EMPLOYMENT TRIBUNALS

Claimant: Mrs C Willisch

Respondent: Upton Hall School FCJ

Heard at: Liverpool

On: 18, 19, 20, 21, 22 and 25 January 2021 and 22, 23, 24, 25 and 26 March 2021, and in the absence of the parties on 26 January 2021 and 23 April 2021

Before: Employment Judge Horne
Sitting with members: Mrs A Ramsden
Mr W K Partington

Representatives
For the claimant: Ms C Casserley, counsel
For the respondent: Mrs K Skeaping, solicitor

RESERVED JUDGMENT

SUMMARY

The claimant has **succeeded** in **two** of her complaints that the respondent failed to make adjustments.

The claimant has **failed** in relation to the rest of her claim.

This summary is intended to help readers to understand the judgment quickly, but has no other purpose. It is the judgment itself, and not this summary, that binds the parties.

JUDGMENT

1. The tribunal has jurisdiction to consider the claimant's complaint that the respondent failed to make adjustments by failing to remove the claimant's responsibility for EPQ students within a reasonable time. Although the claim

was presented after the expiry of the statutory time limit for that complaint, it is just and equitable for the time limit to be extended.

2. The respondent discriminated against the claimant by failing to make that adjustment.
3. The tribunal has jurisdiction to consider the claimant's complaint that the respondent failed to make adjustments when requiring the claimant to attend an Absence Review Meeting by letters dated 30 January 2019 and 28 March 2019, because both failures were part of an act extending over a period which ended after 18 March 2019. In any case, it is just and equitable for the time limit to be extended from 30 January 2019 to the date of presentation.
4. The respondent discriminated against the claimant by failing to take the following steps by way of reasonable adjustment:
   (a) Expressly offering the claimant the opportunity to make written representations as an alternative to attending the meeting;
   (b) Expressly offering the claimant the opportunity to send a representative to the meeting in her place; and
   (c) Pro-actively suggesting these steps without waiting for the claimant to suggest them.
5. The tribunal did not determine whether or not the respondent breached the duty to make adjustments by failing to provide additional administrative support. This is because the tribunal has no jurisdiction to consider the complaint. The claim was presented after the expiry of the statutory time limit for those complaints and it is not just and equitable for the time limit to be extended.
6. In all other alleged respects, the respondent did not breach the duty to make adjustments. The tribunal did not consider it necessary to determine whether or not it had jurisdiction to consider these complaints.
7. In dismissing the claimant, the respondent did not discriminate against her arising from her disability.

REASONS

Preliminary

1. This judgment follows a long hearing that took place partly using a remote video platform. Both parties consented to the format of the hearing.

Introduction

2. The respondent is an outstandingly good school. The claimant is a brilliant Spanish teacher. She has been disabled for approximately 15 years with depression and anxiety. She was employed by the respondent from 1 January 2008 until 31 December 2019. For most of that time, her disability did not cause a problem. But she gradually found herself overwhelmed by the perceived pressure of work and certain situations of conflict. She went on long term sick leave at the beginning of June 2018. Eventually she was dismissed on capability grounds.

The two claims

3. By a claim form presented on 18 July 2019, the claimant raised numerous complaints of discriminatory failure to make adjustments, within the meaning of sections 20 and 21 of the Equality Act 2010 ("EqA") and in contravention of section 39(2)(d) of EqA.

4. On 26 February 2020, the claimant presented a second claim form raising a single complaint of discriminatory dismissal arising from disability, contrary to section 39(2)(c) of EqA and as defined in section 15 of EqA.

The issues

The list of issues and subsequent clarification

5. The parties cooperated well to agree a comprehensive list of issues. Some modification to the list became necessary as the hearing progressed. In particular:

   5.1. The respondent's written response to the claim disputed that the respondent knew that the claimant was disabled. That issue seemed to have disappeared by the start of the hearing. Whilst the list of issues raised the question of whether or not the respondent knew of alleged *disadvantages* (which were said to trigger the duty to make adjustments), the list did not include any issue about the respondent's knowledge of her disability itself. In cross-examination of the claimant, and during the respondent's closing submissions, Mrs Skeaping repeatedly made the point on the respondent's behalf that the respondent had no reason to know prior to the claimant's sickness absence in 2018 that the claimant's mental health problems had come back. We discussed how this factual contention sat within the list of issues. The discussion was resolved satisfactorily. The respondent did not seek to argue that it did not know that the claimant met the *legal* definition of disability. For her part, the claimant accepted that it was still open to the respondent to raise the factual question of when the respondent first became aware that her illness was symptomatic, as this would be relevant to knowledge of any disadvantage.

   5.2. Whilst giving oral evidence, the claimant mentioned a number of steps that, in her opinion, the respondent should have taken as part of its duty to make adjustments. This part of her evidence was formalised into a list of additional of steps, which, in turn, found its way into a revised list of issues. The respondent did not object to this course of action.

   5.3. In the original list of issues, the claimant initially alleged that she was disadvantaged by a provision, criterion or practice (PCP) concerning the relative protected non-contact time allocated to Heads of Faculty and Heads of Year. By the time the parties had completed their closing arguments, the claimant abandoned that contention.

   5.4. One of the alleged PCPs (referred to below as PCP11) was initially phrased, "Following the absence management process, including a requirement to deal with the respondent in writing." The claimant's use of the word, "including" begged the question of whether or not the claimant might subsequently allege that some other aspect of the absence management process might also put the claimant at a substantial disadvantage. No doubt anticipating this difficulty, Ms Casserley's written closing submissions sought to recast PCP11 as "pcp of

not following an absence management process which enabled the Claimant to engage in a way she was able to with those making decisions". We had to decide whether or not to adopt the claimant's re-formulation of the PCP.

5.5. The parties agreed that it was necessary for the tribunal to consider the statutory time limit for some of the alleged failures to make adjustments. In the original list of issues and in their very helpful written submissions, the parties divided the failures into two categories: those occurring before 3 June 2018 and those occurring afterwards. Time limit arguments were concentrated on the earlier period. During the parties' oral submissions, the employment judge suggested that the legally significant date was actually 18 March 2019. For any contravention of EqA done on that date, the last day for presenting the claim (subject to any extension of time for early conciliation) was 17 June 2019. The claimant had notified ACAS of her proposed claim on 15 May 2019 and obtained her certificate on 14 June 2019. During the intervening period, the statutory limitation clock was paused, such that thirty days would need to be added to the end of the limitation period. The last day for presenting the claim would, accordingly, be 18 July 2019, the day on which the first claim was in fact presented. The parties agreed with this analysis. Mrs Skeaping stood by her factual submissions that 3 June 2018 was an important date for time limit purposes. Her case was that the commencement of the claimant's long-term sick leave effectively interrupted what might otherwise have been an act extending over a period.

Our revised list of issues

6. Having clarified the issues in the way we have discussed, we thought it helpful to recast the list of issues so as to reflect what was still in dispute.

Disability

7. It was common ground that the claimant was disabled at all relevant times with anxiety and depression.

PCPs

8. The claimant alleged that the duty to make adjustments came about due to the disadvantage caused by 11 provisions, criteria or practices (PCPs). Of these, 8 were alleged to have applied whilst the claimant was in work and the last three were said to applied when she was on long-term sick leave.

9. We had to decide whether or not the PCPs existed.

10. The alleged PCPs were:

The in-work PCPs

- *PCP1* - To work to a timetable with limited time for Heads of Year to perform tasks in administration.
- *PCP2* - To work to a timetable which did not provide pro rata equivalent protected time for part-time staff as for full-time staff.
- *PCP3* - For Heads of Year to be on call to pupils at breaks, lunch and before and after school

- *PCP4* - For Heads of Year to deal with complaints of teachers about disruptive pupils;
- *PCP5* - For Heads of Year to deal with parent and teacher meetings about complaints and disruptive pupils
- *PCP6* - For Heads of Year to carry out what had been the learning mentor's role
- *PCP7* - To produce weekly meeting notes, attendance reports, provision maps and logs; and
- *PCP8* - For those with Year 12 study periods to take on EPQ (Extended Project Qualification) students.

The absence PCPs

- *PCP9* - That the employee maintain a certain level of attendance at work in order to avoid the risk of disciplinary or other sanctions;
- *PCP10* - To attend absence review meetings under the absence management policy; and
- *PCP11* - Following the absence management process, including a requirement to deal with the respondent in writing OR "not following an absence management process which enabled the Claimant to engage in a way she was able to with those making decisions".

Disadvantage

11. The next issue for the tribunal was whether or not the PCPs had put the claimant at a substantial disadvantage when compared to persons who were not disabled.

12. The disadvantages alleged to have been caused by the in-work PCPs (1-8) were:

12.1. as a result of her disability the high and increased workload created extreme levels of anxiety, fatigue, distress and fear with the effect of causing excessive stress, leading to a breakdown which prevented her from doing her job and making her liable for dismissal;

12.2. as a result of her disability and increased anxiety the Claimant had difficulty in fulfilling her contractual role;

12.3. as a result of her disability she was placed at a significantly increased risk of performance concerns, emotional dysregulation in the workplace and her health and wellbeing were put at unnecessary risk;

12.4. as a result of her disability she was caused significant distress, suffered a detrimental impact on her health causing her to be absent and subjected to absence management;

12.5. as a result of her disability the Claimant was at increased risk of losing her Head of Year role due to an inability to cope with the criterion (i.e. her role);

13. The disadvantages said to have been caused by the absence PCPs (9-11) were:

13.1. as a result of her disability the Claimant was not able to attend Absence Review Meetings and was caused significant distress and her wellbeing put at unnecessary risk;

13.2. as a result of her disability the Claimant was caused significant distress by the repeated requests to attend meetings against Occupational Health advice; this aggravated her anxiety potentially impeding a return to work; and

13.3. written correspondence caused the claimant increased anxiety because of her disability, impeding her recovery and thus any ultimate return to work.

14. The tribunal had to decide, in the case of each PCP,

14.1. whether or not it put the claimant to any of the relevant disadvantages; and

14.2. if it did, whether or not that disadvantage was more than minor or trivial.

