EMPLOYMENT TRIBUNALS

Claimant: Miss A Davin

Respondents: 1. The Governing Body of District CE Primary School
2. St Helen's Borough Council

Heard at: Liverpool (by CVP) **On:** 20, 23, 24, 25, 26 and 27 November 2020 and in chambers on 24 and 25 March 2021.

Before: Employment Judge Aspinall
Mr A Clarke
Mr J Murdie

REPRESENTATION:

Claimant: Mr Greatley-Hirsch, Counsel
Respondents: Mr Mensah, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim for unfair dismissal is well founded and succeeds.

2. The claimant's claim that she was discriminated against because of absence which arose in consequence of her disability is well founded and succeeds.

3. The claimant's claim that the respondent failed to make reasonable adjustments is well founded and succeeds.

4. The matter will now be listed for a Remedy Hearing.

REASONS

Background

1. By a claim form dated 21 August 2019 the claimant, a school teacher, brought a claim for unfair dismissal and disability discrimination against the first respondent. The respondent defended the claim.

2. The matter came to a preliminary hearing for case management on 25 November 2019 before Employment Judge Shotter. The second respondent was joined in the proceedings. Mr Mensah, at this hearing, represents both respondents and we refer to them here, jointly, as the respondent.

3. The respondent disputed that the claimant was unfairly dismissed. It also disputed that the claimant's physical impairments, as then diagnosed, and subsequently described by the claimant as Irritable Bowel Syndrome and Duodenitis and Bile Acid Malabsorption were a disability within the definition in section 6 Equality Act 2010 at the relevant time.

4. If she were disabled it said that it had not failed to reasonably adjust and had not discriminated against her because of something arising out of her disability.

The Hearing

5. The first day was used to discuss arrangements in place for a safe hearing during the coronavirus pandemic. The panel met with the representatives and the claimant but without other witnesses. It was agreed that the hearing would proceed by CVP.

6. There were two bundles of documents in hard copy. The first bundle was 303 pages and the second, a medical bundle, was 502 pages long. The respondent confirmed that disability was disputed until 22 May 2019 but was conceded thereafter. The witness statements were provided and the running order of witnesses was agreed. It was agreed that the claimant would give evidence on liability only and would need to be recalled should remedy become appropriate.

7. Preparation of a remedy bundle was underway and the parties were confident a remedy bundle could be available by the middle of the last day of the hearing should remedy be necessary.

8. A timetable for the hearing was agreed. The claimant, who brought claims for unfair dismissal and discrimination would go first.

9. By 2.00pm on the first day we were able to reconvene with everyone present by CVP.

10. A List of Issues was agreed and is used as subheadings in the application of the law section of this judgment below. The claimant's representative confirmed that the PCP relied on was the application of the Attendance Management Policy (AMP). The panel adjourned the hearing and began reading.

Amendment Application

11. On the morning of the second day, Monday 23 November 2020, the claimant made an application to amend the PCP relied upon to include a new PCP of

consistent attendance. The respondent opposed the late application. The tribunal heard argument and adjourned to consider.

12. The Tribunal applied the balance of hardship and injustice test and decided there was prejudice to the respondent in the late application to amend. It had not had time to take instruction on the proposed PCP and on Friday afternoon had understand the List of Issues to have been agreed. There had previously been a CMPH at which the unrepresented claimant was guided by EJ Shotter in putting her claim and the claimant had had adequate time since then in which to clarify or seek to amend her claim. The respondent had prepared a bundle and witness statements on the case as it had understood it to be.

13. The Tribunal considered that the hardship to the claimant in refusing the application would be minimal as the first PCP is the application of the Attendance Management Policy (AMP) which aims to secure consistent attendance so it could be argued that the PCP the subject of the amendment (a PCP of consistent attendance) is already subsumed within ambit of the first PCP.

14. The balance of hardship and injustice lay with the respondents, the application was denied.

Late introduction of documents by agreement

15. On the second day page 227A was added to the bundle by agreement. It was the second of two pages recording a welfare meeting that took place on 4 April 2019.

16. The claimant also produced three additional pages, A, B and C to be added in. A was an insert for the medical bundle dealing with medication. B and C were copies of screen shots of advertisements for teaching posts at the school placed in February 2019 and May 2019. They were submitted in support of the claimant's argument that her role was being advertised whilst she was off sick. The respondent did not object to their inclusion but protested that the case was already document heavy and that this late introduction of documents meant that it would have to take instruction and may itself need to adduce further documents. In the event it did not.

Oral evidence

17. The claimant gave evidence on 23 November 2020. There were some short supplemental questions before cross examination began. She gave her evidence in a straightforward and helpful way. She was consistent in her account of events at welfare meetings, on the morning of 20 May 2019 and the appeal hearing.

18. We heard evidence from the claimant's sister Mrs Horton. We found her to be a credible witness who gave her evidence in a detailed way, taking care to be accurate about the content and chronology of her conversation with Mr Maguire on 20 May 2019.

19. The respondent's witnesses were Ms Shelford, the head teacher, Ms Barker the HR Adviser to the panel that made the decision to dismiss, Mr Maguire the dismissing officer and Mr Ferguson who heard the appeal.

20. Ms Shelford gave her evidence in a guarded way. She sought to avoid admitting that she had told the claimant on the telephone at around 7.11am on 20 May 2019 that the hearing would go ahead. She was evasive about whether or not she had a conversation with Mr Maguire prior to the hearing.

21. Ms Barker was evasive when giving evidence. She had no plausible explanation as to why she had not told the MIH and had not told the appeal hearing that there had been a request for a postponement from the claimant to Ms Shelford on the morning of 20 May 2019 when she knew that there had been such a request because Ms Lomas had told her there had, and Ms Barker knew that Ms Lomas had got that information direct from Ms Shelford.

22. Mr Maguire gave his evidence in a defensive way and was not truthful when he told the appeal hearing that there had been no request for a postponement on 20 May 2019.

23. Mr Ferguson had no plausible explanation as to why, when at appeal Mr Maguire told him there had been no postponement request, yet Ms Davin told him in person that there had, he did not make further enquiry. He accepted in evidence that he did not have all the information he needed in front of him on that point when conducting the appeal. He also accepted that there was a conflict about the documents that Ms Horton had left; Mr Maguire told him they were comprehensive, the claimant told him they were not and yet he did not see that conflict as a reason to scrutinise the documents the MIH panel had seen. However, elsewhere Mr Ferguson made frank admissions for example when he accepted that at MIH the management statement of case had gone unchallenged and that at appeal he did not have sufficient information to draw conclusions about the impact of the claimant's absence on pupil performance. Mr Maguire also made the frank admission that notwithstanding the fit note saying the claimant was not fit to work the school had an ongoing responsibility to consider reasonable adjustments.

Power outages to CVP

24. During the course of the hearing there were two occasions on which a panel member lost connectivity. The first was when the Employment Judge's internet froze on Day 4 at 10.49 am. An urgent call was made to the clerk to inform the parties to wait. The Employment Judge rejoined the hearing at 10.52 and the parties confirmed that they had noticed that the Judge's screen had frozen immediately and had waited. They had not needed the clerk to tell them to do so. On resumption of the hearing the notes were checked and content agreed with both Counsel. It was confirmed no content had been lost and the parties agreed to proceed.

25. The second outage was was when Mr Murdie – between 10.13 am and 10.22 am on Day 5 during the cross examination of Mr Maguire, lost signal for a few moments. The parties noticed his absence immediately and the hearing was paused to allow him to re-join. The Employment Judge checked back with Mr Murdie as to the content of his last note. It was confirmed that he had not missed any content and the parties agreed to proceed.

Recusal Issue

26. On Day 5 there was a short adjournment around 11.30 am, following cross-examination of Mr Maguire but whilst he remained on oath. The panel adjourned for 15 minutes to consider whether or not it had any questions for Mr Maguire. The panel had gathered to meet in the Tribunal room from which one member had been appearing by CVP. Unbeknown to the Employment Judge and other member, that member had a live link to the CVP room. The panel had decided that it did not have any questions for Mr Maguire when Mr Mensah's voice could be heard through the CVP link calling out to alert the Employment Judge to the fact the panel could be heard. The CVP room was closed immediately.

27. The hearing was reconvened and the Employment Judge explained that it may be that at the end of the break the panel was overheard in private discussion. The parties were asked was there anything that gave them cause for concern with this panel continuing to hear the case.

28. Mr Greatley-Hirsch had not heard anything and had no concerns. Mr Mensah wished to address the panel in the absence of witnesses so as to avoid a situation where opinions might be canvassed as to what had been overheard in front of the witness who was still giving evidence. Mr Greately-Hirsch agreed. The panel adjourned to consider whether it should allow the representatives alone to address the panel.

29. The panel considered the principle of open justice. In the circumstances of the issue having arisen whilst Mr Maguire was still giving evidence it was considered appropriate and in the interest of justice so as to preserve the integrity of his evidence, that an exception should be made to the principle of open justice and that the witnesses on both sides should be invited to withdraw.

30. The hearing was reconvened, the open justice point and the rationale of preservation of integrity of evidence explained and all but Mr Mensah and Mr Greately-Hirsch agreed to withdraw. Mr Mensah then addressed the panel. His understanding was that at 11.43 the panel were overheard via Mr Clarke's microphone in what should have been confidential discussions. Mr Mensah said that what he thought he heard and what Ms Barker and Mr Cartwright thought they had heard was different. Mr Mensah could not be at all sure about what he heard but Mr Cartwright thought that he had heard a reference to Mr Maguire being a liability as a witness.

31. Mr Greatley-Hirsch had heard only Mr Mensah speaking and had heard none of the context. The claimant herself had heard nothing.

32. The Employment Judge then disclosed that the panel had at around 11.40 am already decided that they did not have any questions for the witness and were thinking about the timing of the day and speculating as to whether or not there might be any re-examination. The Employment Judge disclosed that when asked by a member whether there might be any re-examination she had made a generic comment, using words to the effect that *Counsel don't always re-examine as it can be a liability / or he / they might see it as a liability*. Certainly, the word liability was used.

33. The Tribunal then adjourned to give both Counsel time to take instruction as to whether or not they wished to make a recusal application. The hearing was

reconvened shortly before the scheduled 1pm lunch break to explain what was happening to the parties. The Employment Judge explained that an issue had arisen in which some of those present today may have overheard private discussions of the panel and that there was inconsistency in the accounts of what may have been overheard. The Employment Judge explained that the hearing was being adjourned and the lunch break could be used for the representatives to further advise and take instruction. It was agreed we would reconvene at 2.00pm with representatives only.

34. At 2.00pm when the hearing reconvened, Mr Mensah made no application but wished to have the following concerns noted;

34.1 To preface everything with the comment that this was an incredibly sensitive situation;

34.2 To say he is very grateful to the Tribunal for setting out their record of the comment that was made;

34.3 To say he is very grateful for the clear indication the Tribunal gave that anything that was overheard was part of a fluid discussion, which is taking place in the middle of evidence, and that the tribunal was not yet at deliberation stage;

34.4 To have it recorded that there is a conflict between the version advanced by the Tribunal and those versions advanced by the respondent.

35. The Tribunal and representatives then agreed to record the different versions.

35.1 *Mr Mensah's note of what the Employment Judge had disclosed*
not all Counsel would re-examine…. because sometimes they would see that as a liability…..

Mr Mensah then checked that note with the Employment Judge.

The Employment Judge confirmed that her note was;

The Employment Judge's note
Counsel don't always re-examine as he / they (meaning any Counsel) might see it (meaning re-examination) as a liability.

and Mr Mensah agreed to take that note.

35.2 The versions advanced by Ms Barker and Mr Cartwright (Mr Cartwright is the respondent's solicitor who was observing the hearing) were agreed to be recorded as follows;

Ms Barker's version
there is not much you can do with him he's a liability of a witness

Mr Cartwright's version
he's a liability of a witness

Mr Mensah said that those latter two formulations were advanced independently by the witnesses and had not been heard by Mr Mensah. Mr Maguire had not heard anything.

36. Having clarified the versions and agreed the notes above, the representatives were again asked did either of them wish to make a recusal application. Neither party did.though Mr Mensah invited the Tribunal to consider whether or not to recuse of its own volition. He said that it is self-evident that there is a conflict in the versions advanced. He submitted that as we were at day 5 of a 6 day CVP hearing there would be significant cost and time implications for both parties should the panel recuse itself and that in this era of CVP hearings and significant backlogs the parties would not know when the case could be heard again. Mr Mensah very helpfully brought to the attention of the Tribunal three authorities: Re C 2020 EWCA Civ 987, Porter v Magill 2001 UK HL67 and Ansar v Lloyds 2006 EWCA Civ 1462. Mr Mensah repeated that the respondent has concerns about the discrepancies in what may have been said but balances them with the practicalities and asks that the above versions be noted but makes no application for recusal. On balance, the respondent wished the panel to continue with the case.

37. Mr Greatley-Hirsch was familiar with the authorities and made no application for recusal. He submitted that the respondent is attempting to have it both ways, to make no application but seek to object so that should the decision not go the respondent's way it would not be criticised for not having done anything at the time. The Employment Judge agree to record Mr Greatley-Hirsch's submission and to formally record that the respondent has been invited to make an application for recusal, had been given time to take instruction and consider its position and had chosen not to do so. The panel adjourned to consider recusal of its own volition.

