the Claimant was unfavourable treatment, we similarly found force in Mr Ali's submission that the First Respondent's actions were a proportionate means of achieving the legitimate aim of having staff teach in rooms which were considered to be safe working environments. Again, we were mindful that the First Respondent was reacting to the Claimant's requests not to use C10 and TC5, against a backdrop of finite classrooms and competing demands.

172. For those reasons, the claim of disability discrimination in respect of being moved around classrooms is not made out and is dismissed.

173. As found above, drama was not removed from the school curriculum, as claimed. It follows that there was no unfavourable treatment and the claim of disability discrimination in that regard is similarly dismissed.

Indirect Discrimination (Section 19 EqA)

174. The PCP relied upon by the Claimant was the Repetitive Absence Formula contained within the Absence Management Policy. The Claimant averred that its operation put those with asthma at a disadvantage, because they were prone to short unplanned, absences.

175. It was not in dispute that the First Respondent applied the Repetitive Absence Formula to the Claimant or that it was also applied to those who did not share the Claimant's disability.

176. However, for the same reasons as relied upon in dismissing the claim of disability discrimination arising from the Absence Management Policy, the Tribunal did not conclude that the Repetitive Absence Formula put the Claimant at a disadvantage compared to those who did not share her disability or at all. Not only did the Absence Management Policy allow for adjustments to be made to its operation in line with the EqA (per Paragraph 3.7) but the First Respondent also made such adjustments and concessions in applying repetitive Absence Formula to the Claimant.

177. In short, by not adhering slavishly to the 300-point trigger, the First Respondent activated Paragraph 3.7 of the Absence Management Policy and applied the Repetitive Absence Formula in a manner which mitigated against any inherent disadvantage which would otherwise have arisen.

178. For those reasons, the claim of indirect discrimination is not made out and is dismissed.

Duty to Make Reasonable Adjustments (Section 21 EqA)

<u>Classrooms C10 & TC5</u>

179. The Claimant alleged that, as a result of allergens present in C10 and then TC5 arising from the condition of the classrooms and the repair work undertaken to them, she had been put at a substantial disadvantage compared to those without asthma, in that she suffered from asthma attacks, with the resultant impact upon her level of absences. That gave rise to a duty on the Respondents to make reasonable adjustments which, she averred, they had failed to adequately meet.

180. The Respondents countered that, in effect, this claim fell at the first hurdle, since the Claimant had failed to prove that there were allergens in either C10 or TC5 and failed to prove that those allergens were due to repair works or the conditions of the respective classrooms.

181. This aspect of reasonable adjustments claims, as identified in the Judge Jenkins' CMO, was premised upon the exitance of allergens, not on a failure by the Respondents to conduct appropriate tests into the conditions of C10 and TC5. The onus was upon the Claimant to prove, on balance, that such allergens existed.

182. As discussed above, both C10 and TC5 were inspected by Mr Ayee. His reports were the only technical evidence adduced regarding the condition of each classroom. They were also contemporaneous. In respect of C10, Mr Ayee's report did not report the presence of allergens (at [D4] of the Bundle). In respect of TC5, Mr Ayee undertook a more thorough inspection but again did not report the existence of allergens (at [D7] – [D10]).

183. The Claimant was critical of the inspections undertaken by Mr Ayee, including a failure to specifically test for the presence of allergens (although, to be fair to Mr Thakerar, the criticisms were aimed at the instructions given to Mr Ayee by the First Respondent rather than at Mr Ayee himself). Whatever merit there may have been in those criticism, it did not assist the Claimant in addressing what was, in the Tribunal's view, a significant and material gap in the evidence.

184. It was open to the Claimant to seek her own expert evidence as to the likely existence of allergens in C10 and/or TC5, whether at the time or, perhaps more realistically, in the course of the current litigation (presumably based upon a review of Mr Ayee's inspections, the photographic evidence and the OH reports). However, as no such evidence has been adduced, the Claimant is reliant upon the reports of Mr Ayee.

185. The various OH reports expressed concerns regarding the conditions of the classrooms as reported by the Claimant to them or from viewing the photographs she provided. However, their opinions were guarded and qualified. In our judgment, they did not, without more, establish on balance the existence of allergens. At most, they raised it as a possible line of enquiry.