15. In addition, PCP11 required us to decide whether or not to adopt the claimant's reformulation of the PCP.

Knowledge

16. For each substantial disadvantage, the next issues were:

16.1. whether or not the respondent could prove that it did not know of the disadvantage; and

16.2. whether or not the respondent could prove that it could not reasonably have been expected to know of the disadvantage.

Adjustments

17. Finally, on the merits of the adjustments complaint, the tribunal had to consider the steps which the claimant said the respondent should have taken to avoid the alleged disadvantages. Those steps were:

In respect of the in-work PCPs 1-8

- *Step 1* - To provide the Claimant with additional protected non-teaching time, in particular
  - (a) providing her with 3 periods of PHSE and not 4;
  - (b) ensuring that the Supervised Study period be converted into non-contact protected time (related to EPQ student above); and
  - (c) removing both EPQ students;
- *Step 2* - To provide the Claimant with some additional administration support;
- *Step 3* - To formally ensure that the Claimant's Head of Year role was covered effectively on her day off;
- *Step 4* - To provide the Claimant with support in dealing with difficult parent and pupil meetings;

In respect of the absence PCPs 9-11

- *Step 5* - Not to contact the Claimant to arrange absence management meetings during the period that Occupational Health advised she was not fit to attend meetings;
- *Step 6* - Deal with absence management without the need for meetings with information being provided in writing;
- *Step 7* - Acknowledge that the Claimant was struggling and to put measures in place as set out above to ensure her mental health was not affected;
- *Step 8* - not contact the claimant directly e.g. for example, passing message through Lola in October 2018;
- *Step 9* - not link co-operation with/engagement in occupational health and sickness absence to pay in written correspondence;
- *Step 10* – Make clear what the occupational health procedure was;
- *Step 11* – Make clear what adjustments were being provided on behalf of the claimant;
- *Step 12* – Not make appointments during school holidays;
- *Step 13* - Not send letters at weekend and before school holidays when getting advice harder for the Claimant and the Claimant was caused further distress when with her daughter; and
- *Step 14* - alter the letters sent so that the Claimant did not have to request adjustments (such as her mother attend meetings on her behalf).

18. Our task was to decide the following issues in relation to each step, with the onus being on the respondent:

    18.1. Was it reasonable for the respondent to have to take that step?

    18.2. Was that step in fact taken?

Time limit

19. In respect of any failure to make adjustments occurring before 18 March 2019, we were required, additionally, to consider the following questions in relation to the tribunal's jurisdiction:

    19.1. Was the failure part of an act extending over a period which ended on or after 18 March 2019?

    19.2. If not, would it be just and equitable to extend the time limit?

Discrimination arising from disability

20. The only other complaint was discriminatory dismissal arising from disability. Here, the issues were much more straightforward. It was not in dispute that the respondent had treated the claimant unfavourably by dismissing her. The reason for dismissal was the claimant's long-term sickness absence, which had arisen in consequence of her disability. This left two decisions for the tribunal to have to make:

20.1. The respondent argued that dismissing the claimant was a means of running the school efficiently, reducing costs and providing a good standard of teaching and pastoral care. The claimant did not dispute that these aims were legitimate, but required the respondent to prove that dismissing the claimant was a means of achieving them.

20.2. The tribunal had to decide whether the dismissal was proportionate.

Evidence

Oral evidence

21. The duration of all witnesses' evidence was prolonged by persistent connection problems and sound feedback. That said, we did not think it particularly diminished the quality of their evidence. We were able to understand what each witness had to say in response to questions.

22. The claimant gave oral evidence on her own behalf from inside the tribunal room. She frequently became distressed whilst answering questions, which caused the tribunal to have to take many unscheduled breaks in addition to the three planned breaks we took during the course of each day. Matters were not helped by the number of questions about events pre-dating the alleged period of discrimination. In fact, it was not until the third day of the claimant's evidence that Mrs Skeaping started asking questions about the period of time during which the respondent had allegedly discriminated against the claimant. Our general impression of the claimant's evidence was that she genuinely and, at times, passionately, believed what she was telling us, but her account was not always reliable. She was trying to recall events that had taken place some three years ago, through a lens of what she candidly accepted was an acute mental health crisis. This made it difficult for us to be able to rely on generalisations, such as the amount of work or the amount of support she had to do it.

23. Mrs Sanderson's oral evidence mainly concerned a time when her overwhelming priority was her daughter's mental health, not to mention her safety. She was able to give us what we considered to be a reliable account of the decline in the claimant's health and the particular triggers that had made it worse for her, and her own interactions with the school whilst the claimant was on sick leave.

24. For the respondent, Mrs Milward and Mrs Crone both gave, in our view, reliable evidence of what had happened on particular occasions.

25. Mrs Griffiths' witness statement was sent by the respondent to the claimant very shortly before the start of the hearing. Initially there was a dispute about whether or not we should allow Mrs Griffiths to give evidence. On the 6th day of the hearing, the claimant withdrew her objection. Mrs Griffiths' evidence seemed to us to be reliable when it concerned specific incidents. Matters of impression, such as how much support the claimant had, were harder to assess.

26. Mrs Young was prone to speechmaking whilst answering questions. This is perhaps unsurprising, given the criticisms made of her by the claimant, but it made us wary of the self-serving parts of her evidence, unless they were supported by contemporaneous documents.

27. We found Mrs Gaunt's evidence, in general, to be measured and reliable.

Evidence from witnesses who did not attend

28. The claimant sought to rely on a number of written accounts from Ms Lola Cano. We admitted them into evidence, but, where Ms Cano's version clashed with that of live witnesses, we found ourselves unable to give her version any real weight.

29. The respondent produced a statement from Ms Cath Howell, which we also read. We refused the respondent's request to call Ms Howell to give oral evidence on certain topics. The employment judge explained the reasons for this decision at the time. Written reasons will not be provided unless a party makes a request within 14 days of the date when this judgment is sent to the parties. The tribunal's ruling left it open to the respondent to call Ms Howell on one topic, but the respondent subsequently indicated that it did not intend to call her for that purpose.

Documents

30. We were given a bundle which eventually ran to 1,044 pages. We did not read every page. Instead, we concentrated on those documents to which the parties had drawn our attention either in witness statements or orally during the course of the hearing.

31. Some additional documents were not given page numbers. The parties e-mailed us an equal opportunities policy and sickness absence template letters and some Microsoft Word file creation properties, all of which we took into account.

Facts

<u>The school</u>

32. The respondent is an Academy Trust, responsible for a Catholic Girls' Grammar School in Upton, Wirral. The school is a selective secondary school for girls from Key Stage 3 up to and including A-level. It has approximately 150 students in each year. Its Head Teacher is Mrs Andrea Gaunt, who started in post on the retirement of Mrs Patricia Young in July 2018. It has a reputation for academic excellence.

33. The Head Teacher was supported by a Senior Leadership Team (SLT), which included two Deputy Head Teachers. One of these, from 2015, was Mr Michael Quinn, the Deputy Head (Pastoral). The other, from 2013, was Andrea Gaunt, the Deputy Head for Teaching and Learning. The SLT also included the Head of Pupil Progress, Ms Nicola Griffiths.

34. Reporting to the Heads of Faculty were one or more Heads of Department, who had line management responsibility for the Subject Teachers.

35. Each Head of Year had a "SLT link", who took responsibility for supervising the pastoral element of the Head of Year role.

36. Head of Year responsibilities were generally allocated so that each year had the same Head of Year as it progressed through the school. This meant that the claimant was responsible for the same group of people in successive years.

<u>The claimant starts work</u>

37. The claimant is a secondary school teacher, specialising in Spanish. Before starting work for the respondent, the claimant taught at Ridgway High School in Birkenhead. That school was quite different from the respondent. There was no

sixth form, its students were mixed girls and boys, they were not selected by academic ability, and came from an area of Wirral with higher prevalence of social problems than Upton. Understandably, there were differences between the two schools, not only in academic attainment, but also in the standard of the students' behaviour. The claimant had to deal with some students who were not only disruptive but also, at times, aggressive. She felt she did not get the level of support she needed to deal with them. On more than one occasion she was assaulted. The assaults caused a serious deterioration in her mental health. She was diagnosed with depression in 2006 and started a long period of sick leave.

38. During the claimant's sick leave at Ridgway, Mrs Young approached the claimant and encouraged her to apply to the respondent for a maternity leave cover post. The claimant applied, stating in her application form that she had been "off work sick for some time due to unpleasant incidents … I am now completely recovered." She ticked a box to indicate that she was not disabled. She was successful at interview and started work on 1 January 2008.

39. The claimant reported to the Head of Spanish, Ms Lola Cano.

40. The claimant impressed Mrs Young during her maternity leave cover and continued in a permanent role. Throughout her employment she taught to a high standard and her students achieved outstanding grades.

Promotion to Head of Year

41. In 2009, the claimant took on the additional responsibility of Head of Year. With the increased responsibility came an increase in pay. She carried on teaching Spanish and carried on reporting to Ms Cano for the subject-teaching part of her role.

42. The claimant's SLT link in up to July 2016 was Mr Quinn. For the year 2016-2017, when the claimant's year group had progressed to Year 11, the SLT link was Mrs Young herself. For the year 2017-2018 the claimant took on responsibility for a new year group at Year 8 and her SLT link reverted to Mr Quinn.

The claimant goes part-time

43. In 2011, the claimant gave birth to a baby daughter. Following her maternity leave she returned to work on a 0.8 fractional working pattern. In practice, this meant that she worked four days per week during term-time, taking every Tuesday off work.

Working time

44. Since much of this claim concerns the pressure of work, it is necessary to understand something about a teacher's working hours.

45. A teacher's contractual working time is governed by the School Teachers' Pay and Conditions Document (STPCD). According to STPCD, a teacher's total working hours are divided into directed time and non-directed time.