Decision on recusal

38. The hearing reconvened and the Employment Judge gave oral judgment. In that judgment in front of the parties, for the reasons set out above in preserving the integrity of the evidence) it was agreed that the Employment Judge would not recount the content of the remark (or differing versions of that content) that may have been overheard, because a witness was still on oath, but that the full content would appear in the written judgment.

39. The relevant test on recusal is derived from the familiar authorities of Locabail (UK) Limited v Bayfield Properties Limited and others 1999 EWCA Civ 3004 and R v Gough. The tribunal must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased and then must ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased

40. The test was restated in Porter v Magill and in Ansar "whether the fair minded and informed observer, having considered the facts would conclude there was a real possibility that the tribunal was biased."

41. In Locabail it was also stated that although it is important that justice must be seen to be done it is equally important that judicial officers discharge their duty to sit and do not by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge they will have their case tried by someone thought to be more likely to decide the case in their favour. Courts and tribunals are required, it has been said, to have broad backs.

42. At paragraph 25 in Locabail it was said "the mere fact that a judge, earlier in the same case or in a previous case, commented adversely on a party or witness, or found evidence of a party or witness to be unreliable, would not without something more, found a sustainable objection"

43. Also at paragraph 25 in Locabail "whilst recognising that each case must be carefully considered on its own facts, a real danger of bias might well be thought to arise if, in a case where the credibility of any individual were an issue to be decided by the judge, ……. or, on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on their ability to try the issue with an objective judicial mind," then the issue of recusal ought to be decided in the favour of the applicant alleging bias.

44. Applying the law to this case, the Tribunal finds the test is not met. The fair-minded and informed observer, having considered the facts, would not in this case conclude that there was a real possibility that the tribunal was biased because, and in no particular order,

a. the observer would expect the judge and members to be discussing evidence not just of this witness but all witnesses during the course of the hearing in private,

b. the observer would expect that those discussions would be fluid,

c. the observer would expect the panel to be forming a preliminary view,

d. the observer would expect the panel not to reach conclusions until all the evidence had been presented, closing submissions made and deliberations begun,

e. the observer would be aware of the timetable in this case with those things agreed and timed and yet to take place,

f. the observer who heard the remark, taking it at its most prejudicial to the respondent, that is on the most serious version of the differing recollections that have been recorded, would conclude that this was not indicative of any prejudicial view of the Employment Judge about this witness.

g. In the alternative, if the informed observer hearing the remark concluded that this did indicate a preliminary view formed by the judge about the evidence of this witness than the informed observer would know that any such view was i) preliminary and ii) part of an evolving assessment of evidence prior to conclusion of the evidence of that

witness so might yet be changed and iii) part only of the respondent's case (the respondent called four witnesses) and iv) that in any event the Judge's preliminary and evolving view was one of 3 equal decision-making views in the case.

45. Applying the case law, the remark, even taken at its most prejudicial, is not a view in extreme or unbalanced terms such as to throw doubt on the Judge's ability to try the issues with an objective judicial mind.

46. The Tribunal in applying the test on bias, also had regard to the overriding objective. The tribunal considered the considerable prejudice to the parties in cost and delay and in the risk that having reached day 5 of a six-day trial it might no longer be possible to have a fair trial if this Tribunal recused itself. It had regard to the fact that neither party made an application for recusal. This Tribunal could hear the case fairly and justly and having considered recusal of its own volition, did not recuse itself.

47. The hearing resumed. There was some short re-examination of Mr Maguire.

The Facts

Background

48. The claimant worked as a teacher from 1 February 1996 until her dismissal for medical incapability on 31 August 2019.

49. Her head teacher was Ms Shelford. When Ms Shelford came to the school she had 14 teachers in her staff. The school had performance issues. Previous OFTSED reports had cited staff sickness as an issue affecting outcomes and one of the things that Ms Shelford was tasked with was reducing staff sickness absence.

50. The claimant had had warnings for absence from work in October 2015, June 2016 (when she had reported having Irritable Bowel Syndrome), and November 2016 which was her first formal warning. On 7 September 2017 the claimant attended a return to work interview (for an absence which had taken place in July 2017 before school broke up for the summer holidays). Ms Shelford conducted that meeting and Ms Pierce from HR took notes. The notes recorded:

> *"Given the nature of the illness and not being linked to her underlying medical issues …..it was felt we would progress to a second formal warning."*

51. The claimant was given a second formal warning for sickness absence by Ms Shelford.

52. In March 2018 the claimant was absent from work and the reason was vomiting. She was given a warning in March 2018.

53. In May 2018 the claimant was off sick for four days. Ms Shelford opened a return to work interview with her on 8 May 2018. At this time the claimant thought she had irritable bowel syndrome. She had pain, vomiting and diarrhoea. Ms Shelford's handwritten note at p116 of the bundle records:

> *"Suffers from IBS. IBS attack. Happened 4 or 5 times previously. Severe stomach pains.*"

54. Ms Shelford adjourned that meeting and contacted HR saying:

> *"Is it possible to look through her sickness record and see if there is any pattern in relation to time off around bank holidays."*

55. The return to work hearing resumed on 18 May 2018 with notes of the claimant's absence history provided. There was no pattern of absence around bank holidays. The notes of that meeting record:

> *"AD stated that she suffers with IBS and she had an attack where bowel goes into spasm and the pain is horrific. It starts off with contraction like pain she has been hospitalised through it and has been administered morphine. When she has an attack it can start with vomiting and diarrhoea her GP confirmed this was IBS. She has now been given medication to manage the condition which she takes 20 minutes before she eats and she is finding that this is working so far although she can still suffer now and again."*

56. The claimant was warned at that return to work interview that further absence could result in more formal action being taken. She was issued with a Second Formal Warning. She returned to school and had to take frequent trips to the toilet, that could be as many as ten trips a day. Her bowel condition was worsening throughout summer term 2018 and into the autumn term.

57. The claimant taught her own class of year 3 pupils. She had a high proportion of pupils within her class who had special educational needs. She led on art and design for the school and was working on a project across the school to achieve ArtMark accreditation.

Sickness Absence from 16 November 2018

58. On 16 November 2018 the claimant was at work in school. As was usual she was struggling with her bowel problems, tummy cramps, noisy digestion, pain in her side and diarrhoea. She was also experiencing what she thought was an allergic reaction. She felt generally unwell and had a rash on her neck. Ms Shelford, when she heard that the local pharmacist thought it could be an anaphylactic reaction and had recommended going to A&E, insisted that the claimant go to hospital.

59. The claimant was admitted to hospital on 16 November 2018 and remained an inpatient until 18 November 2018. On 19 November 2018 the claimant informed the respondent that she would not be well enough to attend school. She saw her GP on 20 November 2018 and was given a fit note for 2 weeks for anaphylaxis and gastrointestinal problems.

60. School arranged for a higher level teaching assistant to cover Ms Davin's year 3 class for the first three days of sickness and then arranged a supply teacher.

61. The claimant saw her GP again on 28 November 2018. The GP made a referral to a specialist in gastroenterology.

62. On 10 December 2018 the claimant spoke to KC the Business Manager and asked the respondent to refer her to occupational health. She said she was worried about her absence and worried that she had to have a hysterectomy in the new year. She did not say that she might be back in before Christmas.

63. In the last week of term Ms Shelford rang the claimant who told her she was still unfit for work, being investigated for a bowel disorder including Crohn's Disease and diverticulitis and was awaiting an appointment with a consultant. The claimant told Ms Shelford she was also being seen for allergy issues and had to have a hysterectomy in the new year.

64. The claimant remained off sick for the rest of that term. Her class was covered by the supply teacher.

65. On 4 January Ms Shelford emailed KL in HR. She said:

> "*Alison Davin has informed me she will not be returning to work on Monday. She has been absent for a month before Christmas. Karen referred her to occupational health, but I'm not sure if she has seen them yet. Could we arrange to meet with her next week, or would you prefer to wait until she has been to OH? I am unclear as to the reason for her sickness absence. She originally went off with a rash to her neck, but each sicknote has stated a different reason. The last one she was off with diarrhoea."*

66. The claimant contacted the respondent on 9 January 2019 by email. She said:

> *"I saw the doctor again this afternoon. She has issued a new sicknote….. I was told by my GP on 20.12.18 that my test results had indicated that I needed an urgent hospital appointment. I have tried and tried to chase this up as I still haven't received disappointment…. I am still very poorly and really worried about the whole situation."*

67. On 14 January 2019 the respondent made the occupational health referral. Occupational Health itself, deferred the appointment until after the claimant's hospital appointments and welfare meeting.

68. The claimant was so keen to get things diagnosed quickly that she changed hospital to get an earlier appointment.

69. The claimant again updated the respondent on 19 January 2019 by email saying:

> *"I'm still feeling really poorly and in a lot of pain on a daily basis however the lump in my tummy has grown considerably, which is really worrying. Hopefully, I'll finally have some answers when I could see the consultant on Sunday…….. I'm so sorry for all the trouble that I know my illness must be causing."*

70. On 26 January 2019 the claimant attended an appointment with the gastroenterologist who arranged for a colonoscopy investigation and a scan.

First welfare meeting 28 January 2019

71. The respondent's Attendance Management Policy (AMP) provided for welfare meetings to take place. At paragraph 3.6 the policy states:

> *"Welfare meetings are management meetings which exist to facilitate discussion about the individual's absence and steps to be taken towards the earliest possible date for a return to work.*
>
> *The meeting provides an opportunity for the employee to discuss the situation with the manager with a view to the absence being managed and achieve a successful return to work.*
>
> *Welfare meetings can take place at any point during an absence…… and where the meeting follows an Occupational Health appointment, the meeting will facilitate discussion taking into account the advice received as an outcome of that referral."*

72. On 28 January 2019 the claimant attended a welfare meeting at school with Ms Shelford and KL from HR. The tone of that meeting was not pleasant or welcoming to the claimant. The claimant was asked when she was likely to be back in work. She was unable to give a date. The claimant gave frank and full answers about her health to a series of questions from Ms Shelford and KL. The claimant told them she had previously been diagnosed with IBS.

73. She subsequently received notes entitled "record of welfare meeting". The notes wrongly suggested that the claimant has chosen not to take medication to address the diarrhoea she still suffered from. The extract read: *"Lavern asked whether Alison was still suffering with diarrhoea. Alison said she was but had decided against taking some medication due to the side effects".* The claimant was taking medication for diarrhoea and seeking expert advice on her bowel condition. The claimant did not say she was on anti-depressants for stress, she said the anti-depressants were being used to relax the bowel. She did not say she was only on over the counter medication, she said that it had been suggested to her by a doctor that an over the counter medication (Imodium) may also help her. She did not say that the *only* thing she was told to take was Imodium, rather that she had *just,* meaning, *recently*, been told that it may help in addition to the other medications and investigations that were under way.

74. The claimant had four health problem areas. By far the most significant and debilitating was the bowel condition which was causing her absence and was under investigation. The next was a history of gynaecological problems which had led to the need for a hysterectomy which was booked for early 2019. The next was a pain in her left side (subsequently transpired to be internal damage caused by her bile acid malabsorption) and she was also suffering with eye problems diagnosed as glaucoma.

75. Following the first welfare meeting KL requested an Occupational Health appointment for the claimant. The referral request said:

> *"School are concerned that Alison could not provide a timescale when she was going to start treatment and consequently a return to work."*

76. The claimant continued to use email to keep school fully informed about her conditions and medical progress.

The February Job Advert

77. In February 2019 school advertised for a fixed term teacher from September 2019 for one year. This was to cover a period of maternity absence for a colleague RH who had recently told Ms Shelford she was pregnant.

78. The claimant's colleague at work and year group partner KAH contacted her by text to say she had seen this advert and to ask was the claimant leaving. The claimant did not know what the role was for and began to worry that school was planning to get rid of her because of her absence and replace her by the autumn.

79. Ms Shelford knew at around this time that two members of staff would be leaving at the end of the academic year. The claimant was not the only member of staff off sick at this point.

First OH appointment

80. On 27 February 2019 the claimant saw Dr King from occupational health. Dr King's report of the same date referred to the fact that the claimant was due to have a hysterectomy the following week and said that he would expect a 4 to 6 week recovery period from the surgery. He also referred to her frequent diarrhoea and the fact that she was having investigation and awaiting results. He stated:

> *"If surgery goes well and she makes progress with her bowel symptoms it is possible she can be back in work after the Easter holidays. Clearly it would depend on progress of the hospital as to exactly how quickly matters move forward. I see nothing in this to suggest that Alison should not be able to get back to full normal fitness for work in due course."*

81. Under the heading "Equality Act" he said:

> *"I do not think Alison's problems would be considered long-term impairments on daily life at this stage, but if she is indeed diagnosed with inflammatory bowel disease, that probably would then be counted as a disability."*

82. The claimant had her hysterectomy on 4 March 2019.

Welfare meeting 2 on 4 April 2019

83. The second welfare meeting with the respondent took place on 4 April 2019 with Ms Shelford and KL. Ms Shelford asked the claimant about her hysterectomy. The claimant had had post surgery complications and said she would talk to Dr King about the intimate detail of them. Ms Shelford asked the claimant for a return to work date. The claimant said that she wanted to return to work. She explained about her ongoing bowel symptoms and investigations and other health problems including her eye issue.