186. Given the limits in the evidence, how would we find that allergens existed in C10 and TC5 as claimed? The Claimant did not tell us. Mr Thakerar's written and oral submissions did not address us on the presence of allergens. The Claimant's evidence was that the rooms were damp and in poor condition and they caused her asthma attacks. However, her reasonable adjustments claim was couched in terms of the

presence of allergens. In contrast, Mr Ali's submissions invited us to find that there was insufficient evidence for a finding on allergens.

187. We agreed with Mr Ali. The burden was on the Claimant to prove her claim. That claim was founded on the presence of allergens due to the condition of C10 and of TC5. On the evidence adduced, that claim was not made out. It follows that the reasonable adjustments claim regarding allergens in C10 and TC5 is dismissed.

The use of aerosols

188. It was necessary for the Tribunal to initially determine the exact nature of this head of claim. As set out above, it was summarised by Judge Jenkins as follows:

> Did the Respondents have or apply the following PCPs/physical features:
> …
> (ii) permitting the use of aerosols within classrooms
> …

189. The Claimant conceded that the Respondents did not apply a PCP that permitted aerosol use in classrooms. Rather, aerosols were banned from school premises and we saw evidence of that message being reiterated via newsletters issued to pupils and their parents (for example at [G80] of the Bundle).

190. However, from the outset, this claim had been presented as a physical feature rather than a PCP. In her ET3, under the heading *"Physical features"*, the Claimant's reasonable adjustments claim included the following:

> The Claimant contends that the physical features of the school premises caused and subsequently triggered her late on-set asthma diagnosis. … The Claimant suffered asthma attacks as a result of aerosol use within the building, largely from pupils.
> …
>
> …. The use of aerosols in the classroom resulted in the [Claimant] having numerous asthma attacks and absences from work. There is no reason as to why aerosols should be used in classrooms or on school sites, their use could be limited to the gymnasium/changing room areas, particularly when the Respondent is aware that their use is leading to one of its employees experiencing asthma attacks on site. This would have been an easy adjustment to make at no cost to the Respondent and it is contended that not enough was done in order to ensure that they were not brought on to the premises.

191. We did not understand it to be in issue that, notwithstanding the prohibition, aerosols were on occasion brought in by pupils and used. We also did not understand it to be in issue that there were occasions

when the Claimant was exposed to aerosol spray or that the same exacerbated her asthma. Indeed, the Respondents accepted that exposure to aerosols would place the Claimant at a substantial disadvantage (per Paragraph 69 of Mr Ali's submissions).

192. We have therefore approached this head of claim on the basis of a physical feature, namely the presence of aerosol spray within the school environment, which logically arose from the use of aerosols by pupils, albeit contrary to school policy. To the extent that this modified or varied the issues as identified by Judge Jenkins, we were satisfied that any variation was purely cosmetic. The Respondents understood the claim being brought and engaged with the same fully and robustly.

193. The Respondents defended this head on claim on two grounds:

193.1. Until the OH report by Dr Pemberton of 8 June 2018, the Respondents did not know and could not have reasonably known that the Claimant was disabled. As such, any duty to make reasonable adjustments could not have arisen until receipt of that OH report.

193.2. In any event, the Respondents complied with any duty which did arise.

194. Reliance was also placed on Dr Pemberton's report of 5 December 2017, specifically the passage which appeared at [C18] of the Bundle (referred to above and set out again for convenience, as follows):

> *Does the health problem meet the criteria of disability as defined by the Equality Act 2010?*
>
> As you may be aware. this is a legal definition rather than a medical one. However, as she currently has very little in the way of a significant impact on her activities of daily living, I would suggest that she is not covered by the criteria of disability as defined by the Equality Act. The difficulty here is that when she is suffering from an acute attack that these may have an impact on her activities of daily living and it would be prudent to take legal advice before solidifying whether she would meet the criteria of disability or not.