46. Non-directed time is defined in this way: "In addition to the hours a teacher is required to be available to work [that is, the directed time], a teacher must also work such reasonable hours as may be necessary to enable the effective discharge of their duties". The employer is prohibited from telling a teacher when those hours should be worked. It is up to the teacher to decide how much extra

time to spend on that work, and when to do it. Some teachers work through their lunch break; others work late in the evenings once their children have gone to bed; many do both. What matters to the school is that the work gets done. Teachers, in general, and the claimant in particular, have a professional work ethic, which means that they are personally motivated to spend as much time as it takes to complete their work. As Mrs Young put it, teaching is not a nine-to-five job.

47. At the times with which this claim is concerned, the school timetable was divided into 60 teaching periods per fortnight. Each period lasted one hour.

48. STPCD entitles every teacher to a ringfenced proportion of directed time to be devoted to planning, preparation and assessment (PPA). The agreed proportion is 10%. For a full-time teacher, this meant 6 periods.

49. Every teacher was also allocated non-contact time. At the respondent's school, the allocation of non-contact time exceeded the nationally-agreed minimum. During non-contact time, the teacher was required to do what the Head Teacher directed them to do. This could include covering other teachers' lessons if they were absent. Non-contact time was generally seen as easier than allocated subject lesson time. If there were no lessons to cover, the teacher could use the time for preparation and planning. If they did have to cover an absent teacher's lesson, they would generally expect the absent teacher to have planned it.

50. All teachers were required to be in school from 8.30am. The day would usually start with a morning briefing meeting. Form teachers would then take registration with their forms before the first period started at 8.55am. Heads of Year did not have responsibility for form lessons, so they had a brief window of time in which to get on with their own work.

51. Over the course of the fortnight, a full-time Head of Year would teach 44 periods of their academic subject. In addition, they had the following periods allocated to them:

    51.1. There were 4 periods in which they attended assembly or form time. Somewhat misleadingly, one of the respondent's policy documents described these periods as, "PHSE/Assembly/Tutorial." PHSE stands for "Personal, Social, Health and Economic" education, which is part of the school curriculum. In fact, Heads of Year did not teach PHSE. Whilst the students were learning PSHE in their forms, the Heads of Year could get on with whatever work they wanted, but they often used this period as an opportunity to visit the students in their forms because they knew where they would be at that time. Likewise, Heads of Year did not take assembly, but tended to go to assembly with their year group as a way of being visible to them, being able to speak to the students if needed, and keeping abreast of the issues that affected the year group. Assembly was allocated to half the first period, which left some time over for the Head of Year to get on with their other work, but assembly would sometimes overrun.

    51.2. The full-time Heads of Year had three non-contact periods.

    51.3. A further three periods were given to "leadership and management". Two of those leadership and management periods were generally used for the weekly meeting with the SLT link.

52. The running total so far is 54 periods. When the 6 PPA periods were added on, all 60 periods of the school timetable were accounted for.

53. On Wednesday mornings the students went for a short service in the School Chapel. Each year group would lead a service once every half-term. Otherwise, the Heads of Year were not involved. This meant that they had about 25 minutes for their own work on a Wednesday morning prior to the first period.

54. The claimant's directed time was 48 periods to reflect her 80% working pattern. Those 48 hours were broken down as follows:

    54.1. The claimant taught 35 subject lessons per fortnight.

    54.2. She attended two assemblies per fortnight, each on a Monday morning. Being at assembly took up most, but not all, of the time allocated to that period.

    54.3. She had two further non-teaching periods on a Friday morning where she generally visited the students in their form lesson.

    54.4. In addition, the claimant had two non-contact periods per fortnight.

    54.5. She had two Head of Year periods per fortnight during which she met with her SLT link. The length of these meeting was determined in part by how much the claimant wanted to discuss. They often did not take the full 60 minutes of the period, leaving the claimant with a short time in which to get on with other tasks

    54.6. Strictly speaking, the claimant's contractual PPA time was 4.8 periods, being 10% of her 48 hours' directed time. Because it was impracticable to divide up parts of a teaching period, the claimant's guaranteed PPA time was rounded up to 5 periods.

55. Because the claimant's day off was a Tuesday, she had the full benefit of the 25 minutes' additional time on a Wednesday, despite working part-time hours.

56. The amount of fortnightly directed time where the claimant was not specifically timetabled to be in a lesson, an assembly or a meeting was therefore:

PPA	5 hours
Non-contact	2 hours
Wednesday morning	25 minutes
Spare time outside SLT link meeting	Short time
Time when not at students' form lesson	Variable, but less than two hours

57. Most of the claimant's 35 subject lessons would be Spanish. The 35 lessons also included one or more periods of Supervised Study for sixth-form students. Supervised Study periods were generally seen as a good thing for a teacher to have, because they involved no planning, a more mature year group, and little or

no need for active intervention in the lessons. Teachers could use that time to get on with their own work.

Head of Year responsibilities

58. Amongst the responsibilities of a Head of Year were:

58.1. Addressing any incidents of challenging behaviour or welfare concerns amongst students in their year group;

58.2. Preparing written logs of any such incidents;

58.3. Preparing attendance reports based on data supplied by the school's computer system;

58.4. Identifying students with complex or special needs, with the assistance of data on students' subject performance;

58.5. Liaising with the SENCO and colleagues who could provide intervention;

58.6. Telephoning parents of students whose attendance or behaviour or welfare was a concern; and

58.7. Occasionally (less frequently than once per month) meeting concerned parents to discuss their complaints or their child's behaviour.

59. From an early stage in the claimant's employment, Mrs Young recognised that the claimant found meetings with parents difficult, especially if the parent was critical about the claimant herself. The claimant was always accompanied at these meetings by a member of the senior leadership team. She was never refused any particular kind of support that she asked for. Sometimes she would send an e-mail to her proposed SLT companion to ensure that they did not miss the meeting.

60. Heads of Year were rostered to be on-call in the Pastoral Office once per week. Students would go to the Pastoral Office to request permission slips, for example, to leave school for a medical appointment. On their rostered day, the Head of Year was on-call for about 10 minutes at the beginning and end of each day and for a further 10 minutes during the lunch breaks.

61. When not on the rota, Heads of Year were expected to be generally visible and approachable. Students needed to have an opportunity to speak to their Head of Year outside of their own lesson time. It was up to the Heads of Year to decide when to make themselves available. Many Heads of Year would stay in their classrooms during break or lunch, so students would know where to find them. Others would prefer to be around at the end of the school day. The claimant tended to be in her room at lunchtime, but was not required to work at that time.

62. Subject to the modest constraints of the rota, Heads of Year had the freedom to leave the school site during their lunch breaks if they chose to do so. We did not accept the claimant's argument that the Head Teacher's permission was required. Her argument was based on the experience of one teacher who reached an agreement with Mrs Young that she would take her lunch breaks away from the school. This was not because that teacher needed permission to leave. It was because the teacher wanted or needed to smoke cigarettes and Mrs Young did not want her to be seen smoking near the school.

Cover for the claimant's day off

63. If any incident arose on a Tuesday, when the claimant was not at work, it would generally be dealt with by another member of staff on the spot and there would be no need to involve the claimant. Sometimes, if the circumstances were more complicated, the member of staff concerned would e-mail the claimant to suggest some follow-up, such as a telephone call. The claimant would then be expected to deal with it on her return to work. If the Tuesday incident was more serious still, for example if it was linked to a student's wellbeing, it would be escalated straight to Mrs Griffiths and the claimant would have little to do on her return.

64. One of the factual questions for us was the extent, if any, to which the follow-up from Tuesday incidents added to the claimant's overall workload. There seemed to us to be very little empirical evidence to enable us to measure that additional work. There was considerable evidence to show that the claimant sent work e-mails on her day off. That was unsurprising. Teachers routinely work outside their directed time. The examples of work the claimant did on a Tuesday told us nothing about what work had been *generated* on a Tuesday. During the claimant's closing submissions, the employment judge asked Ms Casserley whether or not there was any evidence of work that the claimant had had to do in response to events that had occurred on her day off. Ms Casserley was not able to point to any such evidence.

Administrative tasks

65. One of the terms of STPCD was that teachers should not be required to perform purely administrative tasks. According to STPCD, tasks were "administrative" if they required no element of a teacher's judgment.

66. The School Secretary, Mrs May, carried out administrative tasks for all Heads of Year including the claimant. These included:

    66.1. Creating pupil passes including toilet passes and time out cards;

    66.2. Sending important e mails regarding pupil matters on behalf of all Heads of Year and all form tutors;

    66.3. Creating Round Robins for all Heads of Year and Leadership;

    66.4. Emailing pupils provision maps to the appropriate teachers and sending copies home to parents;

    66.5. Sending Progress Watch letters home to parents;

    66.6. Dealing with queries over the phone for any member of staff;

    66.7. Forwarding e mails that went to the general school e mail addresses to the relevant member of staff;

    66.8. Sending letters about uniform and detentions.

67. There was a clash of oral evidence about how much of this support Mrs May provided, and whether Mrs May provided any more of this kind of support for the claimant than for other Heads of Year. The empirical evidence did not particularly help us to resolve that clash: the claimant compared her outgoing e-mails to Mrs May to the e-mails forwarded by Mrs May from other Heads of Years. This did not suggest that the claimant made particularly frequent written demands on Mrs May's time, but it did not suggest that any other individual Head of Year did so either.

More importantly, it was common ground that e-mails were only a part of the support that Mrs May provided. We thought it likely that Mrs May made more telephone calls to parents for the claimant than for other Heads of Year, because this was an aspect of the role that the claimant did not enjoy doing. Other than that, it was hard for us to make findings. Our task was made more difficult, in our opinion, by the fact that we were having to rely on generalised evidence of relatively unremarkable tasks that were being performed over three years ago.

Learning mentors

68. The respondent's catchment includes some areas of social deprivation, with a significant number of students from those areas being entitled to free school meals. One government initiative to combat these disadvantages was the provision of learning mentors. The responsibilities of a learning mentor included organising breakfast clubs and providing study spaces for students whose home circumstances were too chaotic for them to be able to do homework.