84. Ms Shelford told the claimant that there were other people in work coping with conditions such as colleague SS who had shared openly about her bowel condition and a governor who has glaucoma and continues to work. The claimant was pressed

by KL for a date for her return. Ms Shelford asked if she might be back after Easter. KL again asked the claimant to confirm that she could not provide a timescale. The notes of the meeting at p227A say:

> *"KL advised that as there was currently no timescale and Alison was currently awaiting the outcome of tests and then potentially further long-term treatment school would need to look for an outcome. She advised that the school would move to a medical incapacity hearing if there was no definite date to return to work."*

85. The claimant was devastated to hear that she might lose her job because she could not give a timescale for her return to work. Ms Shelford made a handwritten note on her copy of Dr King's report that said "*medical incapacity hearing if no definite date to return to work".*

Occupational Health meeting 2

86. On 26 April 2019 the claimant saw Dr King for the second time. He reported that neither the hysterectomy nor the glaucoma that had been diagnosed would be reasons for absence from school for very much longer. He said the main issue was with continuing bowel symptoms which he described. His advice to management was:

> *"I can see no reason why this bowel problem cannot be resolved but it is hard to put an exact timescale matters at present because it will depend on timescales to investigations and appointments as well as identifying an exact cause for her symptoms so that the correct treatment can be instituted. It is hard to say however that this will definitely occur within the next few months, but it certainly shouldn't be a lot longer. Once we are on top of Alison symptoms we would hope that her condition would not prevent her from providing regular and reliable service in the future or affect her ability to carry out her role in any way. We cannot be sure exactly what the future is likely to hold, but most of the likely bowel problems that Alison could have can be controlled, entirely satisfactorily, so they do not have to cause significant difficulties with work in the future."*

87. Again under the heading "Equality Act" he advised:

> *"Currently we have taken the view that Alison probably doesn't qualify as disabled, but of course if symptoms persist or diagnosis of a long-term condition is eventually reached (which I think is likely) she will then be considered disabled under the Act."*

Welfare meeting 3

88. On 30 April 2019 the claimant attended the 3rd welfare meeting with Ms Shelford and KL. The claimant was accompanied by a workplace colleague this time. She chose to ask someone to come with her because she had found the previous two meetings so hostile towards her and not focused on her welfare at all.

89. She was told by KL that school needed a reasonable timescale for her return to work and that it would now go to the governors for a decision with the potential for dismissal on the basis that there was an indefinite period before her return.

90. In May 2019 Mrs Clarke, a senior teacher who had been off long-term sick, returned to work. She took over the claimant's class of year 3 pupils.

91. The claimant was invited to a Medical Incapacity Hearing and the date was set for 20 May 2019. On 16 May the claimant asked a workplace colleague Ms CM to attend the hearing with her to take notes. Ms CM agreed to do so and to be there at 9am on 20 May.

92. On 17 May 2019 the claimant and her sister Ms Horton met to go through the paperwork the claimant had prepared for use at the hearing. The claimant planned to attend the Medical Incapacity Hearing on 20 May 2019.

93. The respondent's Attendance Management Policy provides;

> 3.13 Exceptional cases
>
> *There may be occasions… where the nature of the circumstances is such that strict control measures with absolute adherence to this procedure are inappropriate. Such cases should be dealt with fairly and sympathetically at all times welfare and support provided, together with professional medical or other assistance where necessary. Decisions in these cases will be taken after seeking advice from the human resources section.*
>
> 3.14 Persistent absence over significant periods of employment
>
> *Management reserve the right to consider individuals aggregate absence records over periods of more than 12 months and consider overall levels of attendance and previous action under this procedure...*
>
> *… In all such cases management will give full consideration to the individual's circumstances, any chronic condition/illness or illness that is deemed to be likely to be a protected characteristic under the Equality Act. The school will always consider such cases in line with its obligations under the Equality Act and its position as a reasonable employer.*

94. Paragraph 7 deals with fit notes. It provides:

> *….Fit notes are not binding on the employee or the school. There is no requirement to obtain a fit note to facilitate a return to work.*

95. At paragraph 8.6 procedure deals with the content of welfare meetings. It says:

> *"In determining the approach and action in relation to the 0H report all relevant factors should be taken into account including the length of time the employee is estimated to be absent for and the feasibility of making reasonable adjustments to the employee's job or working environment to accommodate any incapacity or disability."*

96. Paragraph 8.7 (iii) of the procedure states:

> 8.7 Outcome of the medical referral and management considerations
>
> *"Occupational Health may decide under the circumstances of a particular case not to make a recommendation at the time of the medical examination but to review the case at a specified date in the future. This may be to wait for the outcome of continued treatment, or if appropriate report from GP and or consultants. The employee will be informed of the arrangements to be made for the review."*

97. Under this heading the procedure deals with the situation where an employee is unfit for employment for an unacceptable specified period or an unspecified period. The procedure provides:

> *"The determination of what is acceptable is a matter for the council based on the individual circumstances of the case, taking into account all evidence and adherence to this policy. If the recommendation is that the employee is* ***unfit for employment for an unacceptable specified period or an unspecified period,*** *medical incapacity hearing will be convened to consider their future employment position."*

Paragraph 10 deals with medical incapacity hearings

98. A medical incapacity hearing is convened when an individual is deemed to be unfit to continue in employment:

> *"The hearing will be conducted by either the headteacher, the headteacher with advice from a committee of 2 governors, or a committee of the governing body with a minimum of 3 governors*.
>
> *A thorough evaluation of the situation will be undertaken before a decision on the case is made. Under this procedure that decision could include:*
>
> *(a) dismissing the employee on grounds of incapacity for health reasons*
>
> *(b) dismissing the employee because of unacceptable persistent absence*
>
> *(c) issuing a final warning and confirmation that their absence remains a cause for concern which would lead to future decision to dismiss*
>
> *The provisions of the Equality Act 2010 will be taken into account when determining the course of action.*
>
> *In determining what action to take / before a decision is taken to dismiss an employee on the grounds of medical incapacity the hearing officer or panel must be satisfied that every reasonable avenue to continue employment has been considered or explored and an opinion on the overall medical profession has been obtained from occupational health. Decisions will take into account all evidence and will adhere to this policy."*

99. The policy provides for an appeal against dismissal which is to be heard by the governing body appeal panel.

20 May 2019

100. On the morning of 20 May 2019 the claimant was unwell. She called an ambulance and contacted her sister for support. She rang Ms Shelford at around 7.11am. She was so unwell that Ms Shelford found it difficult to comprehend who was calling or what it was about. Only when the context of the hearing that day became apparent did Ms Shelford know it was the claimant.

101. The claimant asked Ms Shelford if the MIH hearing could be postponed and Ms Shelford told her that it could not. She used words to the effect that it was too late for the hearing to be postponed as arrangements had been made for it and it would go ahead. The claimant was panicked and distressed to hear this. She was at risk of losing her job and could not attend. She told Ms Shelford she wanted to attend and that she had prepared paperwork for the hearing. Ms Shelford told her that the panel would consider any documents she had prepared if she could get them to school by 9.00am.

102. The claimant told her sister what Ms Shelford had said and asked her sister to go to school and try to represent her at the hearing and if she wasn't allowed to then to leave the papers with school. The claimant was too unwell to specify which papers. Ms Horton gathered up the claimant's files and set off for school. The claimant texted her sister an authority to appear on her behalf.

103. Ms Shelford arrived at school and told Ms RL from HR (during a short chat in the kitchen) and Mr Maguire (when she popped her head around the door of a room in which he was waiting) that the claimant had asked for an adjournment but that she had made it clear that the hearing would go ahead. Ms Shelford had told the claimant, Ms RL and Mr Maguire that it would go ahead.

104. When Ms Horton arrived at school she sat outside Ms Shelford's office. Ms Shelford saw her sitting there. Mr Maguire was made aware that Ms Horton had arrived. Ms Horton was shown into a room to talk to Mr Maguire and Ms Barker from HR. Ms Horton told him that her sister was ill and waiting for an ambulance, and that her sister wanted a postponement, her sister had asked Ms Shelford for a postponement and had been told the panel would go ahead.

105. Ms Horton asked if she could represent her sister at the panel. She offered to show Mr Maguire a text from her sister giving her full authority to represent her. Ms Horton told Mr Maguire that she is a solicitor and was willing to represent her sister. Ms Barker said that she could not because the policy allowed only for a trade union representative or workplace colleague. Mr Maguire did not look at the policy at that time and did not consider that these might be exceptional circumstances under the policy which might permit representation by a third party.

106. Ms Horton then asked if the panel would accept some papers the claimant had prepared. She told Mr Maguire that the claimant had wanted to be there and had more to say than was contained in the papers. She said that her sister had wanted to draw the panel's attention to things and had made notes. She was hesitant about leaving the papers. She sorted through the file and made a rapid decision as to what to leave and what not to leave. She chose to leave the claimant's Additional Information document at p 236 of our bundle, the claimant's questions at p 238, the claimant's summary at p239 and Dr Ritter's letter at p240.

107. There was a copy of the Statement of Management case in the file that had been sent to the claimant. The claimant had annotated it and was planning to use it to ask questions and to challenge the school's position at the hearing. Ms Horton decided that the annotated document would not make sense to the panel and did not leave it.

108. Ms Shelford told Mr Maguire that the claimant had wanted Ms CM present as a notetaker. Mr Maguire went and spoke to Ms CM, who, in the claimant's absence, did not wish to attend the hearing and take notes on behalf the claimant. Mr Maguire did not explore the possibility of someone else taking notes for the claimant.

Medical incapacity hearing 20 May 2019

109. Mr Maguire chaired the medical incapacity hearing. The other panel members were governors MB and TT. Principal HR Officer Ms Barker was adviser to the panel, Ms Shelford and Ms RL (HR Officer) presented the management case.

110. The papers Ms Horton had left were copied for all members of the panel and all present at the hearing.

111. The panel met with Ms Barker present as their adviser prior to the opening of the full hearing for around 40 minutes, to discuss postponement. Ms Barker put options to them. Their reasons for deciding to proceed in the claimant's absence were;

i) the difficulty the school would face if they postponed; the school would not have the certainty of an outcome so as to enable the school to plan for September and

ii) Mr Maguire thought the claimant was stressed and anxious about the uncertainty of her position and that certainty, one way or the other, would help her as even if she were dismissed as she would have a right of appeal

iii) if they did postpone they would not be able to reconvene as a panel in the short term because of work commitments and if they didn't use governor MB for the incapacity hearing and had to call on another governor that would reduce the pool of governors available to hear the appeal.

112. Mr Maguire did not when he later signed off the letter of dismissal put the reason at iii) in the letter of dismissal as he did not think the claimant would want to hear about it.

113. Mr Maguire did not consider the exceptional circumstances paragraph of the Attendance Management Policy at that stage.

114. He did not think CM's decision to withdraw, and the broader absence of a person to take notes for the claimant, was a factor in a decision to postpone. It was not discussed. He made no enquiry as to who would be taking an accurate note of the meeting. He assumed that probably someone from HR would.

115. There was brief discussion at the hearing about whether or not the claimant was disabled. Mr Maguire relied on an extract from Dr King's report on 26 April 2019 in forming the view that the claimant probably didn't qualify as disabled as at that date. He did not consider the passage of time since that report had been written, the claimant's absence history and the fact that the claimant had remained ill and was, that day, in an ambulance on her way to hospital.

116. The hearing proceeded with the presentation of management case. Ms Shelford had prepared an Impact Statement setting out what she said was the impact of the claimant's absence on the school. It described the impact of her absence as "serious and significant".

117. It said the claimant's absence has:

- Impacted on the growth and development of less experienced members of staff
- She has missed her own professional development opportunities and been unable to contribute to school improvement
- Year 3 SEND pupils are particularly disadvantaged by inconsistent staffing
- Children require a knowledgeable and consistent teacher
- Many children have not made the progress expected from Year 2 and standards are very low as demonstrated by the termly data
- Difficulties for parents who have had to liaise with teachers who do not know their children well
- Delayed the development of curriculum progression tools in Art
- Delayed achievement of ArtsMArk
- Reduced capacity across the school
- Increased the workload and burdened the other Year 3 teacher
- Exacerbated financial strains on the school

118. Ms Shelford's Impact statement detailed the insurance cover for the claimant's salary. The school had an excess of £ 26,400 to fund from school budget and only received insurance payments for the element of salary paid above that excess. Ms Shelford explained that the school insurance premium had more than doubled for sickness absence and that the claimant's absence had contributed to that. Ms Shelford also explained that the school could not change provider as any staff members currently absent would not be covered by the new policy.

119. The panel did not ask any questions or challenge the accuracy of the management case in any way.

120. The management case document contained a reference to the pupil outcomes. The panel were referred to documents showing average attainment for pupils and those pupils who were at or above expectation. The documents did not have dates on them but referred to Year 3.