195. In contrast, Dr Pemberton was of the view in her 8 June 2018 report that "*[G]iven the uncertainty and complexity arising from managing this lady's case. my advice is that it would be wise to manage this case on the basis that the disability provisions of the Equality Act are likely to apply"* (at [C20] of the Bundle).

196. It was not in dispute that, at all relevant times, the Claimant was disabled. The Respondents' defence was one of knowledge.

197. Dr Pemberton's opinion in her report of 5 December 2017 came with a number of important qualifications. She referred to it being a legal rather than medical definition. She "*suggested"* that the Claimant did not meet that definition. She raised what she considered to be a "*difficulty*". Most notably, she believed it "*prudent to take legal advice before solidifying whether* [the Claimant] *would meet the criteria or not."*

198. In our judgment, it would have been reasonable, upon receipt of Dr Pemberton's report of 5 December 2017, for the Respondents to seek legal advice as suggested. Had they done so, they no doubt would have been advised that the Claimant did indeed meet the applicable legal definition (since the same is now conceded).

199. When considering the totality of the OH reports, the information provided by the Claimant to the First Respondent during her employment about her health, the absences she had from work, the fit notes provided from her GP and the absence management issues which the First Respondent was engaged in, it was, in our judgment, disingenuous for the Respondents to claim that they either did not know or could not reasonably have know that the Claimant was disabled until receipt of Dr Pemberton's report of 8 June 2018. Our conclusion is further supported by the fact that the First Respondent had access to HR support from the Second Respondent throughout this process and that the Paragraph 3.7 of the Absence Management Policy expressly directs the mind to the possibility that the Equality Act 2010 may be engaged.

200. For those reasons, if the Respondents did not have actual knowledge that the Claimant was disabled until June 2018, as claimed, it was reasonable for them to have acquired that knowledge throughout the relevant period.

201. The Claimant contended that the First Respondent should have done the following:

    201.1. Enforced the ban on aerosols more robustly, by way of greater publicity.

    201.2. Acceded to her request to be able to lock her classroom during breaks.

    201.3. Allocated her a younger year group sooner than September 2018.

202. The Tribunal concluded that there was insufficient evidence before us to find that greater publicity of the aerosol ban would have made a material difference to aerosol use on the school premises. It was difficult to assess how pupils and carers would react and we were unable to find that the measures taken by First Respondent breached any duty which arose under section 20 of the EqA.

203. However, we were persuaded that allowing the Claimant to lock her classroom would have had a beneficial impact upon her exposure to aerosols, by limiting the unsupervised use of the room by pupils. There had been incidents of aerosol exposure in classrooms and classrooms and pupils were left largely unsupervised during breaks. No meaningful explanation was given for why the Claimant's request in this regard had not been granted, save that it was not school policy to lock pupils out of their classroom (per Paragraph 47 of the Claimant's witness statement).

204. As such, we concluded that, when weighed against the impact aerosol exposure was having on the Claimant, the fact that the ban on aerosols was not being universally adhered to and the relative ease with which the proposed measure could be implemented, varying school policy and allowing the Claimant to lock her classroom during breaks was a reasonable adjustment. It followed that the First Respondent breached its duty under section 21 of the EqA in refusing or not actioning the Claimant's request.

205. We were also of the view that allocating a younger year group to the Claimant would have reduced her exposure to aerosols. Those pupils in Years 7 & 8 were less likely to use aerosols or deodorants because of their age and associated physical development. That would have had a beneficial impact upon the atmosphere within the Claimant's classroom, a measure which was perhaps all the more relevant in light of the First Respondent's failure to allow the Claimant to have control over access to her classroom.

206. Again, when weighed against the background to and context of the Claimant's exposure to aerosols, we concluded that this was a reasonable adjustment to make. Indeed, albeit with the benefit of hindsight, the allocation of a Year 7 tutor group to the Claimant at that started of 2018/19 coincided with the cessation of any aerosol-induced asthma attacks and absences. However, this did not occur until two and half years after the Claimant's first adverse reaction to aerosols within the school. In our judgment, it would have been reasonable for the First Respondent to have allocated a younger year group to the Claimant earlier than September 2018. It followed that the First Respondent breached its duty under section 21 of the EqA in failing to act sooner in this regard.