69. The school had two learning mentors. They were employed by the respondent, but externally funded. In about 2012, the funding was withdrawn. This left the school with a problem. They had two valuable members of staff, whom they did not want to lose, but no budget from which to pay them. As a temporary solution, they were given Teaching Assistant roles whilst they looked for another job. One of them left to work in a different school. The other, whilst still employed as a Teaching Assistant, developed a specialism in working with children with complex special needs. Colleagues were in the habit of calling her the "Learning Mentor" and the name stuck. In 2014 she, too, left the school. Day-to-day special needs intervention was picked up by an English teacher, Ms Burnett. Her time was funded by savings from the former Teaching Assistants' salaries.

70. This transition did not substantially increase the workload of the Heads of Year. It did not result in Heads of Year having to provide special needs intervention directly with students. All it meant was that the Head of Year had a different point of contact when liaising with those responsible for special needs provision.

Claimant's experience prior to 2014

71. Until about 2014 the claimant was able to manage her additional Head of Year responsibility without any significant problems. As many teachers do, she took her work home with her, spent the early evening with her daughter, and caught up on her work once her daughter had gone to bed. She found the work rewarding and her mental health remained good.

2014 to 2017

72. In June 2014, the claimant asked Mrs Young if she could give up her Head of Year responsibilities and revert to being purely a subject teacher. There is a dispute about how the conversation went. We preferred Mrs Young's account, which is more consistent with the contemporaneous documents and with Mrs Young's undisputed comments on the same subject a year later. Our finding is that the claimant told Mrs Young that she was seeking a better work-life balance. Mrs Young informed the claimant that changes to a teacher's role were a matter for the governors, so she would have to make a written request. She successfully

persuaded the claimant that she was valued as a Head of Year. The claimant later confirmed that she wished to carry on with her Head of Year responsibilities.

73. In September 2014, Mrs Young asked the claimant to attend a meeting with a parent of a former student, to whom we will refer as "CR". Initially Mrs Young envisaged that she herself would accompany the claimant, but, owing to a family tragedy, she was unable to do so and Mr Quinn accompanied the claimant instead. During the meeting, CR's mother talked about an occasion on which the claimant had allegedly shouted at her daughter many years ago; she relayed CR's view that the incident had harmed CR's mental health. The claimant was stung by the accusation and left the meeting.

74. The claimant had known in advance of the meeting that CR's mother would make this point. In her witness statement and in her oral evidence to us, the claimant denied having known of this prior to the September 2014 meeting, but a subsequently-disclosed document shows that this denial was incorrect: the claimant did know of CR's mother's accusation in advance of the meeting.

75. Following that meeting, the claimant started to experience some of the symptoms that had caused her to be unwell at Ridgway. The school had no reason to know that this was happening. She took no sick leave, she did not mention her mental health to anyone in a senior leadership position, and continued to work to her usual high standards.

76. In February 2015, the claimant was diagnosed with Generalised Anxiety Disorder (GAD). In June 2015 she started a course of Cognitive Behavioural Therapy. The therapy was effective. The claimant was able to manage her symptoms without the need for medication.

77. From time to time the claimant would confide health-related matters to Ms Cano. She regarded Ms Cano as a friend and a peer in the organisation. She did not expect Ms Cano to share any of what she told her, escalate it any further, or take any management action of any kind. Ms Cano did not do so.

78. In September 2015, the school received a complaint from the mother of a student known to us as "EM". The complaint arose from an arm gesture that EM had made, which the claimant interpreted, rightly or wrongly, as a Nazi salute. Based on her understanding of what had happened, the claimant had little choice but to challenge EM's behaviour. EM's mother complained that EM had been "distraught" and demanded a meeting with the claimant. Without waiting for an appointment, she telephoned to say that she was on her way to the school. Mr Quinn, who would have been the natural choice to accompany the claimant, was unavailable, so he arranged at short notice for the claimant to be accompanied instead by Mrs Griffiths. During the meeting, EM's mother was agitated and critical of the claimant. The claimant found the meeting particularly difficult and walked out before it was finished. Three days later, the claimant discussed what had happened with her therapist. Mrs Young later met with the parent, who apologised for the way in which she had spoken to the claimant.

79. The claimant went to see Mrs Young. She told her of various problems she had with difficult parents. Mrs Young asked her, as part of the conversation, whether she would like to give up her Head of Year responsibilities. The claimant declined.

80. There is a dispute about whether or not the claimant specifically told Mrs Young about her mental health condition. We think, on balance, that the claimant probably did not mention it at this time. We have found her evidence about two (admittedly peripheral) matters in 2014 to have been unreliable.

81. This was a different type of confrontational situation to that which had caused the claimant to become unwell at Ridgway. Instead of aggression from a student, the claimant was now on the receiving end of personal criticism from aggrieved parents. Nevertheless, the respondent could reasonably have been expected to make a connection between these meetings with parents and the claimant's previous history of depression and anxiety. This was the second time in two years when the claimant had walked out of a meeting because she could not cope with what a parent was saying. The claimant was clearly concerned enough to raise it with her Head Teacher. From that time onwards, the respondent should have known that the claimant found it significantly more difficult than others to cope with situations of confrontation with parents, and that that difficulty was in part due to her relatively fragile mental health.

82. At this stage, there was nothing to suggest that the claimant was having any difficulty with her workload or that the volume of work was having any effect on her health.

83. Following this meeting, the claimant continued to attend meetings with parents, some of whom could be challenging. When she did, there was always a member of the SLT present to accompany her. These were all meetings that the claimant arranged herself, and she knew in advance what the parent wanted to discuss.

84. By March 2016, the claimant's GP noted that her CBT had considerably helped. She was discharged from the CBT clinic. With the help of the CBT techniques she had learned, the claimant was able to manage her anxiety condition without medication.

85. In May 2017 a disagreement occurred between Mrs Gaunt and Ms Cano. The disputed topic was the allocation of A-level Spanish courses. Teaching A-level was seen as one of the more satisfying parts of the job, albeit that it could also be hard work when there were significant changes to the course content. Ms Cano submitted her proposals for the timetable for the next academic year. The proposal was that Ms Cano and the claimant should both teach Year 12 and Year 13, and that the third teacher in the department would wait a year before having two A-level year groups to teach. Mrs Gaunt suspected that Ms Cano might have allocated the A-level classes unfairly, giving the claimant preferential treatment. She and Ms Cano argued about it. Taking the evidence of the claimant and Mrs Gaunt about this incident together, we consider this to have been a two-sided argument with hostility from both sides. The claimant witnessed the altercation and felt powerless to escape because she would have had to walk past Mrs Gaunt. It affected Ms Cano enough for her to take a period of sick leave for two months. The claimant told her version of events to Ms Anne Rycroft, her trade union representative. She added that she was feeling "extremely anxious" and did not want to be alone in a room with Mrs Gaunt. Her anxiety at this time was about confrontation and not about workload.

86. During the academic year 2016-2017, the claimant was absent during term-time on 7 separate occasions, totalling about 22 days. One of these absences, which was for several days, was due to a medical condition unrelated to the claimant's mental health. Another was to care for her daughter. Other occasions were usually only for parts of the school day, and were for non-medical reasons such as attending her daughter's school play. The non-medical absences required Mrs Young's permission, which she gave without complaint. On 29 June 2017, when the claimant asked for time off to collect family from the airport, Mrs Young granted the request, but politely reminded the claimant of the number of absences she had had, and the need to keep an eye on her absences in future. The e-mail was perfectly appropriate, in our view, but it caused the claimant additional worry.

87. On 14 July 2017, the claimant emailed Mrs Gaunt to express a concern about the following year's timetable. The difficulty with the timetable, as she described it, was that particular lessons were scheduled for the afternoons, when students' ability to concentrate was generally at its lowest. She did not suggest that she would not be able to cope with the workload, or that she had insufficient non-teaching time, or that it would affect her health. We find this unsurprising. The claimant did not actually think that she was suffering from any stress-related illness at that time. In a subsequent occupational health consultation, the claimant said that she felt that she started suffering with the symptoms of stress-related illness at around January 2018.

<u>September 2017</u>

88. In September 2017 the claimant again approached Mrs Gaunt and asked if her timetable was incorrect. It was unusual for teachers to query their timetables at the start of the academic year – matters such as this were supposed to have been sorted out during the previous term. The particular part of the timetable that concerned the claimant was the Supervised Study period. In the previous academic year, the claimant had had two periods of Supervised Study; for the coming year, her Supervised Study periods had been reduced to one. Mrs Gaunt offered the claimant to replace that period with an additional period of non-contact time. The claimant said she would prefer the Supervised Study. Mrs Young told the claimant that she could use the Supervised Study period to do her Head of Year work. It was not a promise that she would not be given any additional responsibilities as part of her Head of Year role in general.

89. From September 2017, the claimant's SLT link was once again Mr Quinn. She resumed her weekly meetings with him to discuss Head of Year issues. She did not mention to Mr Quinn during these meetings that her health was suffering. She did, however, ask him for more support. On 4 September 2017 she asked Mr Quinn for administrative support in compiling Head of Year reports. She then e-mailed Mrs May to ask for attendance data to be provided to her in a format that could easily be inserted into her head of year report. Ms May replied that her understanding was that this was a job done by the Heads of Year. This was because Mr Quinn had not yet asked Mrs May for more support on the claimant's behalf. Within a short time, that misunderstanding was corrected and Mrs May supplied the attendance figures to the claimant and any Heads of Year who required it. Other Heads of Year were sufficiently confident with the school computer system to be able to extract the information for themselves.

Provision mapping

90. Certain students, such as those with special educational or healthcare needs, require provision maps which outline the support they require from year to year. In October 2017, Mrs Griffiths asked the claimant to update the provision mapping for her year group. For most Heads of Year this took about 20 minutes: they put a template form in front of the relevant students and asked them to check it. The claimant had more work than that to do on provision maps. This was partly because not all of the maps had been updated during the previous academic year (when the claimant's year group had been in Year 7). Mrs Griffiths supported the claimant with this task and completed some of the provision maps herself. The claimant e-mailed Mrs Griffiths with some queries about two students, but never suggested that she was struggling with the task.

Christmas 2017

91. By the Christmas holidays, the claimant was exhausted. She did not tell anyone just how tired she was, and did not give the appearance of being any more tired than a teacher would usually be at that time of year.