The claimant's position

121. The claimant's position in the Additional Information document was, in essence:

> *"The health issue that remains potentially disruptive is my bowel condition… There is no reason to suggest that my condition should not be manageable with appropriate treatment and that as a result she (Dr Ritter) would expect me to be able to return to work in the near future following appropriate advice and treatment.*
>
> *I have been grateful for the governors' patience up to now. I'm sorry that it will take a little longer to get the condition under control, but going by Dr Ritter's and Dr King's respective prognoses I should be able to provide reliable attendance from the start of the next academic year. Accordingly, I think management can plan confidently for next term."*

122. The claimant also quoted from Dr King's report following the medical on 26 April 2019. He had said that he thought it likely that the claimant would be diagnosed with a long-term condition and that she would then be considered disabled under the Equality Act 2010.

123. What she was asking for was more time.

Notice of termination of employment

124. On 22 May 2019 a letter was delivered to the claimant's home address. It gave notice of termination of employment. It said:

> *"Prior to the commencement of the hearing Ms Shelford informed me that you had telephoned at approx.. 7.10am to inform her that you were unwell and requiring emergency medical help. You told her you had prepared information which you had intended to present at the hearing."*

125. It does not recite that the claimant has asked Ms Shelford for a postponement. It says:

> *"There was no request for the hearing to be postponed."*

126. The letter concludes:

> "*Given that there is no definitive date of return {the panel feels} unable to maintain your employment."*

The May job advert

127. In May 2019 the respondent advertised on St Helen's Council's site for a teacher, newly qualified or experienced to start in September.

The claimant appealed

128. Her notification of appeal was made by completing a simple form. Her grounds of appeal were set out in a document entitled "Summary" which had pages, comprising 11 numbered paragraphs attached.

The 5 June appointment

129. The claimant saw Dr Smith consultant gastroenterologist on 5 June 2019. He reported that the most likely reason for the symptoms was IBS but that further tests were needed and then there would be a review in 3 months.

130. Appeal hearing 24 June 2019

131. The claimant attended the appeal hearing. She was not represented nor accompanied.

132. Mr Ferguson chaired the hearing. There were two governors present along with Principal HR Officers Mr Howarth and Ms Barker, and Mr Maguire, chair of the panel that had made the decision to dismiss.

133. Ms Barker presented the management case. As part of that case she stated (wrongly) that on 20 May 2019 "no request for a postponement was made". She said that the panel had met in her presence on 20 May and the reasons it went ahead were (i) that the claimant's sister had left information for them to consider and (ii) there had been no request for a postponement.

134. The management case also stated that the claimant had said, since dismissal, that it would have been a reasonable adjustment to give her time before reaching a decision to dismiss. Ms Barker said at the appeal hearing that "this was considered by the panel but due to the impact of the claimant's absence in terms of cost and impact on the education provision of the school, it was an adjustment that the school could not facilitate.

135. Ms Barker then questioned Mr Maguire. She asked did he recall any request for an extension of time before making a decision on absence. He said he did not.

136. Ms Barker asked had the panel considered the issue of disability and Mr Maguire said that it had and that Dr King had said the claimant was not disabled. Mr Maguire said that the claimant "did not present as disabled".

137. Ms Barker asked had the panel considered any reasonable adjustments and Mr Maguire talked about the needs of the school. He talked about the impact of her absence on the school and said it was "significant, as detailed in the report".

138. The appeal panel accepted Ms Shelford's impact statement as had the dismissal panel. The claimant said in her summary "I cannot be held accountable for the management of the school of progress made by the children in my class in my absence through illness".

139. Mr Maguire was asked if additional time could have been facilitated as a reasonable adjustment. He said no it could not. He said "the impact of her absence

is clear in the report. Need to balance [her] welfare with the needs of the school and came to a point where needed to consider [her] continued employment."

140. The claimant then had the opportunity to question Mr Maguire. She asked him to confirm that he had said there was no request for a postponement and he did. When the claimant said that she could provide witness statements from people who could confirm she had asked for a postponement he replied: *"I was not present when you made the 7.11am call."*

141. The claimant told him that she had been told on a Friday lunchtime that she had to submit her grounds of appeal by Monday at 12 noon. She said that she had not been ready to do that and asked Mr Maguire was there a requirement for the grounds of appeal to come in with the appeal form. He said it was normal to do so.

142. Mr Maguire questioned the claimant, asking her why she had not contacted school to enquire about the children in her class.

143. The claimant presented her own case at appeal. Her arguments were:

(i) That the panel was incorrectly advised by Dr King as to her meeting the definition of disability in the Equality Act.

(ii) That the panel failed to give effect to the Attendance Management Policy. The claimant referred to paras 3.13 and para 5. She also refers to Section 10 of the Policy and says that it was not followed. It says, "the panel must be satisfied that every reasonable avenue to continue employment has been explored".

144. After the claimant presented her case, Ms Barker then questioned her. The claimant confirmed that she did not have a definitive diagnosis of her bowel condition. Ms Barker asked, "if you have not got a diagnosis yet how can you meet the definition of being disabled under the Equality Act?".

145. The claimant responded to questions about the school not being able to put off a decision indefinitely by saying no account was taken of her welfare and welfare meetings were aggressive.

146. The governors were then able to question the claimant and Mr Ferguson asked "do you maintain that you are disabled under the Equality Act without a diagnosis?" and the claimant said "Yes". Mr Ferguson asked the claimant had her sister asked for a postponement on 20 May 2019 and she said yes, that Ms Horton had raised the matter with Mr Maguire and Ms Barker.

147. Ms Barker then made closing submissions and again stated it was the management case that there had been no request for a postponement on 20 May 2019. She said the panel had considered a request for more time before making a decision but had decided, due to the impact of the claimant's absence on the school, not to delay.

148. In closing submission at the appeal hearing the claimant said:

- She had phoned Ms Shelford and had asked for a postponement and been told the hearing would go ahead. The panel had ignored that request for adjournment.

- That she was disabled on 20 May 2019 and that the panel had been misadvised by Dr King.

- That the panel failed to explore "every reasonable avenue" for the claimant to remain employed.

- That the decision to convene the medical incapacity hearing when the school convened it was a breach of the Attendance Management Policy as at that time Dr King had not found the claimant to be unfit to continue in employment.

149. The claimant concluded with remarks about the adverse impact of the school's handling of her absence on her health. She asked to be reinstated.

150. The panel adjourned and reconvened to give its decision.

151. The appeal panel was satisfied that the panel was right to make the decision to terminate the claimant's employment given the effects of her absence on the school. The appeal panel was satisfied that the Attendance Management Policy had been followed and it upheld the panel's decision to dismiss. Mr Ferguson said he would write giving more detail of their reasoning.

Appeal dismissed

152. By a letter dated 4 July 2019 Board of Governors dismissed the claimant's appeal and decided to uphold the original decision at the medical incapacity hearing to terminate the claimant's employment with effect from 31 August 2019.

153. The letter said that the decision of the panel to dismiss was "a reasonable one in the circumstances". The letter reiterated that the claimant still did not have *a diagnosis or treatment plan that would provide an indication of the date that you are likely to be fit to return to work*. The letter said that it would not have been a reasonable adjustment to defer a decision on the claimant's continued employment given the significant effect of her absence on the school.

154. The claimant was devastated by the news. She hid herself away, felt unable to face the world.

155. By an email dated 16 July 2019 Ms Barker writing to an HR colleague to deal with the claimant's pay on termination of employment, says:

> *"There was an initial request made to the headteacher about the hearing being postponed when Alison notified the head she was unwell. This was not the head's decision to make but she did pass this request onto the panel for their consideration. However, events superseded this request as Alison's sister arrived at school at approximately 9am asking to speak with the panel. I and the chair of governors met with her said that she had been given full authority to act and speak on Alison's behalf. She brought along the*

paperwork Alison had prepared and intended to present to the panel and the questions she wished to ask of the management case and made the request to attend the hearing and present/ask questions on Alison's behalf. It was explained to her sister that the school policy allowed only for Alison to be represented by a trade union representative or work colleague. Her sister was quite taken aback by this and made the decision to leave the documentation for the panel to consider. At no point did she request a postponement."

156. The claimant's notice period expired on 31 August 2019. On 7 September 2019, just days into the new term, the claimant was diagnosed with bile acid malabsorption. She was prescribed medication which she will take for the rest of her life and was referred for a gastroscopy in November 2019. The new medication had led to an improvement in the claimant's symptoms so that she could have returned to work with some reasonable adjustments in place possibly by the end of September.

The Law

157. The disability discrimination complaints were brought under the Equality Act 2010. Section 6 defines a disability as follows:

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

158. The section goes on to provide that any reference to a disabled person is reference to a person who has a disability.

159. The word "substantial" is defined in section 212(1) as meaning "more than minor or trivial". It would be reasonable to regard difficulty carrying out activities associated with toileting or caused by frequent minor incontinence as having a substantial adverse effect on normal day to day activities.

160. There are some additional provisions about the meaning of disability in Schedule 1 to the Act. Paragraph 2 provides that the effect of an impairment is" long-term" if it has lasted for at least 12 months or is likely to last for at least 12 months, and that:

> "**If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."**

161. In assessing the likelihood of an effect lasting for twelve months account should be taken of the circumstances at the time the alleged discrimination took place. Account should also be taken of both the typical length of such an effect on an individual and any relevant factors specific to this individual for example general state of health or age.

162. Under paragraph 5 of Schedule 1,

> **"An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if**

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect."

Guidance

163. Section 6(5) of the Act empowers the Secretary of State to issue guidance on matters to be taken into account in decisions under section 6(1). Section D of the guidance contains some provisions on what amount to normal day-to-day activities, and paragraph D3 provides:

> **"In general day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities. Normal day-to-day activities can include general work-related activities and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents and keeping to a timetable or shift pattern."**

Discrimination arising from disability

164. Section 15 of the Equality Act 2010 reads 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".

165. A Section 15 claim will not succeed if the respondent shows that it did not know, and could not reasonably have been expected to know, that the claimant had the disability.

166. Scott v Kenton Schools Academy Trust [2019] UKEAT 0031 considered the test, under Section 15, of something arising in consequence of the disability. HHJ Auerbach said at paragraph 41 of the judgment:

> *"The test has been examined in prior authorities now on a number of occasions, as well as other aspects of Section 15. The most useful guidance to be found in one place, I think, is that in the decision of the President of the EAT, as she then was, Simler J, in Pnaiser v NHS England & Another [2016] IRLR 170 where she drew the threads together of the previous authorities, as follows:*
>
> > *31. ……the proper approach to determining section 15 claims …. can be summarised as follows:*

(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport [1999] IRLR 572. ..

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

I observe that the tenor of all of this guidance is that, whilst it is a causation test, and whilst there must be some sufficient connection between the disability and the something relied upon in the particular case in order, for the "in consequence test" to be satisfied, the connection can be a relatively loose one."

Duty to make Reasonable Adjustments

167. Section 39(5) Equality Act 2010 applies to an employer the duty to make reasonable adjustments. Further provisions about the duty to make reasonable adjustments appear in Section 20, Section 21 and Schedule 8.

"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."

168. The words "provision criterion or practice" (PCP) are not defined in The Equality Act 2010. The Commission Code of Practice paragraph 6.10 says the phrase "should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions".

169. The importance of a Tribunal going through each of the constituent parts of the provisions relating to the duty to make reasonable adjustments was emphasised by the EAT in Environment Agency –v- Rowan [2008] ICR 218 and reinforced in The Royal Bank of Scotland –v- Ashton [2011] ICR 632.

170. The question of what will amount to a PCP was considered by the Employment Appeal Tribunal in 2018 in Sheikholeslami v The University of Edinburgh UK EATS 2018 Mrs Justice Simler considered the comparison exercise. At paragraph 48:

> "*It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question…There is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances."*
>
> *"The PCP may bite harder on the disabled group than it does on those without a disability. Whether there is a substantial disadvantage is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."*

171. In Ishola v Transport for London [2020] EWCA Civ 112 Lady Justice Simler considered what might amount to a PCP at para 35:

> *"The words "provision, criterion or practice" are not terms of art, but are ordinary English words…they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application."*

172. And at paragraph 37:

> *"In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treated employee by an act or decision and neither direct discrimination nor disability -related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant*

ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP."

173. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) defines substantial as being "more than minor or trivial".

174. The Equality and Human Rights Commission Code of Practice on Employment (2011) provides in relation to reasonable adjustments at paragraph 6.24

"There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask)"

And at paragraph 6.28

"*The following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:*

- *Whether taking any particular steps would be effective in preventing the substantial disadvantage*
- *the practicability of the step*
- *the financial and other costs of making the adjustment and the extent of any disruption caused*
- *the extent of the employer's financial or other resources*
- *the availability of the employer financial or other assistance to help make adjustment (such as advice through Access to Work) and*
- *the type and size of the employer*

Unfair dismissal

175. **Section 95(1) of the Employment Rights Act 1996 ("ERA") provides,**

(1) For the purposes of this Part an employee is dismissed by his employer if … and … only if- (a) the contract under which he is employed is terminated by the employer (whether with or without notice).