207. For those reasons, the First Respondent breached its duty under section 21 of the EqA in respect of the use and effect of aerosols within the school. Given that finding, it was also necessary to consider whether the claim regarding reasonable adjustments had been brought out of time.

Time Limits

208. It was not in dispute that from September 2018, the Claimant was allocated a Year 7 form group. In effect, that addressed both of the

reasonable adjustments contended for by the Claimant. She had been allocated a younger year group and, as a result of their reduced or non-existent use of aerosols, it was not necessary for the Claimant to lock her classroom during breaks.

209. It followed that from September 2018, the First Respondent ceased to be in breach of its duty to make reasonable adjustments and, consequently, time to bring a claim potentially began to run.

210. However, the Tribunal concluded that the First Respondent's breaches of its duties under section 21 of the EqA were part of a continuing act which included the dismissal of the Claimant with effect from 31 December 2018. The Claimant was absent from work as a result of asthma attacks caused by her exposure to aerosols. Those attacks and the resulting absences began in March 2016. There was no evidence before the Tribunal that those aerosol-related absences were discounted by the Committee in deciding to dismiss the Claimant. It was not suggested that they had been afforded any special treatment or dispensation when the Committee considered the background or context to their decision, even the same was, as claimed, based solely on absences in 2018/19. It was not suggested that the Committee disregarded or distinguished the aerosol-related absences in concluding that there would be no improvement in the Claimant's absence record. If anything, and as discussed above, the Committee failed to consider discounting those absences caused by deliberate spray attacks, notwithstanding the meeting between the Claimant and Mr Ellis in November 2017.

211. There was a link between the aerosol-related absences and the First Respondent's failure to make reasonable adjustments. There was a link between the aerosol-related absences and the Committee's decision to dismiss the Claimant (as they formed part of her overall record of absences). In addition, there was a proximity in time and personnel between the background that led to the decision to dismiss and the failure to make reasonable adjustments. In conclusion, the Tribunal was satisfied that the First Respondent's breach of its duty to make reasonable adjustments, as found above, was part of a continuing act with the decision to dismiss and the termination of the Claimant's employment..

212. It follows that time began to run from the date of dismissal, which was 31 December 2018 and so the reasonable adjustment claims that have succeeded were brought in time.

The Second Respondent

213. It was not explicitly averred that any of the claims being pursued by the Claimant were directed solely or jointly at the Second Respondent. Indeed, having regard to the Tribunal's findings of fact, it was the

decisions of the First Respondent (whether made by staff or governors) which were at the heart of all of the claims pursued.

214. The Second Respondent's involvement in the narrative underpinning the claims were encompassed within the roles of Mr Ayee (in inspecting and reporting upon the conditions of C10 and TC5) and Ms Jones (in providing HR advice to Mr Ellis and the Committee, at Stages 2 and 3 respectively of the Absence Management Policy). Both were employed by the Second Respondent. However:

    214.1. No criticisms were levelled against Mr Ayee by the Claimant. It was acknowledged by Mr Thakerar that Mr Ayee was, at most, simply following the instructions he received from the First Respondent. In any event, it was difficult to see on what basis he could be liable to the Claimant under the heads of claim being pursued.

    214.2. If there were any failings in the HR service provided to the First Respondent by the Second Respondent, they did not create a liability as between the Claimant and the Second Respondent. It was not suggested that there was any relevant legal relationship between the Claimant and the Second Respondent, such that any liability could have arisen in any event.

    214.3. The decision to dismiss the Claimant was made by the First Respondent.

    214.4. It was not contended that Mr Ayee, Miss Jones or anyone else from within the Second Respondent acted in a discriminatory manner towards the Claimant.

215. For all those reasons, to the extent that any claims were pursued against the Second Respondent, they were not made out.

Next Steps

216. As the Claimant has been partially successful in her claims, a Remedy Hearing has been listed for 19 July 2021.Case management directions to prepare for that hearing will be issued separately.

Order posted to the parties on
2 June 2021
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For Secretary of the Tribunals

EMPLOYMENT JUDGE S POVEY
Dated: 27 May 2021