The EPQ students

92. On 9 January 2018, Mrs Young sent an e-mail to various leadership colleagues, asking them to take on responsibility for supervising EPQ students. "EPQ" stands for "Extended Project Qualification" and involves a sixth-form student completing an in-depth project on a subject of interest. Amongst the responsibilities of the supervisor were discussing the topic that the student proposed to research, and meeting regularly with the student to see how their project was progressing. Forwarded with the e-mail was some more detailed guidance, which indicated that more training would follow. (The training, for those teachers who wanted it, was provided at lunchtime on 30 January 2018.)

93. The claimant was included on the list of proposed supervisors because she had a period of Supervised Study in her timetable. Two EPQ students were allocated to her. We will refer to them as "CD" and "AD". One of these students, AD, was in her first year of sixth form, which meant that her EPQ might not necessarily be completed in that academic year.

94. The evening after the claimant saw this e-mail, she started crying uncontrollably. The next day, she e-mailed Ms Rycroft (her NASUWT representative), complaining about her workload. In her e-mail, the claimant told Ms Rycroft that the EPQ students were "the final straw for me yesterday", adding, "I am at the point where I literally cannot do anything else in the day and feel close to breaking point." Ms Rycroft gave the claimant a workload pro-forma to complete. Having completed the document, the claimant rhetorically asked, "I am right in feeling so overwhelmed with all the work I have to do?"

95. Screenshots provided the claimant show that, during this week, the claimant was working late into the evening and at weekends. We find that this was fairly typical of the hours that the claimant was working during her non-directed time.

96. On 17 January 2018, the EPQ coordinator, Ms Heather Davies, e-mailed the EPQ supervisors, including the claimant, attaching 5 substantial documents with which supervisors would need to be familiar.

97. The claimant made initial contact with the EPQ students on 24 January 2018.

Four meetings

98. On 2 February 2018, the claimant met with Mrs Young to discuss her workload. The meeting happened shortly after an appraisal meeting that Mrs Young had completed with Ms Cano. During that earlier meeting, Ms Cano had not mentioned to Mrs Young any concerns over the claimant's wellbeing.

99. The claimant told Mrs Young that she felt she did not have sufficient non-contact time to undertake her Head of Year role. There is a clash of evidence about what exact language the claimant used to bring home the force of this point. The claimant's evidence was that she told Mrs Young that she was "overwhelmed" and had "cried herself to sleep". Mrs Young described the conversation as "business-like" and denied that the claimant had expressed herself so emotively. Our finding is that, at the very least, the claimant told Mrs Young that she was having difficulty coping. This was Mrs Young's oral evidence to us when asked to explain an account of the meeting she gave in a subsequent occupational health referral. It is also consistent with an account of the meeting that the claimant gave to Ms Rycroft a few days later. As we explain in a little more detail when we come to the occupational health referral, we also find that, on 2 February 2018, Mrs Young consciously made the connection between the claimant telling her she was struggling to cope and the claimant's history of mental health problems.

100. The claimant and Mrs Young discussed the "pinch points" which were causing her to feel overworked. The claimant mentioned the time it took for her to meet with Mr Quinn and with the administration team, and the time it took her to upload incidents onto logs and to prepare attendance reports. She did not mention any particular problem associated with the expectation that she be available to speak to students outside of their lesson times. Nor did she suggest that she was having any difficulty in dealing with any complaints from teachers about students' behaviour.

101. One topic that the claimant definitely mentioned was the EPQ students, and she raised it in an odd way. This is how Mrs Young (correctly, in our view) remembers that the conversation went:

> "[The claimant] then queried her allocated non-contact periods and objected to being asked to manage two EPQ sixth form students in the Sixth Form study support lesson she had been allocated.

102. Here, then, was the claimant expressing her perception that the acquisition of EPQ students meant that she would have to spend her Supervised Study period doing EPQ work. This was a form of hypothecation that bore little resemblance to the reality of what she was being expected to do. What was required in practice was for her to manage her time so that the EPQ supervision work got done. She also had Supervised Study available to her in order to get on with whatever work needed to be done. There was no need for her to do the EPQ work during the Supervised Study period.

103. The claimant and Mrs Young agreed on measures to help with the claimant's workload. Mrs Young:

103.1. said that she would speak to the EPQ coordinator regarding re-allocation of both students and, if necessary, would take over responsibility for one of the EPQ students herself;

103.2. offered to speak to Mrs Griffiths who could help the claimant extract attendance data more easily from the system;

103.3. proposed that the claimant's weekly meetings with Mr Quinn might be reduced to fortnightly; and

103.4. agreed to speak to Mrs Gaunt about the following year's timetable to see if it could include increased non-contact time for Heads of Year.

104. Though the claimant does not recall it, we are satisfied that, at this meeting, Mrs Young did make an offer to the claimant to appoint a person to be responsible for her Head of Year post on the claimant's day off. Mrs Young's contemporaneous handwritten notes bear this out. The claimant's response to that offer was to decline it. As part of her reason for turning it down, the claimant gave Mrs Young an example of that arrangement having been unsuccessfully attempted for a colleague.

105. There is a dispute about whether, during this meeting, the claimant mentioned that she had been to her union. Similar disputes arise in relation to later meetings. We did not find it necessary to resolve these disputes. Their apparent relevance was to the disputed contention that Mrs Young had a hostile attitude towards the teaching unions. But Mrs Young's motivation, whether towards trades unions or even towards the claimant herself, is not what this claim is about. So far as the claim concerns Mrs Young, it is about what she should have known about disadvantages suffered by the claimant, what steps she ought to have taken and whether or not she actually did take them.

106. One final area of factual uncertainty is whether or not the claimant suggested that she should be provided with a Dictaphone and for her typing to be done for her. We were unable to make a clear finding on this question. We thought that the passage of time had made it more difficult for us to find the facts.

107. Following the meeting, Mrs Young spoke to Mrs May about helping the claimant produce reports. Mrs May told Mrs Young that she was already providing the claimant with the information she needed and was generally supporting the claimant more than she was for any other Head of Year.

108. Mrs Young spoke to Mrs Davies about the EPQ students. It is not clear when this happened. Mrs Davies told Mrs Young other members of staff were available to take on additional EPQ students. Mrs Young agreed that she would take responsibility for CD and the claimant would remain responsible for AD. Mrs Young did not contact CD to inform her that she was her new supervisor. Nor did she tell the claimant, who continued to worry. Mrs Young did not, as her witness statement suggests, offer to take responsibility for both students.

109. On 23 February 2018, the claimant visited her GP. She told the doctor that she was increasingly anxious about her increasingly pressurised timetable and lack of time for preparation and administration. She was having negative thoughts and could not relax.

110. The claimant met again with Mrs Young on 23 March 2018. She expressed the concern that the matters that had previously been agreed had not been implemented. In particular, she mentioned that she was still waiting to hear about the EPQ students. It was at this point that Mrs Young first informed the claimant that she had taken over CD's EPQ. Mrs Young said that she would make further enquiries about AD, who had not been in contact with the claimant since January.

111. Mrs Young also informed the claimant that, for the following academic year, her non-contact periods would be increased from two to three.

112. They had another discussion about the possibility of the claimant relinquishing her Head of Year responsibilities. (Although Mrs Young denied this in her oral evidence, we think it is likely that this happened, based on a written statement Mrs Young subsequently made to the grievance investigation.) The claimant declined.

113. The claimant recounted the meeting to her mother, whose impression of the claimant was that she was "traumatised and down". She told her mother that "nothing was done".

114. Following the meeting, the claimant made contact with CD and informed her that her supervision would transfer to Mrs Young. By 26 April 2018, CD and Mrs Young had made direct contact.

115. The claimant and Ms Davies still believed that the claimant was AD's supervisor. On 30 April 2018, they exchanged e-mails, sharing concern over the lack of contact with AD. They both agreed to chase AD. Shortly afterwards they discovered that AD had withdrawn from the EPQ course.

116. On 18 April 2018 a meeting took place amongst the Heads of Year. There is a conflict of evidence about whether, during this meeting, the claimant tried to recruit colleagues to bring a complaint about workload via their trades unions. Again, we do not find it necessary to resolve this dispute. The claimant was, on any view, sufficiently concerned about her own workload that she was involving her own union and going to the doctor about it. The other Heads of Year were sufficiently unconcerned about their workload that it did not feature in the minutes of that meeting.

117. There was a further Heads of Year meeting on 30 April 2018. Again, there is a dispute about what, if anything, was said about the claimant having gone to the trade union. For the same reasons as before, we do not see the need to resolve it. At the meeting, it was agreed that, going forward, the frequency of meetings between Heads of Year and their SLT link would be reduced to once per fortnight. In addition, they would be allocated an extra "administration" period each week. This was Mrs Gaunt's decision, but it broadly coincided with what Mrs Young had told the claimant at their two one-to-one meetings in February and March. A member of staff (not the claimant) was given the responsibility of producing the attendance data.

118. The claimant was very pleased to hear about the additional non-contact time for the next year. At around this time, she saw Mrs Gaunt by the photocopier and said, "I could hug you!" And they did.

119. On 10 May 2018, following the GCSE Spanish oral examinations, the claimant spoke with Ms Cano about some students who, in their opinion, should have done

more revision. They were overheard by Mrs Griffiths, who passed the information onto Mrs Young. Later, Mrs Young informed Ms Cano that she hoped the claimant's "negativity" had not rubbed off on the students as they still had three more exams to sit. That comment was relayed back to the claimant, who was hurt by it.

120. At none of the time in which the claimant was in work did she raise a grievance. She found confrontation difficult at the best of times and did not want to pick a fight with Mrs Young.

Final week in work

121. The week commencing 21 May 2018 was the last week before the half-term holiday. It turned out to be the claimant's last ever week in work for the respondent. She had less teaching time that week because her examination classes were on leave. But she also had examinations to mark, reports to write and progress data to input.

122. At some point during the week, the claimant asked Mrs Young if she could be released from the Year 13 leavers' Mass so that she could pick up family members who were arriving from Spain for her daughter's first communion. Mrs Young agreed.

123. Tuesday 22 May 2018 was supposed to be the claimant's day off. She spent some of that day reading and responding to e-mails relating to HOY matters concerning a particularly difficult family.