176. Section 98 of ERA provides:

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

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

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

(2) A reason falls within this subsection if it relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do.

(3) ….

> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case.**

177. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA.

178. In applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision falls outside the range of reasonable responses that the dismissal should be held to be unfair. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself: *J Sainsbury plc v. Hitt* [2003] ICR 111.

Incapability dismissals

179. In Spencer v Paragon Wallpapers Ltd [1976] IRLR 373 Phillips J said:

> "*Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all circumstances, the employer can be expected to wait any longer and, if so, how much longer?"*

180. Relevant circumstances include the nature of the illness, the likely length of the continuing absence and the need of the employers to have done the work which the employee was engaged to do.

181. In Lynock v Cereal Packaging [1988] IRLR510 the EAT considered the range of factors which may be taken into account including; the nature of the illness, the likelihood of occurring or some other illness arising, the length of the various absences in the space of good health between them, the need of the employer for the work done by the particular employee, the impact of the absences on others who work with the employee and the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching.

182. The EAT in Lynock emphasised that the appropriate approach for the employer to take is one of understanding and not a disciplinary approach.

183. In East Lindsey Disctrict Council v Daubney [1977] IRLR 181 the EAT stated that it is necessary that an employee should be consulted and the matter discussed with him before he is dismissed on the grounds of ill-health. It said, "*if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves of the*

true medical position, it will be found in practice is all that is necessary has been done".

184. In O Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145 the claimant was a senior teacher at the school who had been absent on sick leave for a year. She was dismissed for capability reasons, the respondent stating that there was unsatisfactory evidence as to a likely return to work date. At internal appeal the claimant adduced new evidence in the form of a fit note that she was fit to return to work. The respondent rejected that evidence and dismissed the claimant. The claimant brought claims for unfair dismissal and disability discrimination together with other claims. The employment tribunal rejected some of her claims but found that she had been unfairly dismissed and that her dismissal was an act of discrimination arising out of her disability. The respondent appealed the tribunal's decision and, on the unfair dismissal and discrimination arising out of a disability arguments, it was reversed by the EAT.

185. The Court of Appeal allowed the claimant's appeal and reinstated the Tribunal's finding. The majority decision was that the tribunal had not erred in law in its findings on the reasonableness of waiting a little longer. The Tribunal had found that it would be reasonable for the school to have obtained its own evidence to confirm the claimant's argument at appeal that she was fit to return to work, but that need only occasion a short delay and there was no real evidence that serious further damage would be done during that time. In a dissenting judgment Davis LJ considered that the issue was "how much longer did this employer have to wait".

186. The question of how long it is reasonable for an employer to wait in an unfair dismissal claim may overlap with the consideration of a proportionality defence where a claimant also brings a claim under section 15 Equality Act 2010.

187. The O'Brien case also addressed the issue of the consideration of the reasonableness (and proportionality for the Section 15 claim) of the employer's response as at the date of dismissal or the date of appeal. The Court of Appeal, by majority decision, said "as a matter of substance her dismissal was the product of the combination of the original decision and the failure of her appeal, and it is that composite decision that requires to be justified" and cited its own earlier decision in *Taylor v OCS Group Ltd [2006] EWCA Civ 702.*

Submissions

188. Both Counsel had prepared detailed written submissions which they spoke to in equal time allocations.

189. Mr Mensah's primary submission, in a document of 100 paragraphs, was that the issue in this case was whether or not it was reasonable for the respondent to have given the claimant more time. He referred the Tribunal to East Lindsey and to Spencer v Paragon. He distinguished this case from O Brien on the basis that in O Brien there was a timescale for return whereas in his submission there was not in this case.

190. Mr Mensah expressed concern that the Tribunal had been taken off at tangents in what he described as a highly emotive case about a long serving teacher:

190.1 The first tangent was that the rationale for the school not coping was based on insufficient grounds.

190.2 The second tangent was that the school should have engaged with the claimant whilst absent to get her back to work that is to say that the claimant seemed to be arguing that the school should have ignored her fit notes which said she wasn't fit for work.

190.3 The third tangent was that there was too much focus on postponement in this case. That Mr Maguire and the panel considered postponement of their own volition and had reasons not to postpone and that even if the hearing had gone ahead with Ms Horton representing her sister the outcome would have been no different as Ms Horton could not have given the respondent a date for the claimant to return to work.

191. Mr Mensah also raised concern that the claimant had made a number of submissions that fell outside the agreed List of Issues; namely-

(i) that the respondent ought to have had the claimant examined by a medical expert

(ii) that the respondent ought to have considered alternate duties for the claimant whilst off sick

(iii) that there had been no previous criticism of the tone of the welfare meetings until final hearing

(iv) that the suggestion that the claimant's Grounds of Appeal document had not been paid sufficient attention by Mr Ferguson was not put so boldly as that to Mr Ferguson

(v) that the appeal was a "rubber stamping" of the MIH decision, was not put to Mr Ferguson

(vi) that a new "something arising" for the section 15 complaint appeared in the claimant's written closing submissions but had not been part of the agreed List of Issues. This point was conceded by Mr Greatley-Hirsch and his closing submissions amended to remove it.

(vii) that the claimant's arguments that the MIH and appeal panel failed to take into account the inconsistencies in the management statement of case had not been put before final hearing

(viii) that the claimant had failed to fully particularise the substantial disadvantages to which it says she was put by the alleged failures to reasonably adjust until closing submissions. They were a) greater likelihood of being subjected to a MIH under the AMP b) increased difficulty in participating in any MIH under the AMP c) greater likelihood of dismissal on the grounds of medical incapacity and d) greater likelihood of dismissal for absence related reasons.

192. Mr Greatley-Hirsch's written submissions ran to 191 paragraphs. In his submissions the claimant ought to succeed in each of her claims; in short because she was disabled, because no MIH ought to have been convened as there was no recommendation that the claimant was unfit to continue in employment, because the MIH ought not to have gone ahead when the claimant was unable to attend on 20 May 2019 and no reasonable employer would have failed to postpone on that day, because the MIH went ahead and failed to challenge the management case and relied on misleading content of the management case, because the report of Dr King was misapplied and because there ought to have been more up to date medical information before the panel, because the welfare meetings had been hostile and the respondent had failed to discuss ways of getting the claimant back to work (her fit note being no bar to those discussions), because the appeal failed to properly review the decision of the MIH; this being evident by its failure to challenge the statement of Mr Maguire that there had been no request for a postponement. The overarching submission was that the respondent ought to have done more to support the claimant and waited longer for information about a definite return to work.

193. Mr Greatley-Hirsch referred to authorities all of which had been shared with Mr Mensah when they had exchanged their written submissions.

Applying the Law

UNFAIR DISMISSAL

194. The parties agreed a List of Issues in this case. The Tribunal's reasoning is set out using the headings from the List of Issues.

195. Was the Claimant dismissed by the first respondent for a potentially fair reason of a kind of defined by Section 98 of the Employment Rights Act 1996. Specifically, was the Claimant dismissed on grounds of capability assessed by reference to how as defined by Section 98 (3) (a) of the ERA?. In answering this question the Tribunal first considered what was the reason for dismissal ?

196. The decision to dismiss was made by a panel chaired by Mr Maguire and comprising two other governors, MB and TT. The principal reason for dismissal was the claimant's absence. The fact that the respondent did not have a definite date for a return to work was also a factor in the decision to dismiss.

197. Was it a potentially fair reason within section 98 ERA 1996 ? The reason for dismissal falls within section 98 (2)(a) capability. Absence due to ill health is a potentially fair reason for dismissal.

198. Did the first respondent follow a fair procedure in dismissing the claimant? Specifically, did the first respondent engage in reasonable and appropriate consultation with the claimant before reaching the decision to dismiss?

199. The respondent did not engage in reasonable and appropriate consultation. Its failings lay in the conduct of the welfare meetings and the failure to postpone the MIH.

200. *The welfare meetings*: The welfare meetings on 28 January 2019 and 4 April 2019 were conducted in a way that was hostile towards the claimant. Her evidence, which we accepted on this point, is corroborated both by the notes of the meetings and by the fact that for the third meeting she arranged to take someone with her.

201. During the first welfare meeting Ms Shelford trivialised what the claimant was suffering from. The notes record the claimant as saying she was suffering from colitis or Crohn's but go on to wrongly record the claimant as having said she was taking anti-depressants for her stress levels. She did not say that, she said it was to help with her bowel problems which can be exacerbated by stress. The notes wrongly record her as saying that she had only been told to take over the counter medication. They wrongly record her as having said that she had decided not to take some of her medication because of side effects.

202. We accept the claimant's evidence (corroborated by the fact that there is nothing in those notes to show Ms Shelford or KL asking the claimant) that she was not asked what she needed, what school could do, how they could make it easier for her to get back quickly. The respondent's AMP provides, in relation to welfare meetings, at paragraph 8.6:

> *"In determining the approach and action in relation to the OH report all relevant factors should be taken into account including the length of time the employee is estimated to be absent for and the feasibility of making reasonable adjustments to the employee's job or working environment to accommodate any incapacity or disability."*

203. The discussion, as the claimant said, had not been about her welfare at all. It had been focused on obtaining a return to work date.

204. The second meeting was on 4 April 2019. The Tribunal accepts the claimant's evidence that at this meeting she was again pressured for a return to work date. Her condition was again trivialised in that she was told by Ms Shelford that another teacher SS manages a bowel condition and is able to work and that a governor has glaucoma and manages to work. The claimant was told at the end of that meeting, just a month after she had had a hysterectomy and during the currency of her sick note for hysterectomy recovery, that the school would move to a medical incapacity hearing if she could not give them a return to work date. This was unreasonable and inappropriate at that time.

205. The third meeting continued in the same way, pressuring the claimant for a return to work date and failing to consult her about what could be done to help her. It was not reasonable or appropriate consultation.

206. *The decision to proceed with the hearing:* The decision to proceed with the hearing on 20 May 2019 in the claimant's absence made by Ms Shelford at 7.11am and later that morning affirmed by Mr Maguire also amounted to an unreasonable and inappropriate failure to consult the claimant prior to her dismissal. In proceeding in her absence they denied her a fair hearing.

207. Did the first respondent conduct appropriate investigation to ascertain the claimant's up-to-date medical position as at the time of the decision to dismiss. As at the 20 May 2019 the respondent had an OH report that said that the claimant could be expected to make a full return to work and that it was not clear when that would be. It expressed Dr King's opinion that she wasn't disabled as at the date he saw her but also that she probably would become disabled.

208. The information before the panel that morning was that the claimant was awaiting an ambulance to be taken to hospital. The panel knew the claimant was due to see a specialist on 5 June 2019. Ms Shelford knew the claimant had had bowel problems since she (Ms Shelford) had written *"suffers from IBS. IBS attack. Happened 4 or 5 times previously. Severe stomach pains*" on notes of a return to work interview on 8 May 2018. Ms Shelford had been kept informed by the claimant at the welfare meetings of the ongoing investigations and of the difficulty the claimant was experiencing in coping with her symptoms.

209. Given the acute situation on 20 May 2019, the respondent in relying solely on Dr King's report and not pausing to find out the updated position, had not conducted appropriate investigation before dismissing. It would have been appropriate to have requested an update from OH, particularly because Dr King had suggested that the claimant if diagnosed with inflammatory bowel disease would probably be classed as disabled, and to have paused to investigate the reason for the acute illness requiring an ambulance that morning which might, on the respondent's interpretation of Dr King's report, have then meant she was disabled. Its investigations were inadequate.

210. Were appropriate steps taken by the first respondent to discover the claimant's medical condition and likely prognosis? Consulting OH was a reasonable and appropriate step. In proceeding in the claimant's absence the respondent however failed to take the appropriate step of asking the claimant what was the up to date position before moving to dismissal on 20 May 2019.

211. The focus of the panel on 20 May was on the availability of governors and timescales for the claimant's exit rather than on proper scrutiny of whether she was unfit to continue in employment. Its policy required it to explore every reasonable avenue to preserve employment. It would have been an appropriate step to have an update on the OH report of Dr King, to have news of the reason for the ambulance on 20 May 2019.

212. Did the first respondent follow its own policies specifically section 3.13, 3.14, 8.7(iii) and 10 of the attendance management procedures? The respondent had an Attendance Management Policy (AMP) and provision within the AMP for termination of employment for medical incapacity. At paragraph 8.7 of the AMP there are circumstances in which it may be appropriate to move to a Medical Incapacity Hearing to consider termination of employment. Paragraph 8.7(vi) details one of those circumstances as being when a recommendation has been made that an employee is unfit for employment for an unspecified period. That paragraph refers the reader to paragraph 10 on Medical Incapacity Hearing, which begins:

> *"A Medical Incapacity Hearing is convened when an employee is deemed to be unfit to continue in employment."*

213. Ms Shelford had a MIH in mind prior to the second welfare meeting on 4 April 2019. The claimant was warned at that meeting that a MIH would ensue if she could not give a fixed date for return to work. On 4 April 2019 and at no time thereafter was there a recommendation that the claimant was unfit to continue in employment. She was, at that time, recovering from a hysterectomy and under investigation for bowel problems. The claimant had seen Dr King. He did not say that the claimant was unfit to continue in employment. On the contrary, he said *"we would hope that her condition would not prevent her from providing regular and reliable service in the future".*

214. Paragraph 8.7 (iii) of the AMP states *occupational health may decide under the circumstances of a particular case not to make a recommendation at the time of the medical examination but to review the case at a specified date in the future. This may be to wait for the outcome of continued treatment, or if appropriate report from GP and or consultants.* Dr King did not make a recommendation that the claimant be deemed unfit to continue in employment but nor did he explicitly state that he would review the case at a specified date.