124. On 23 May 2018, Mrs Griffiths sent the claimant an e-mail about a forthcoming Year 8 PHSE Day, which would replace the normal teaching timetable for that day. It gave details of an imaginative project. For the project, the students would need to collect materials such as cereal boxes and newspapers. The e-mail gave instructions to "get the girls to start collecting quickly". Otherwise, the e-mail continued, the claimant and other PHSE teachers would be left with half a day's PHSE to fill for themselves. That was not a threat: it was little more than a statement of the obvious. Nor was it particularly onerous. It required some early planning so that the students would fill half a day's teaching time. That time would usually have been taken up with lessons that the claimant would have had to plan. But it caused the claimant additional anxiety when she read it.

125. That lunchtime (and not 24 May as Mrs Young claimed) Mrs Young went to find the claimant concerning two students in her year group. When she arrived at the claimant's classroom, she was informed that the claimant was using the school gym. Mrs Young was initially dismayed – although teachers were allowed to use the gym, the building where it was situated was being used for examinations and Mrs Young thought the claimant might disturb the candidates. When she realised that no examination was actually in progress, she made a remark something on the lines of, "It's alright for some". When the claimant learned what had happened, she perceived it as a criticism.

126. Later that evening, Mrs Griffiths e-mailed the draft PSHE Day program to the claimant.

127. On 24 May 2018, the claimant complained that she was not able to get any marking done because of the number of e-mails she was receiving. She sent two e-mails to arrange for the collection of supplies for the PHSE day.

128. During the lunch break, an unpleasant incident occurred between two students, SAC and CS. The fracas had started in an English Intervention class earlier in the day and spilled over into the playground. A colleague, Mr H, had been first on the scene. He had tried to alert the claimant but – for whatever reason – was unable to find her. Mrs Gaunt dealt with the situation instead and reported what had happened to Mrs Young.

129. At 5.33pm that evening, Mrs Young e-mailed the claimant. Her e-mail started with a positive comment about the ongoing preparations for the PHSE day, but quickly moved onto what had happened between SAC and CS, the fact that Mrs Gaunt had stepped in for her, and what needed to be done about it. The e-mail was appropriately-worded, but when the claimant read it the following morning, it caused the claimant additional anxiety, resentment and distress. The anxiety came from what the claimant perceived as criticism for not being available on her lunch break. Her sense of resentment came from being expected to be available in the first place. As the claimant saw it, the incident should have been dealt with by the English intervention teacher and, if necessary, escalated to the Head of Faculty.

130. Friday 25 May 2018 was the claimant's last day in work. In the morning she sought and obtained a briefing from Mr H about the previous day's lunchtime incident. She then e-mailed Mrs Young somewhat defensively. During a morning free period, she then spoke with SAC and CS about their behaviour. Whilst speaking to CS, the claimant raised her voice in frustration. At 12.58pm, a message was passed to Mrs Young's personal assistant (PA) asking if Mrs Young could telephone CS's mother. The message stated that the claimant had just "screamed to [CS] and she was extremely upset and pointed out that CS had Attention Deficit and Hyperactivity Disorder. CS's mother asked for an appointment with Mrs Young to discuss the incident. At 1.49pm, Mrs Young's PA e-mailed the claimant to inform her that she had booked an appointment to meet with the claimant and Mrs Young. The e-mail requested further details of the incident. Later, Mrs Young sent an e-mail to the claimant, saying,

> "I don't for one moment believe that you would scream at any pupil but I think it is important that you and I meet Mum and discuss [CS's] behaviour and how her ADHD is going to be managed for the rest of the year and in the future. I want to make sure you are well supported before I go and that [CS's mother] understands completely what is expected of CS."

131. The claimant "broke down" when she read this e-mail. She needed two colleagues to help her write her reply. With their assistance she e-mailed, "I did raise my voice with frustration as unfortunately this is not the first time I have had to speak to CS about such poor behaviour. Thank you for your support".

132. That weekend, the claimant put on a brave face for long enough to get through her daughter's first communion on the Sunday. Straight away afterwards, she was noticed by members of her family to be behaving alarmingly. She was tearful, pacing about, and did not want any of her family to touch her. They kept her under constant supervision. She could not see her general practitioner the next day

because of the bank holiday, but she visited on Tuesday 29 May 2018. She was noted as having low mood, being "weepy", having poor concentration, taking no pleasure in life and having suicidal thoughts. She was prescribed Sertraline.

133. For some time afterwards, the claimant was incapable of getting out of bed or getting dressed. She had thoughts of wanting her life to end. She believed that the School was spying on her by tapping her telephone and positioning a photographer outside her house. When the half-term holiday ended on 4 June 2018, the claimant began a period of sick leave from which she never returned.

Sickness Absence Policy

134. Before we relate what happened during the claimant's sickness absence, we step out of the timeline to set out some relevant provisions of the respondent's Sickness Absence Policy.

135. Paragraph 4.8 of the Policy included this phrase:

> "The Headteacher, or other nominated person, is also entitled to make reasonable contact with you during your sickness absence, whether or not you have complied with the requirement to make weekly contact."

136. Paragraph 6.1 provided that the respondent would have the right to refer an employee to Occupational Health at any time. By paragraph 6.3, the Policy stated:

> "…if you decide not to engage in an Occupational Health referral the Academy will have no option but to proceed to make decisions without the benefit of medical advice."

137. Long-term absence was catered for in paragraph 9 of the Policy. Paragraph 9.2 provided:

> "An absence lasting 4 working weeks will normally lead to a Formal Absence Review Meeting."

138. The formal requirements of the Absence Review Meeting were set out in some detail in paragraph 10. Notably absent from those requirements was any facility for the absent employee to send a proxy representative to the meeting or to make representations in writing.

139. Paragraph 11.1 listed the management action available to the respondent following an Absence Review Meeting. Measures included:

139.1. a First Written Caution, warning the employee that if they did not return to work within a specified period (within the range 4-12 weeks), there would be a further Attendance Review Meeting;

139.2. a Final Written Caution, which would operate in a similar way, but with the sanction for non-return being referral to a Final Absence Reviewer for consideration of termination of employment.

140. Elsewhere in paragraph 11, the Policy authorised the Final Absence Reviewer to dismiss an absent employee with notice, set out the formal procedural requirements and the factors to be taken into account, and established a right of appeal.

141. At paragraph 13, the Policy provided more detail of the right to be accompanied at an Absence Review Meeting. It did not provide for a proxy to be sent in place of the absent employee. According to paragraph 13.7, if the companion could not attend, the respondent might accept written representations.

Sickness absence – remainder of academic year

142. We now return to June 2018. The second week of the half-term, starting 11 June 2018, was the week of the school trip to Spain. The claimant had been due to accompany the students on the trip. The claimant's family informed Ms Cano of the claimant's poor health. In turn, Ms Cano told Mrs Young on the first day of the half-term. During that conversation, Mrs Young made a remark that has been variously captured as "that's not a surprise", "I could see that coming", or "I knew something like this would happen". There is conflicting evidence about what Mrs Young meant by this and the context in which she said it. As to what was said, and the wider discussion in which she made the comment, we prefer the oral evidence of the respondent's witnesses over the untested accounts of Ms Cano and Ms Howell. Mrs Young made the remark during a conversation about things always going wrong during the week of the trip to Spain. That leaves the question of what Mrs Young meant. Did Mrs Young mean to say that she could have predicted that the claimant might not be able to cope with her workload because of her mental health? Mrs Young's remark is of course *consistent* with that meaning. It is also consistent with what Mrs Young actually knew: see our discussion of the 2 February 2018 meeting. As it happens, however, it is not what she was getting at the context of the discussion.

143. On Friday 6 June 2018, the claimant received a voicemail message on her phone. The message was on behalf of an occupational health provider, asking to make an appointment. In her mother's words, the claimant "went to pieces", fearing that she would be forced back to work. Her mother rang back to occupational health, explaining it was too soon for an appointment.

144. On Saturday 7 June 2018, Mrs Young wrote a letter to the claimant, addressed to her home address. The letter was in two parts.

144.1. The first part asked the claimant to provide consent to an occupational health referral. Explaining her request, Mrs Young wrote:

> "As you know this is standard practice whenever a member of staff is absent with stress and, in particular, work related stress."

144.2. The second part of the letter gave the claimant an update with regard to her recent meeting with CS's mother. The assessment was upbeat. Mrs Young assured the claimant that CS's mother was "supportive of the work that had been undertaken by all her teachers, including you…" Contrary to the opinion of Mrs Sanderson, our impression was that Mrs Young had gone out of her way to write a supportive letter.

145. The management referral to occupational health followed a standard template into which Mrs Young inserted her own words. One of the prompts on the form was, "Please give any other information you may feel is helpful." In answer, Mrs Young wrote:

> "As stated above [the claimant] has expressed concerns about workload. On the birth of her daughter she changed her [contract] to 0.8 of full time. This year she has stated that she is finding coping with the work difficult and proposed that some extra non-contact time would help. This has been arranged for next year. To ease her current concerns I took on one of her Sixth Form students for the … EPQ. The nature of her [Head of Year post] means that much of her non-contact time in school will be spent on dealing with pastoral issues. In turn this means that planning, preparation and assessment of her curriculum work will need to be undertaken at home. This year [the claimant] has found this difficult to balance. Her concerns have been taken seriously in view of her history of depression and anxiety…"

146. In her oral evidence, Mrs Young told us, and we accepted, that she had always been vigilant concerning the claimant's mental health. When the claimant told her on 2 February 2018 that she felt overworked, Mrs Young was conscious that the claimant's concerns would need to be acted upon swiftly in the light of the claimant's history of depression and anxiety.

147. The claimant and Ms Rycroft exchanged e-mails from 21 to 24 June 2018. In her e-mails, the claimant stated that she had read the Sickness Absence Policy and understood that she was required to cooperate fully with the occupational health referral. Her preference was to engage her own psychiatrist, as she feared that speaking to an occupational health practitioner would set her back. She shared her suspicion that Mrs Young had made an early referral because she was "well aware that she has done little to help me this year". She asked Ms Rycroft, "How long can I put occupational health off?"

148. Ms Rycroft advised the claimant to contact the school, via a relative if necessary, to explain that she was not ready to engage with occupational health; and to ask her doctor to inform the school that contact with work was exacerbating her illness.

149. Pausing for a moment, we noticed a conspicuous omission from this exchange. There was no sign of the claimant having been confused or thrown by Mrs Young's reference to an occupational health referral being "standard practice". Nor did she comment on how that explanation compared to the wording of the Sickness Absence Policy, which she had read. Our finding is that, although the claimant thought the timing of the referral was telling about Mrs Young's motives, she was not particularly troubled at that time by Mrs Young's explanation, or by any perceived mismatch between her explanation and the Policy.

150. On 26 June 2018, the claimant's husband wrote to Mrs Young, enclosing a further fit note. Although signed and sent by him, the wording of the letter was pre-agreed between the claimant and Ms Rycroft. The letter stated that the claimant was "very unwell with depression and anxiety." It continued,

> "Any worries about school make her worse, so if you need to contact her please could you do so through myself or her mother. It is probably easier to contact her mother as she is with her most of the time."

151. On the subject of occupational health, the claimant's husband informed Mrs Young that the claimant had had medical advice to request an occupational health

home visit, accompanied by a family member. He warned that the claimant was still finding it very difficult to come to terms with what had happened to her and that any occupational health consultation would cause the claimant to "relive" all these emotions again.

152. On 28 June 2018, Mrs Young and Mrs Sanderson spoke over the telephone. Mrs Young proposed that the claimant and her mother discuss the possibility of letting the Head of Year responsibility go, so she could focus on teaching Spanish. Her mother agreed. Mrs Young told the claimant's mother that there was nothing in school to worry about and that she should leave the occupational health meeting until September if she was not ready for an earlier appointment.

153. Mrs Young retired at the end of term. The new Head Teacher was Mrs Gaunt.

154. The claimant's mental health remained poor over the summer of 2018. She missed her parents' Golden Wedding anniversary because she could not trust herself not to get upset. On 17 and 20 July 2018 she went to see her GP. The doctor noted that the claimant was extremely stressed about work and having suicidal thoughts. Soon afterwards, the claimant started a course of counselling, paid for through her husband's private insurance. Her counsellor was a consultant psychologist, Dr Nightingale. The claimant found the counselling helpful, but her recovery was very protracted.

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155. The new term started in September 2018. The claimant was still too unwell to return to work. She went back to her GP on 25 September 2018 and told her doctor that she was having frequent nightmares of being in school and being shouted at. She was given a fit note for a further three months.

156. By the end of September 2018, in keeping with the claimant's husband's request, there had been no direct contact between the school and the claimant. This was a matter of concern to Mrs Gaunt, the new Head Teacher. Two particular things troubled her. First, she was keen to make progress in arranging an occupational health appointment. Second, whilst respecting the claimant's wish to be insulated from contact with the school, she did not want the claimant to forget that she was part of the school community. That message was in danger of being lost if the only communications the claimant received, even indirectly, were formal letters about sickness absence and occupational health. Mrs Gaunt therefore decided on a change of tack. She approached Ms Cano, told her that she was about to send the claimant a letter regarding an occupational health appointment, and shared with Ms Cano her worry that the letter, on its own, might seem somewhat cold. She then asked Ms Cano to approach the claimant informally and to pass on the "love and best wishes" of her colleagues, so that the claimant might put the letter into perspective.

157. As agreed with Mrs Gaunt, Ms Cano visited the claimant on 7 October 2018 and took her out for a walk. As they were walking, Ms Cano passed on Mrs Gaunt's message of goodwill, but what stood out from the conversation in the claimant's mind was Ms Cano mentioning that Mrs Gaunt was about to send her a letter. On learning about the letter, and realising that Ms Cano was acting as Mrs Gaunt's messenger, the claimant had a panic attack and started breathing

erratically in front of Ms Cano. She went back to her GP the next day and described what had happened.

158. On 11 and 12 October 2018, the claimant exchanged e-mails with Ms Rycroft. In that exchange the claimant made plain how scared she was at the prospect of going back to work or even going to occupational health.

159. Mrs Gaunt's letter was dated Friday 12 October 2018 and sent by post to the claimant's mother. Although the claimant's statement describes it having been received over the weekend, it is not clear exactly when the letter arrived through the claimant's mother's letterbox. Nor do we know when her mother relayed its contents to her. Whenever it was, we are sure that the claimant's mother would have chosen what she thought was the most suitable moment.

160. In her letter, Mrs Gaunt invited the claimant to a telephone consultation with occupational health on 24 October 2018. That date fell in the middle of her daughter's half-term holiday. The letter followed a standard template supplied by the respondent's outsourced human resources advisers. That template included the following wording which was adopted in the letter itself:

> "I would also remind you that under paragraph 8.1(iv) of the Burgundy Book it is a condition of your entitlement to receive sick pay that you to comply with the School's reasonable request for you to attend an examination with a medical practitioner of our choice. Therefore, failure to participate in the occupational health consultation arranged may lead to a loss of entitlement of sick pay."

161. We note in passing that the Burgundy Book is the well-known nickname for the collectively-agreed *Conditions of Service for School Teachers in England and Wales.* Nobody suggested to us that the letter misrepresented the meaning of paragraph 8.1(iv).

162. The claimant found the letter to be "extremely cold" and "uncaring". She felt forced into cooperating with occupational health and anxious about having to speak to them whilst her daughter was at home on holiday. She went back to her GP and discussed her anxiety, which included "thoughts of dying", but she "denied thoughts of committing suicide". Her anti-depressant medication dosage was increased.

163. On 24 October 2018, the claimant spoke on the telephone with Ms Deborah Lewis, a registered general nurse engaged as the respondent's occupational health advisor. As Ms Lewis noted in her report, the conversation had barely started when the claimant became distressed and started showing what Ms Lewis thought were symptoms of a panic attack. She calmed down enough for them to continue with the telephone call. The claimant described her history. It was in this conversation that the claimant said (as we have mentioned) that her symptoms of stress-related illness began in January 2018. The claimant also described her current state of health, which Ms Lewis summarised as "significant and debilitating anxiety". For example, Ms Lewis noted, the claimant was unable to reply to text messages from work colleagues and was still anxious about the recent letter from Mrs Gaunt. In her report, Ms Lewis recommended a follow-up appointment in four weeks' time.

164. One of the questions Ms Lewis was asked to address was:

> "What accommodations (adaptations, modifications, restrictions or reasonable adjustments) are recommended to facilitate a return to work/functioning?"

To which Ms Lewis answered:

> "This would need to be advised upon, at a point at which Mrs Willisch is able to consider a return to work as advice would need to be current, and for that reason I will not include that today."

165. In all her subsequent reports, Ms Lewis answered that question in much the same way. Workplace adjustments, in her expressed opinion, did not even arise for consideration until there was some prospect of the claimant being able to return to work in the foreseeable future.

166. The claimant was very upset following her occupational health consultation. It took her, on her estimation, about two weeks to recover.

167. In accordance with Ms Lewis' suggestion, the claimant was informed by letter dated 6 November 2018 that there would a face-to-face occupational health appointment on 28 November 2018. As with the previous occupational health invitation, the letter linked cooperation to continuing entitlement to sick pay.

168. The second occupational health assessment took place at the providers' offices in Bromborough. The claimant was distressed and was noted to have a severe level of anxiety and depression. In her report dated 28 November 2018, Ms Lewis noted:

> "I am unable to state when she will be able to return to work. I would be cautiously optimistic that if I able to review her in around 4 to 6 weeks' time, she may have shown further improvement and we could begin to discuss or plan a meeting. Currently she has stated she is far too unwell to [go to] any face-to-face meetings, and I would support that given her previous history."

169. By letter dated 7 December 2018, delivered to Mrs Sanderson's address, the claimant was informed that her pay was been reduced to half pay in accordance with STPCD.

170. Whilst off sick, the claimant generally avoided going to church. She made an exception during the Christmas holidays. Whilst in church, she saw a member of staff from the school. She left the church in tears and took several days to recover.

171. The claimant's follow-up occupational health consultation took place with Ms Lewis on 16 January 2019. As with the two previous appointments, there had been a letter sent to Mrs Sanderson, which had linked engagement with occupational health to continuing sick pay. The claimant was tearful throughout the assessment.

172. Following the consultation, Ms Lewis reported that the claimant was continuing to demonstrate "very severe levels of anxiety", giving the recent incident in church as an example. No return to work date was in prospect. Ms Lewis' report revisited the prospects of the claimant attending a workplace meeting. The assessment was not optimistic:

> "In my opinion she remains too unwell to have a face-to-face workplace meeting. I discussed this with her, and that they might be the possibility

for a neutral venue and she became distraught at the thought of the meeting."

173. In order to assist the claimant and the respondent to move forwards, Ms Lewis recommended:

173.1. a telephone review in four weeks' time; and

173.2. "a consultation with an occupational health physician, to assist with the particular complexities of this case".

First Absence Review Meeting

174. By the time this report was seen by Mrs Gaunt, the claimant had been on sick leave for over 7 months. The Sickness Absence Policy provided that the trigger point for the first Absence Review Meeting was four weeks. Mrs Gaunt considered that the school had already waited considerably longer than the Policy provided, and that it was time for a meeting with the claimant.

175. On Wednesday 30 January 2019, Mrs Gaunt therefore wrote to the claimant, giving her notice of a formal Absence Review Meeting. The proposed date for the meeting was 8 February 2019. Amongst the purposes of the meeting was to "Consider if it would be necessary or helpful to obtain further medical evidence about your current condition, prognosis and likelihood of reocurrence [sic]".One of the potential outcomes of the meeting, according to the letter, was that the claimant might be issued with a First Written Caution.