215. The respondent failed to follow paragraphs 8.7 and 10 of its own AMP policy in that it convened a medical incapacity hearing in the absence of a recommendation that the claimant was "deemed to be unfit to continue in employment".

216. The respondent's position in its witness evidence that it would be inappropriate to discuss adjustments or remote working unless and until there was a return to work date, is rejected. There was nothing in the fit note that prevented the respondent from having those conversations with the claimant. Paragraph 7 of the AMP deals with fit notes. It provides: *Fit notes are not binding on the employee or the school. There is no requirement to obtain a fit note to facilitate a return to work.* Ms Shelford and HR could and should have been having supportive conversations about the claimant's welfare and what steps the respondent could be taking to help the claimant make some contribution as soon as she was able to do so. The false prerequisite of a return to work date, imposed by the respondent, supports the drawing of an inference that there was an exit agenda in the mind of Ms Shelford during the second and third welfare meetings.

217. In failing to postpone the hearing on 20 May 2019 the respondent missed an opportunity to apply paragraph 3.13 of its AMP on exceptional cases. Neither Ms Shelford nor Mr Maguire *dealt with fairly and sympathetically at all times* with the claimant's request for a postponement and for representation by her sister. Ms Shelford failed to consult HR, as envisaged by paragraph 3.13, before refusing a postponement.

218. Paragraph 3.14 deals with persistent absence over significant periods of employment. In proceeding in the claimant's absence and in failing to obtain more up to date medical information both from Dr King and in relation to the acute circumstances requiring an ambulance that morning, both Ms Shelford and Mr Maguire failed to give *full consideration to the individual's circumstances.* Ms Shelford and HR knew that the claimant had had bowel related absences which she had described as IBS since 8 May 2018. Ms Shelford, HR and the panel knew that the claimant was under investigation for possible bowel disease and knew from Dr

King that inflammatory bowel disease would probably qualify as a disability. Ms Shelford, HR and the panel failed to follow paragraph 3.14 which required full consideration of *any chronic condition/illness or illness that is deemed to be likely to be a protected characteristic under the Equality Act. The school will always consider such cases in line with its obligations under the Equality Act and its position as a reasonable employer.*

219. The respondent also failed to follow its own policy in exploring every reasonable avenue to preserve employment. The failings of the welfare meetings, set out above, are relevant here. An understanding approach, rather than an exit focused approach, to those meetings, had one been taken, might have elicited an earlier return to work with adjustments or some contribution from remote working.

220. The respondent failed to follow its own policy in the way in which the MIH was conducted. The AMP requires at paragraph 10 *A thorough evaluation of the situation will be undertaken before a decision on the case is made.* For the reasons set out below, namely the failure to challenge the management statement of case and Ms Shelford's Impact Statement and the failures to obtain an up to date medical position, the respondent did not carry out a thorough evaluation. Its evaluation was cursory and was based on a partial and limited reading of Dr King's report.

221. Should the hearing on 20 May 2019 have been adjourned due to the claimant's inability to attend ? Yes. The decision to proceed in her absence was outside the range of reasonable responses of a reasonable employer in circumstances in which:

(i) The claimant had told the head teacher she had prepared to attend.

(ii) She had told the head teacher she wanted to attend but couldn't because she was acutely ill and awaiting an ambulance.

(iii) She asked the head teacher for the hearing to be postponed and was told in immediate response it would go ahead.

(iv) She had sent her sister to the school with a request for permission to represent her which was declined.

(v) Her sister had left some documents but the respondent knew, through Ms Barker and Mr Maguire that this was not all the claimant wanted to say in defence of her employment.

(vi) This was the first convened hearing.

(vii) The person she had arranged to take notes for her had withdrawn.

(viii) It was only 8 weeks since she had had a hysterectomy.

(ix) She was unfit for work and undergoing investigations for bowel disease.

(x) She risked losing her livelihood.

222. The failure to postpone, and the reasons given in evidence for it by Mr Maguire; which we summarise as certainty, availability of appeal, lack of availability of governors to reconvene, support an inference that there was an exit agenda by the respondent, that the outcome of the MIH whether the claimant attended or not, was a foregone conclusion. She was to be dismissed.

223. Did the first respondent act reasonably in treating the reason as a sufficient reason for dismissing the claimant in all the circumstances, specifically: given the ongoing investigations and comments in the occupational health report of Dr King, 27 November 2019 and 26 April 2019 could the respondent have been expected to wait any longer for the claimant to return to work? The respondent had referred the claimant to OH but it relied on a partial and limited reading of Dr King's report. *Partial*, because for reasons set out below we find that Ms Shelford was motivated to dismiss the claimant from early January 2019. Her email to KL on 4 January 2019 is disingenuous when it says *I am unclear as to the reason for her sickness absence.* Ms Shelford knew the claimant had an underlying bowel condition. She had discussed this with the claimant in September 2017 and on 8 May 2018 had herself written on the return to work interview notes *suffers from IBS. Limited*, because Ms Shelford, advised by HR, had an agenda to move to dismissal of the claimant because of her sickness absence. She focused on the part of the report that did not give a definite date for return because she believed that was the requirement for her to be able to trigger a MIH.

224. The respondent also focused on the part of the report that it felt said the claimant was not disabled as at 26 April because it, through Ms Shelford and Ms Barker and Mr Maguire wanted to move to dismissal *before* it felt (erroneously) it was at risk of disability discrimination.

225. The respondent could reasonably have been expected to wait beyond the 5 June 2019 appointment for further information.

226. As at the date of the appeal the claimant had seen Dr Smith who said that the most likely reason or the symptoms was IBS but that further tests were needed and then there would be a review in 3 months.

227. Was the claimant's absence caused by incapacity sufficient reason to dismiss her on 20 May 2019? No. the claimant was not, by the first respondent's own OH report evidence, unfit to continue in employment on 20 May 2019. Both Dr King and Dr Ritter were saying that there could be a return to work and to full duties. The respondent did not act reasonably in treating the claimant's sickness absence and the lack of a fixed return date as at 20 May 2019 as a sufficient reason for dismissal.

228. There was an agenda to terminate employment from Ms Shelford and Mr Maguire and to do it *before* the reports from OH might say, conclusively, that the claimant was disabled. We reach that conclusion based on the following:

232.1 Ms Shelford's motivation to reduce staff sickness absence generally, it was part of her remit.

232.2 Ms Shelford having requested information about whether or not the claimant's absences fell around bank holidays in May 2018. This suggested, and we put it no higher than this, that Ms Shelford was

looking carefully at all absence and likely to move rapidly to disciplinary or capability process in the best interest of the school.

232.3 Ms Shelford's email to KL on 4 January 2019 in which she says she is not clear about the claimant's reasons for absence and says the latest sick note says diarrhoea. This suggested to us that Ms Shelford, who knew the history of IBS, was seeking to trivialise or disbelieve the claimant's condition:

232.4 The fact that the claimant was told that school would move to an MIH at the second welfare meeting.

232.5 The tone of those welfare meetings which, we accept on the claimant's evidence, was hostile and focused on pressure for a return date.

232.6 The fact that Ms Shelford spoke to Mr Maguire on 20 May 2019 prior to the hearing.

232.7 The fact that Ms Shelford did not speak up at the hearing on 20 May 2019 and say that the claimant wanted a postponement.

232.8 The fact that Mr Maguire did not press Ms Shelford or Ms Horton as to what it was the claimant wanted.

232.9 The fact that Mr Maguire did not pause to consider again whether or not to postpone when he knew CM did not want to attend on behalf of the claimant as a notetaker.

232.10 The fact that Mr Maguire us that he considered that the claimant would be better with certainty, either way, and that she could always appeal.

229. For those reasons the Tribunal finds that Ms Shelford and Mr Maguire had an exit agenda for the claimant.

230. Further, the panel did not act reasonably in treating her absence and the lack of a return date as sufficient reason to dismiss because it did not interrogate the management case on the impact of her absence. It was unreasonable to simply accept Ms Shelford's Impact Statement which, Mr Maguire and Mr Ferguson both accepted in evidence, went unchallenged. The Impact Statement contained two important inaccuracies that went uncorrected in the presentation to the panel and formed the basis of the decision to dismiss. The first inaccuracy was that the pupil performance data did not show what it was represented as showing, that the pupil performance for the claimant's class had dipped since the claimant had been off sick. The second inaccuracy was that the insurance policy costs and the fact that the respondent could not change provider whilst the claimant was off sick, in effect a "lock-in", were not attributable solely to the claimant's absence. There were other teachers off sick long term. The MIH panel did not challenge the management case that was put to it. The claimant was not there to be able to challenge it. The reason for dismissal given in the letter of dismissal related to those two inaccuracies: impact on pupils and cost.

231. Paragraph 10 of the AMP set out the range of decisions available to the panel. It said:

> *"Under this procedure that decision could include:*
>
> *(d) dismissing the employee on grounds of incapacity to health reasons;*

(e) dismissing the employee because of unacceptable persistent absence;

(f) issuing a final warning and confirmation that their absence remains a cause for concern which would lead to future decision to dismiss."

It also said:

> *"The provisions of the Equality Act 2010 will be taken into account when determining the course of action. In determining what action to take / before a decision is taken to dismiss an employee on the grounds of medical the hearing officer or panel must be satisfied that every reasonable avenue to continue employment has been considered or explored and an opinion on the overall medical profession has been obtained from occupational health. Decisions will take into account all evidence and will adhere to this policy."*

232. The panel could not, because of the failings in investigation, be satisfied that every reasonable avenue to continue employment had been considered or explored. It did not have in front of it a recommendation that the claimant was unfit to continue in employment for an unspecified period of time, a basic requirement for convening an MIH. It had no evidence of efforts made to discuss alternate working or facilitating a return to work.

233. The claimant's absence from November 2018, or including her aggregated absences over the previous twelve months, and whether the hysterectomy absence was included or discounted, and the lack of a return date were insufficient grounds for dismissal.

234. Should the first respondent have waited for the conclusion of investigations, the diagnosis, for a prognosis and/or waited any longer to see if these could be produced in a reasonable further period of time? The respondent need not have waited indefinitely. It did not need to wait for conclusion of investigations, for a diagnosis or prognosis, sometimes in some cases those things can take so long that no reasonable employer could be expected to wait for them. The school, and we accept in Ms Shelford's evidence that she was conscientiously trying to put the interests of the children first, must often balance competing needs.

235. In this case the respondent was unreasonable in failing to wait beyond 5 June 2019 and to review the position then. We find it was unreasonable because the claimant, Dr King and Dr Ritter were saying that she could make a return to work. Every reasonable opportunity for that to happen should have been explored *before* the claimant was dismissed.

236. We accepted Ms Shelford's evidence that another teacher was teaching the claimant's Year 3 class. The respondent argued that a change of teachers during an academic year is not good for children, particularly those with special educational needs. On its own argument whether the claimant returned in academic year 2018/19 or not it would have been beneficial for the children not to have another change, to remain with that other teacher to complete the year. There was no pressing need to put the claimant back in front of her year 3 class in May 2019.

237. The insurance policy excess had been met so the policy was, by the end of May 2019, covering the claimant's salary. There was other sickness absence being claimed on the policy so the claimant was not the sole reason why the school was "locked in" to the policy.

238. Advertisements had been placed for teachers to start in September 2019 to cover maternity leave and two other teachers who were leaving. We accept the respondent's evidence that it was not advertising the claimant's role in February or May 2019. We accept the respondent's evidence that it was already late in terms of recruiting to replace the claimant for September 2019 by 20 May 2019. A role would have to be advertised, recruited for, a selection process carried out, an offer made and accepted and notice given by the successful candidate to his or her employer by 31 May 2019 to be able to move for September. Those steps would usually be commenced in February of an academic year to obtain a new teacher for September. Recruitment was therefore not a pressing need for the claimant's dismissal on 20 May 2019.

239. The respondent could and should have waited to see if there could be a return to work within a reasonable further period of time. That reasonable further period of time for a return to work could have been considered after 5 June 2019 appointment.

240. This brings us to the heart of this case. How long should the employer have waited after the 5 June 2019 appointment? The employer should have waited until it could reasonably form the view that the claimant was unfit to continue in employment at all or for an unspecified period of time. It could reasonably form that view either when it had medical or OH recommendation in those terms.

241. Dr King's report of 26 April 2019 said that the claimant would return to work, so this was not an "unfit to continue" recommendation. And he said that her return to work shouldn't be a lot longer than within the next few months, so this was not "an unspecified period of time". The next few months would mean 2 – 3 months and then some additional time, but not a lot longer, so on a plain reading of that report, not the same amount again, after that. On the report from Dr King the claimant might, in April, have been expected to be back at work, not in May, June or early July, but in a little while longer after that, say 5-6 weeks, roughly in August to September time.

242. We find that it was outside the range of reasonable responses not to have waited until the end of August, early September before reviewing the situation and requesting an OH or medical opinion as to whether or not the claimant was, at that time, fit to return to work or unfit to continue in employment at all or for an unspecified period. If a medical or OH opinion had been obtained in late August or early September and if it had said that the claimant was unfit to continue in employment, it would then have a taken a further few weeks for the respondent to consult the claimant and convene a MIH. That would take the claimant to mid to late September before the respondent could reasonably have proceeded to a MIH.

243. In the event, by 7 September 2019 the claimant had a diagnosis and newly prescribed medication. She had been suffering from a complex and unusual condition called Bile Acid Malabsorption. It explained the cramps, diarrhoea, lump in her side and fatigue. The Tribunal accepts her evidence that her diagnosis and new

prescribed medication led to a rapid improvement in her symptomatology such that if she had been consulted during mid September she would have been able to inform the respondent that she was fit to return to work, possibly with some adjustments in place. If the respondent had acted within the range of reasonable responses there would have been no question of her being deemed unfit to continue in employment for an unspecified period by the date of any MIH. If it had acted within the range or reasonable responses (and within the indicative time limits given by Dr King) she would not have lost her career.

244. Of course, the respondent had to balance the needs of the school with its obligations to the claimant. It was desirable that the school year should start with a teacher in place for Ms Davin's new class who could see those children through the year but no school can ever be certain when starting a year that a teacher won't be off sick, or that a maternity or other absence won't arise. In 2017/18 year Ms Shelford had had two resignations and at least two significant sickness absences that we were made aware of. There was no new detrimental impact to the respondent in waiting a reasonable period of time for the claimant to return from May 2019. It was a case of more of the same. The provision that was made in 2019, either an agency teacher or later in the year another member of permanent staff covering the claimant's teaching, whilst not the preferred route, could have continued on through that term and in early September. The insurance lock in, had not changed, the policy covering the claimant's salary had not changed.

245. Was dismissal within the range of reasonable responses available to the first respondent? Dismissal was not within the range of reasonable responses on 20 May 2019 for the reasons set out above.

246. Turning now to the appeal. Although this was not expressly addressed in the List of Issues the law is clear and was restated in O Brien when it cited its earlier decision (in Taylor v OCS Group Limited) that as a matter of substance the claimant's dismissal was the product of the combination of the original decision and the failure of her appeal, and it is that composite decision that requires to be both within the range of reasonable responses in unfair dismissal law and justified in terms of the respondent's defence to the Section 15 claim which we address below.

247. The appeal was heard by Mr Ferguson. The claimant attended and presented her case. It was outside the range of reasonable responses at appeal not to overturn the decision on the basis (i) that the hearing should not have proceeded in the claimant's absence on 20 May 2019 given the circumstances of that absence and (ii) that there should not have been an MIH on 20 May 2019 as there was no evidence before the respondent deeming the claimant to be unfit to continue in employment for an unspecified period of time. Dr King had specified not much longer again after 2 – 3 months.

248. A reasonable appeal hearing would have reviewed the route to MIH and called for the evidence that could trigger an MIH. There was no trigger for an MIH, neither in April when Ms Shelford decided to convene a hearing, nor May at the MIH nor in June at appeal. The OH opinion was that the claimant would return in not a lot longer than two to three months after 27 April 2019, depending upon the timescale of hospital appointments and investigations. The appeal panel acted outside the range of reasonable responses when it followed the partial and limited reading of Dr King's

report taken at MIH. It failed to consider for itself, or to criticise the MIH for having failed to consider for itself, whether the Equality Act might apply to the claimant or not. It approved the respondent's (erroneous) insistence on a diagnosis before the Equality Act applied and by the MIH's partial and limited reading of Dr King's report. The approach of the appeal panel in failing to consider whether the claimant might have a protected characteristic or not *for itself* thwarted the purpose of the AMP and equality legislation and was outside the range of reasonable responses in terms of its review remit.

249. The appeal panel failed to challenge the inaccuracies in Ms Shelford's impact statement that had been relied on at MIH in relation to the impact on pupil performance and the insurance position. The appeal panel failed to see the conflict in Mr Maguire's position and that of the claimant on two points (i) postponement request and (ii) whether the documents left for the MIH were comprehensive or not as reasons to fully review the information before the MIH. Mr Ferguson accepted in evidence that the management statement of case had gone unchallenged and that at appeal he did not have sufficient information to draw conclusions about the impact of the claimant's absence on pupil performance. Mr Ferguson also made the frank admission that notwithstanding the fit note saying the claimant was not fit to work the school had an ongoing responsibility to consider reasonable adjustments.

250. The claimant, in closing submission, specifically requested a finding in relation to the assertion by Mr Maguire at the appeal hearing that there had been no request for a postponement on 20 May 2019. Mr Maguire knew there had been a request for a postponement because Ms Shelford told him on the morning of the hearing when she popped her head round the door, to use the language he used in evidence on oath to us, and told him. He also knew because Ms Horton had told him that her sister had requested a postponement. Mrs Barker, HR Adviser to the panel, sat in with and advised the panel during their deliberation about adjournment. She had been told of the request by Ms Lomas who had been told by Ms Shelford. Mr Maguire told us on oath that even if he had not been made aware of the request for a postponement by Ms Shelford he and the panel would have considered a postponement because it was the right thing to do, to consider it, in the claimant's absence. Mr Maguire gave reasons to us for the decision not to postpone. If those reasons, were the reasons of the panel at the time, and we find that they were, then it is difficult for us to reach any conclusion other than that he misled the appeal panel when he told it there had been no request for a postponement.

251. By the date of the appeal the claimant had had her 5 June 2019 appointment and the respondent had seen Dr Smith's report which said that the symptoms were probably due to IBS and that the claimant was to have more tests and be reviewed in three months. This did not change the timescales from Dr King's report, that the claimant would likely be back at work not much longer again after 2-3 months from 27 April. The respondent, at appeal, acted outside the range of reasonable responses in upholding the decision to dismiss.

DISABILITY DISCRIMINATION

252. Did the claimant have a disability as defined by section 6(1) of the Equality Act 2010 as at the dates of each of the acts of discrimination complained of ? Was the

claimant suffering from irritable bowel syndrome, gastritis, duodenitis and or bile acid malabsorption?

253. We find that the claimant was disabled from 8 May 2018. It is not necessary for there to have been a definitive label to the condition or for the claimant to have stated that she was disabled. We reject Mr Maguire's evidence that because the claimant did not tell them that she was disabled the Equality Act did not apply.

254. What matters in applying the section 6 definition is the impact of the condition on the claimant's ability to carry out her normal day to day activities. From July 2017 the claimant had a physical impairment. We accept her evidence that she was having episodes of stomach cramps, bowel frequency and urgency, continence issues, that she had a lump in her side and was suffering diarrhoea and that taken together the symptoms caused her fatigue.

Did they amount to a physical impairment that had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities?

255. Yes. The claimant reported symptoms of a bowel problem for ten years prior to bringing this claim. She referred to IBS in absence from school in June 2016 and again referred to symptoms of a bowel condition in July 2017. In May 2018, she was absent from school and on return to work reported herself as suffering from IBS and as having had 4 or 5 incidents.

256. Applying the definition of "long-term" to the claimant's case we find that as at the dates of the acts of discrimination complained of in 2019, from the first welfare meeting on 28 January 2019 the claimant was suffering from an impairment that had a long-term effect. It had already lasted more than twelve months.

257. Further, the impairment was likely on each of the dates of the acts of discrimination from 28 January 2019 until termination of employment, to last twelve months from each of those dates. She had been referred to a gastroenterologist and was being investigated for Chrons disease and diverticulitis.

258. The claimant had flare ups in her condition. The flare ups increased so that by the autumn term of 2018 the claimant was having to visit the bathroom around ten times during the school day. We accept the evidence of the claimant as to the impact of the condition on her ability to carry out her normal day to day activities. It was debilitating for her. The impact of the condition is deemed by reason of it recurring, to have been substantial throughout the period from June 2016 when she reported having IBS to school, until termination of employment with exacerbation so that she was suffering continuously from September 2018.

259. If so, did the first or 2nd respondent know or could they reasonably have been expected to know that the claimant had these disabilities? Ms Shelford knew or ought to have known when she wrote on the return to work interview notes on 8 May 2018 that the claimant suffered from IBS and had had 4 or 5 incidents, that the claimant was disabled. The claimant's absence history would have shown that she reported IBS in June 2016. Ms Shelford was an experienced leader. She had been brought in to tackle absence issues. The management of absence and attendance requires a working knowledge of disability which has been protected under the law

since 1995. Ms Shelford had sufficient information from the claimant at return to work interview on 8 May 2018 for the respondent to know that the claimant was protected by the Equality Act 2010.

Discrimination Arising from Disability

260. What is the something arising from disability relied upon by the claimant ? The something arising from disability is the claimant's absence. She was absent from 16 November 2018 until termination of her employment.

261. Applying Pnaiser, the Tribunal identified, in respect of each allegation, what was the unfavourable treatment, by whom was it perpetrated and what was the reason for the unfavourable treatment. Unfavourable treatment is not defined by the Equality Act but EHRC Code of Practice says that it means that a person must have been put at a disadvantage. It can also be construed widely to mean suffered a detriment.

262. The Tribunal focused on the reason for the treatment in the mind of the perpetrator of the treatment. We reminded ourselves that the reason need not be the main or sole reason but must have had a significant effect in the sense of being more than trivial. Once we established the treatment and reason for it we then asked objectively was it something that arose in consequence of the claimant's disability and we noted that there need only be a loose connection between the disability and the something that arose in consequence of it.

263. Did the first respondent treat the claimant unfavourably (and did that unfavourable treatment arise in consequence of her disability) by:

(a) Failing to adjourn the medical incapacity hearing on 20 May 2019 Failing to adjourn the hearing on 20 May 2019 meant that the claimant could not put her case and could not challenge the management case and Ms Shelford's impact statement. Although documents were left with the panel, they were not the whole case that the claimant wished to put. We accept Ms Horton's evidence that Mr Maguire knew this to be the case. Mr Maguire knew that the claimant, in the alternative wanted to be represented by her sister, but this was denied her. He knew that the claimant wanted CM to take notes for her, but CM withdrew and no alternate provision was made. The claimant was treated unfavourably by the failure of the panel to adjourn on 20 May 2019.

264. The failure to adjourn was because of the claimant's disability related absence. Mr Maguire took the lead from Ms Shelford who had told him she had refused a postponement. She had an exit agenda for the claimant for the reasons set out above. In applying Pnaiser we reminded ourselves that Simler J said "*the causal link between the something that causes unfavourable treatment and the disability may include more than one link"*. We find that the connection between the claimant's absence, Ms Shelford's exit agenda and its influence on Mr Maguire and the panel and the decision to not to postpone is a sufficient connection to meet the test of causation.

(b) Prematurely reaching the decision to dismiss

265. The decision to dismiss was reached prematurely and was unfavourable treatment. It was premature because the respondent had convened the hearing without the claimant being deemed unfit to continue in employment for an unspecified period and on a partial and limited reading of Dr King's report as to return to work. No decision to dismiss should have been considered at all on 20 May 2019.

266. It was also premature because it reached its decision without having heard the claimant's full case. It saw some of her documentation but Mr Maguire knew that the claimant had wanted to represent herself and question the witnesses and had asked for an adjournment. He also knew that having been denied an adjournment she had asked to be represented by her sister, which was denied and he knew she wanted to have a note taker present, which did not happen.

267. It was premature because the OH report of Dr King was almost a month old and the respondent had not obtained an updated position from Dr King. It was premature because the panel were told that the claimant had a medical appointment on 5 June 2019 (excluding half term that would have been 7 school days away from the MIH) and yet the panel failed to wait for the outcome of that appointment.

268. The premature decision arose out of the claimant's disability related absence. Mr Maguire took the lead from Ms Shelford who, in the content of her Impact Statement, and in her decision not to postpone on 20 May 2019, had made it clear that she wanted the claimant's employment terminated.

269. Ms Shelford was acting to reduce sickness absence and cost and impact of absence to the school. She had an exit agenda in relation to the claimant. In applying Pnaiser we reminded ourselves that Simler J said "*the causal link between the something that causes unfavourable treatment and the disability may include more than one link"*. We find that the connection between the claimant's absence, Ms Shelford's exit agenda and its influence on the panel and the decision to dismiss is a sufficient connection to meet the test of causation.

(c) Failing to receive the outcomes of medical investigations and treatments

270. The respondent obtained Dr King's reports but treated the claimant unfavourably in convening a MIH when there was no medical opinion that the claimant was unfit to continue in employment for an unspecified period and there was a partial and limited reading of Dr King's report as to return to work and there being no specified date. The panel also treated the claimant unfavourably in failing to wait for the 5 June 2019 appointment outcome and review the position thereafter.

271. The reason for the failure to wait was because Mr Maguire and the panel followed Ms Shelford's exit agenda for the claimant. Ms Shelford wanted the claimant's employment terminated because she had been absent and could not give a return to work date. That absence arose in consequence of her disability and meets the causal link required in Pnaiser.

(d) Failing to take into account the medical evidence

272. The partial and limited reading of the OH report detailed above was unfavourable treatment. The panel rushed to dismiss before it (wrongly) believed the claimant might have a protected characteristic.

273. The reason for failing to take into account the medical evidence was because Mr Maguire and the panel followed Ms Shelford's exit agenda for the claimant. Ms Shelford wanted the claimant's employment terminated because she had been absent and could not give a return to work date. That absence arose in consequence of her disability and meets the causal link required in Pnaiser.

(e) Failing to take into account the alleged inaccuracies and unfairness in the information provided to the panel which the claimant alleges were not addressed because she was not present at the hearing

274. The panel failed to interrogate the management case. It was accepted without challenge. This was unfavourable treatment. Mr Maguire admitted under cross examination that he did not actually know that the school was locked in to the insurance provision at the time of the decision to dismiss. This showed us that there was insufficient consideration of the impact of the claimant's absence on the school.

275. Ms Shelford was acting to reduce sickness absence and cost and impact of absence to the school. She had an exit agenda in relation to the claimant. We find that Ms Shelford's view tainted the decision making process of the panel. In applying Pnaiser we reminded ourselves that Simler J said "*the causal link between the something that causes unfavourable treatment and the disability may include more than one link"*. We find that the connection between the claimant's absence, Ms Shelford's exit agenda and its influence on the panel and its failure to interrogate the management case culminating in the decision to dismiss is a sufficient connection to meet the test of causation.

(f) Failing to take into account the claimant's length of service and likelihood of returning to work

276. The respondent was required, by its AMP, to look at all the circumstances. The panel knew the claimant's length of service. It did not fail to consider length of service. It considered it but did not think it outweighed the needs of the school for attendance going forward.

277. The panel did consider the likelihood of the claimant returning to work but it engaged in a partial and limited reading of Dr King's report. The panel gave undue weight to the lack of a fixed return date. To say in effect, you are dismissed (in part) because you can't currently tell us (and nor can our OH expert) exactly when you will return to work, even though our OH report says you are likely to make a return to work and it shouldn't be much longer than a few months, is unfavourable treatment.

278. The reason for failing to take into account the likelihood of return to work was because Mr Maguire and the panel followed Ms Shelford's exit agenda for the claimant. Ms Shelford wanted the claimant's employment terminated because she had been absent and could not give a return to work date. That absence arose in consequence of her disability and meets the causal link required in Pnaiser.

(g) Failing to take into account the communication from the claimant which suggested she was keen to return to work and trying her best to do so

279. Mrs Horton had submitted paperwork from the claimant which made it clear that she wanted to return to work and was trying her best to do so. There was the content of the welfare meetings and the claimant's correspondences with school in which she provided detailed information about her condition, apologised for her absence and expressed her desire and efforts to return. We accept Mr Maguire's evidence that the claimant's paperwork was read by the panel. The panel did take this into account. There was no unfavourable treatment in this part of the complaint in the panel deciding not to give it more weight than the claimant would have liked. It is conceivable that in medical incapacity cases an employee might wish to come back and try to do so even where the weight of the medical evidence is such that she is unfit to continue in employment. It is not unfavourable treatment for a panel to conduct the exercise of considering the employees view and deciding that it is outweighed by medical evidence. The claimant's view was taken into account.

280. If so; was the termination of the contract a proportionate means of achieving a legitimate aim of managing the school's organisational and economic needs

281. The school had a legitimate aim in managing its organisational and economic needs. In particular, we accept that a school will seek certainty about its staffing resource in the best interests of its pupils.

282. The issue that arises is whether or not the termination of the claimant's employment on 20 May 2019 was a proportionate means of achieving that aim. For the following reasons it was not:

282.1 There was cover in place for the claimant's class that could have run and would in the best interest of the pupils not been changed, to the end of that summer term.
282.2 The insurance excess had been reached so the policy was now covering salary for the claimant and in that respect the salary position was getting no worse.
282.3 The claimant's absence was not the sole cause of the respondent's "lock in" with its then current insurance provider.
282.4 It would have been less discriminatory and no additional hardship to the respondent to postpone the MIH on 20 May 2019, to reconvene after 5 June to then consider in the light of any new medical report whether the claimant was deemed unfit to continue in employment or whether there could be any specified date for return and whether there should there be an MIH at all.
282.5 It would have been less discriminatory to follow Dr King's timeline, on 20 May 2019 and or after 5 June 2019 and or at the appeal hearing which anticipated a return in not much more time than 2 -3 months from April 2019.
282.6 There was no more hardship to the respondent in maintaining the claimant's employment until a review at the end of August or early September and then (if the grounds existed) to consider convening an MIH (and we find that if the respondent had convened a hearing due process would have meant that there would have been time beyond 7

September 2019 for the claimant to indicate an ability to return to work), than to have dismissed in May 2019.

283. Given that the claimant's dismissal was a product of both the decision of the MIH and the failure of her appeal we also considered whether or not the decision on appeal was a proportionate means of achieving a legitimate aim. We repeat the reasoning at para 282 above, here. The position had not changed at appeal. For those reasons the decision to uphold dismissal at appeal was not a proportionate means of achieving a legitimate aim.

284. The respondent's statutory defence to the Section 15 claim fails for lack of proportionality of response.

Failure to make reasonable adjustments

285. Did the school fail to comply with its duty to make reasonable adjustments specifically; did it apply the PCP of the attendance management policy to the claimant if so, could it have adapted the policy for attendance management?

286. The AMP was a provision, criterion or practice applied to the claimant. Paragraphs 8.6, 8.7 and 10 were (mis)applied to the claimant and paragraph 3.13 was (mis)applied in that Mr Maguire did not think that the claimant's absence in the circumstances of 20 May 2019 amounted to an exceptional circumstance.

287. Could the school have explored reasonable avenues as per their own policy prior to reaching the decision to terminate the claimant's contract ? The respondent failed to consider "every reasonable avenue to continue employment" in accordance with paragraph 10 of the AMP. Mr Maguire failed to interrogate the management case as to whether reasonable avenues had been considered at the MIH. Mr Ferguson failed at appeal to review the MIH decision in so far as it related to whether or not "every reasonable avenue to continue employment" had been explored. Mr Ferguson told us in evidence he did not have sufficient information in front of him to have done that.

288. If so, did any or all of these PCPs put the claimant at a substantial disadvantage in comparison with persons who did not have her disability ? Convening the MIH when the triggering criteria (a recommendation that she was unfit to continue in employment either at all or for an unspecified period) had not been met put the claimant at a substantial disadvantage in comparison with persons who did not have her disability. The substantial disadvantage was a greater likelihood of dismissal.

289. Failing to postpone put her at a substantial disadvantage because she was in an ambulance and due to her disability unable to attend and represent herself that day. Someone with no material difference in circumstance in relation to the claimant save for her disability would not have been in the ambulance and would have been able to attend and represent themselves. The substantial disadvantage was a greater likelihood of dismissal.

290. Failing to allow her sister to represent her put the claimant at a substantial disadvantage as there was no one at the hearing to repeat her request for

postponement, to challenge the management case, or even to address the issue of proper note taking at the hearing. Someone who did not have a disability would have been able to attend themselves and not needed representation. The substantial disadvantage was a greater likelihood of dismissal.

291. Failing to explore every reasonable avenue to continue employment put the claimant at the substantial disadvantage of a greater likelihood of dismissal.

292. Did the respondent fail to take such steps as would have been reasonable in all circumstances avoid the disadvantage specifically

292.1 allowing the claimant to be represented by a member of the family ? The respondent failed allow the claimant to be represented by her sister. It could have done this within the provision for exceptional circumstances at paragraph 3.13 of the AMP. The failure to do so amounts to a failure to take a reasonable step to avoid the substantial disadvantage to the claimant. Her sister would have been able to repeat *to the panel* (and not just Mr Maguire and Ms Barker) that the claimant had wanted a postponement and the panel may then have decided to adjourn avoiding the dismissal at that time. Ms Horton would have been able to tell the panel that the case she had in the documentation before her, and the questions the claimant had prepared to ask the witnesses were not the comprehensive statement of the claimant's case. Again, this may have led to adjournment and avoided dismissal at that time. Ms Horton would have been able to focus the panel on (i) the inaccuracies in the management statement of case around impact of absence on pupil performance and insurance provision (ii) the disabled status of the claimant and the need for the panel to read Dr King's advice more broadly, to look at Dr Ritter's advice and to apply the Equality Act definition for themselves and might have persuaded the panel not to proceed to dismissal on those arguments. Ms Horton would have been able to point out that there was no notetaker for the claimant, to address the issue of the need for notes of the hearing and for their content to be agreed. The two other panel members, irrespective of the line taken by Mr Maguire, might have been persuaded by Ms Horton, to holdoff dismissing the claimant if Ms Horton had been allowed to represent her position to the panel.

292.2 allowing the claimant the opportunity to challenge any alleged inaccuracies or unfairness in the information provided to the medical incapacity hearing ? The respondent, in its application of the AMP and refusal to postpone, denied the claimant the chance to challenge the case against her. She was denied a fair hearing. It would have been a reasonable step to postpone until the claimant could represent herself. It was not a reasonable step to think that the documents left by Ms Horton were sufficient when Mr Maguire was aware that there was more the claimant and in the alternative her sister wanted to say.

292.3 allowing the claimant a longer period of time to await the outcome of the medical investigations and treatment before reaching the decision to terminate her contract ? The claimant specifically requested more time in her statement, before the panel in writing, to the MIH. In failing to wait beyond the 5 June appointment and review the position then the

respondent failed to take reasonable steps to avoid the substantial disadvantage to the claimant in the application of the AMP.

293. If not, what steps would have been reasonable in the circumstances? Having regard to the factors set out in the ECHR Code of Practice on Employment [2011] we find that a reasonable thing for the respondent to have done would have been to adjourn the hearing to allow the claimant time to recover from her acute illness on 20 May 2019 and be able to represent herself. If it had not done that then it would have been reasonable to allow Ms Horton to represent the claimant but once it became aware of the claimant's arguments on disabled stats which would have been put by Ms Horton it would have been reasonable then to adjourn and consider further medical or OH evidence. It would have been reasonable to delay a reconvened hearing until after the 5 June 2019 and to ensure that the claimant or her representative had a full opportunity to challenge the management statement of case both by in person questioning and submissions. We find this because taking those steps would have prevented the substantial disadvantage to the claimant. They were practicable steps which would have caused minimal disruption (a reconvened hearing, possibly with a different panel) when balanced against the significant harm of the loss of employment. The first respondent had the support of the second respondent and access to HR advice.

294. Did the school know or should it reasonably have known the failure to take such steps would place the claimant has a substantial disadvantage? We conclude the respondent knew that this would disadvantage the claimant. The respondent chose to proceed (putting the claimant at a substantial disadvantage) so as to further the exit agenda of Ms Shelford (which influenced the decision making of Mr Maguire). The respondent felt itself to be under time pressure because of its partial and limited reading of Dr King's report. It thought it had to move quickly because the claimant might soon become disabled (in fact she already was) and have the protection of the Equality Act (she already did). It also felt time pressured because Mr Maguire knew that it would be difficult to get MB to sit on a reconvened panel and that if he had to get someone else to sit a first instance MIH that would reduce the pool of governors available for appeal.

295. The List of Issues did not require us to address the allegation that was put in cross examination and in closing submission by Mr Greatley-Hirsch that the respondent should have been consulting the claimant about reasonable adjustments at the welfare meetings and during her absence generally, notwithstanding the fit note saying she was not fit for work. This was clearly a contentious issue and given that both Ms Shelford and Mr Maguire were challenged about it we comment that it would have been our view, had this appeared on the List of Issues, that a fit note does not extinguish the duty imposed by the Equality Act to consider reasonable adjustments from the point at which the PCP is applied to the disabled claimant. There would be a danger of an impasse being reached: *I can't come back to work till you adjust / we won't discuss adjustment till you tell us a date for return / it depends what I might be returning to (in hours and duties) as to when I could return / we won't discuss what you might return to until you tell us when,* which would thwart the aims of the Equality Act and the AMP with its emphasis on every reasonable avenue for continuing in work being explored.

296. We also note that there were submissions and law from Mr Greatley-Hirsch about disregarding periods of sickness absence related to disability in triggering provisions of attendance management policies which did not form part of the List of Issues. We have not addressed those issues as they were not put to the witnesses in evidence.

Conclusion

297. The claimant's claims succeed.

Remedy

298. Under Rule 29 Employment Tribunal Rules of Procedure Regulations 2013 Employment Judge Aspinall ORDERS the parties to write to the Tribunal within 14 days of the date of promulgation of this judgment indicating their estimated length of hearing, non available dates for a remedy hearing between June 2021 and March 2022 and setting out proposed case management orders, which they have agreed between themselves to prepare for that hearing.

Employment Judge Aspinall

Date: 19 April 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
20 April 2021

FOR THE TRIBUNAL OFFICE