176. The letter gave the claimant the option of being "accompanied at the meeting" by a colleague or trade union representative, but did not anywhere suggest that she could send someone to attend the meeting in her place. The claimant was requested to inform Mrs Gaunt, "If you or your companion, are unable to attend the meeting on the date given", in which case the claimant would "be required to provide the reason for non-availability and a list of suitable alternative times". This instruction gave the impression that the meeting might be postponed by a few days to accommodate, for example, a trade union representative's diary commitments or a prior medical appointment. The letter also asked the claimant to inform Mrs Gaunt if she required any reasonable adjustments to the meeting on account of disability. It did not suggest that, instead of attending the meeting, she could make written representations.

177. On 1 February 2019, before the claimant had been informed about the letter, she went for her first consultation with Dr Waring, a consultant psychiatrist. Dr Waring noted the claimant's increasingly severe anxiety symptoms and changed her medication to Venlafaxine. The claimant was referred for further treatment with a psychotherapist, Ms Gean Viriri.

178. The claimant's husband told the claimant about the letter on Saturday 2 February 2019. She panicked and could not stop crying. The following day, Sunday, she e-mailed Dr Nightingale to ask for an appointment. Her e-mail described how scared she was about the meeting, adding "Thoughts that dying will only get rid of the pain although I am not going to do anything but I wish they would go away." On Monday 4 February, she e-mailed Ms Tracy Cole, an NASUWT Regional Official, to say that she had been "in a mess all weekend". The next day she went to her GP, who prescribed diazepam for her.

179. On 7 February 2019, Ms Cole e-mailed the school, asking to postpone the meeting on the ground of the claimant's health. Unfortunately, by the time Ms Cole sent the e-mail, Mrs Howell had already telephoned the claimant's mother to ask whether the claimant would be attending the meeting. Mrs Gaunt agreed to the postponement and the meeting did not proceed.

180. The claimant's health did not improve during February 2019. Her Venlafaxine dose was increased, first to 75mg and then, on 4 March 2019 to 150mg.

181. On 28 March 2019, Mrs Gaunt wrote to the claimant's mother again. Her letter observed, correctly, that Ms Cole had not been back in touch to rearrange the meeting and expressed Mrs Gaunt's view that "we cannot delay any further". The claimant was invited to another Absence Review Meeting scheduled for 16 April 2019. So far as the proposed arrangements for the meeting were concerned, the letter was written in the same terms as the letter on 30 January 2019.

182. The claimant wrote directly to Mrs Gaunt on 1 April 2019. By this time, the claimant had instructed Ms Cole that she no longer wanted NASUWT to represent her. In her letter, the claimant informed Mrs Gaunt that she was instructing a solicitor and that she would not be well enough to attend the forthcoming meeting. She enclosed a letter from Ms Viriri, bearing the same date, which asked for a three-month postponement of the meeting. Ms Viriri confirmed that the claimant's symptoms of depression and anxiety remained severe, and added:

> "I am aware that you have requested her to attend a formal sickness absence meeting. I am really concerned about this as her current mental state is fragile and she is not in a position to be able to cope with such a meeting. I am concerned that any additional stress and distress at this point in time can actually cause further deterioration and will make recovery difficult."

183. Mrs Gaunt was not prepared to postpone the meeting any longer. She informed the claimant of her decision in a letter dated 5 April 2019. The letter went on to offer the claimant two alternatives to attending the meeting. One option was to provide written representations. The other was to send her mother, or union representative, to the meeting in her place.

184. Around 8 April 2019, in preparation for the meeting, the claimant drafted two letters, one considerably longer than the other. Only the shorter letter was eventually passed to the respondent, but both letters give us an insight into what the claimant was thinking at the time. The letters both recorded the claimant's disappointment that the school, instead of obtaining a report from an occupational health physician, had proceeded to an Absence Review Meeting. In her longer letter, the claimant went on to state that she would no longer allow the school to obtain further medical evidence. According to that letter, her reasons for withdrawing consent were, first, that the respondent had "completely let me down with regard to occupational health" and, second, that she was already receiving adequate treatment from her psychiatrist and psychotherapist.

185. On 16 April 2019, Mrs Sanderson and the claimant's Godfather, Mr Tierney, met with Mrs Gaunt for the Absence Review Meeting. Human resources support was provided at the meeting by Mrs Caroline Prosser, a solicitor. At the meeting, Mrs Gaunt explained that the Spanish department was struggling and some

parents were angry. Teaching cover had been provided for the claimant's lessons, but the supply teachers lacked the claimant's experience and were not teaching to the same level as the claimant's excellent standards. Mrs Gaunt's particular worry was about the GCSE students. We believe not only that Mrs Gaunt articulated these concerns, but that they were correct. It was not put to Mrs Gaunt that she had in any way exaggerated the impact of the claimant's absence.

186. There followed a rather dysfunctional conversation about occupational health. The claimant's mother attempted to raise a query in relation to Ms Lewis' recommendation in her 16 January report. (It will be remembered that in that report Ms Lewis had suggested a referral to an occupational health physician.) The claimant's mother said that they had been waiting for the school to arrange for the claimant to see a "consultant", but nothing had ever happened. For whatever reason, Mrs Prosser did not properly understand that point. Mrs Prosser thought that the claimant's mother was talking about a consultant psychologist or psychiatrist whose responsibility was for the claimant's clinical care, rather than the occupational health physician that Ms Lewis had recommended. According to the meeting minutes, Mrs Prosser said that it would be up to the claimant to seek referral to a consultant through her private medical insurance. That led to a discussion of the claimant's existing clinical provision from Dr Waring and Ms Viriri. The misunderstanding was compounded when the minutes were agreed by Mr Tierney. He proposed two corrections, but neither of those corrections pointed out that the claimant's mother had actually been talking about an occupational health physician.

187. Following the meeting, Mrs Gaunt issued the claimant with a first written warning. The warning was dated 26 April 2019 and sent to the claimant directly.

Grievance and early conciliation

188. By letter dated 1 May 2019, the claimant raised a written grievance. The format of her letter was different to the GRP1 prescribed by the respondent's grievance policy, but in its 8 closely-typed pages, it set out the claimant's complaints about workload and her treatment whilst on sick leave.

189. The grievance was allocated to one of the new Deputy Head Teachers, Ms Anne Murphy, to investigate.

190. Over the next three weeks, correspondence passed between the claimant and Ms Murphy by e-mail with a view to agreeing on the scope of the grievance under investigation. During the course of that correspondence, the claimant indicated that she had taken legal advice.

191. Ms Murphy conducted a series of interviews with colleagues as part of her investigation. The claimant, who has since seen the records of those interviews, disagrees fundamentally with some of those colleagues' opinions about their workload and the amount of support that the claimant received. We took into account those points of disagreement when reaching our findings about what actually happened whilst the claimant was at work. The claimant was particularly upset by some comments about the claimant's personality. We did not consider it necessary to make any finding about whether or not those comments were justified. There is no separate legal complaint about what those colleagues said.

192. On 12 June 2019 Ms Murphy wrote to the claimant with the outcome of her investigation. The grievance was not upheld. This letter was written on the same day that the claimant prepared a lengthy GR1 form outlining her grievance in more detail. The claimant is critical of Ms Murphy for not waiting for that form before concluding her investigation. She also takes issue with Ms Murphy's findings. We do not find it necessary to explore those criticisms, as in our view, they do not help us to resolve the issues in this claim.

193. Much of the grievance process overlaps with a period of early conciliation. The claimant notified ACAS of her proposed claim on 15 May 2019 and obtained her certificate on 14 June 2019.

Resumed occupational health contact and absence management

194. We now rewind the clock a few weeks. On 22 May 2019, Mrs Gaunt wrote to the claimant, asking her to attend a further occupational health appointment. The letter followed the same template as the previous letters, and included the usual reminder that non-cooperation could affect entitlement to sick pay.

195. Mrs Gaunt's letter was sent directly to the claimant. By this time, the claimant had written directly to Mrs Gaunt on 1 April and 1 May 2019. As Mrs Gaunt saw it, the claimant's letter had demonstrated that she was ready to correspond directly. The claimant did not ask Mrs Gaunt to desist or to send her letters to any different address.

196. The proposed date for the consultation was Wednesday 29 May 2019. As with the previous October, that date fell in the middle of her daughter's half-term holiday. The claimant did not want to become distressed with her daughter at home, so she asked her mother to rearrange the appointment. This was done by an exchange of e-mails with Mrs Howell on 28 May 2019. Mrs Howell agreed to the postponement without requiring Mrs Sanderson to justify or explain her request.

197. Prior to the consultation, Mrs Gaunt completed a management referral form and sent it to the occupational health provider. One of the questions on the form was whether or not the claimant was suitable for ill-health retirement.

198. The claimant and her mother met with Ms Lewis on 5 June 2019 for the occupational health appointment. The same day, Ms Lewis reported that, although the claimant had experienced a reduction in many of her symptoms, and was able to engage with daily living more fully, she was still unable to attend any workplace meetings or have any communication with the respondent. The report continued:

> "I understand the employer is fully aware of [the claimant's] intentions about returning to work, and for that reason I will not recommend any follow-up with Occupational Health, unless on request."

199. Ms Lewis' report did not answer the question about ill-health retirement.

200. Following receipt of that report, the claimant did not query the point about ill-health retirement. Nor did she make any request for any further occupational health review.

201. This is as convenient a point as any to record our findings about the claimant receiving correspondence during weekends and holidays. The claimant's witness statement gives specific examples of having been upset to receive correspondence

at weekends and shortly before holidays during the first 10 months or so of her absence. In a more generalised paragraph towards the end of her witness statement, the claimant makes a number of criticisms of the respondent's behaviour "throughout the whole absence process". One of these criticisms is that the respondent "sent letters at weekends and school holidays". We have compared this generalisation with the claimant's more detailed account of how she felt on receipt of particular communications. Having done so, we have come to the view that, by the end of May 2019 claimant had stopped being significantly disadvantaged by the timing of these letters. This is partly because there are no examples of the claimant having been upset to receive a weekend letter after this date. It is also because, by then, Mrs Gaunt had started communicating with the claimant directly again, and the claimant had not asked her either to refrain or to send her letters on different days. Although Ms Lewis' report mentioned that the claimant could not have any communication with the respondent, she did not mention any particular difficulty with weekends.

202. By letter dated 17 June 2019, the claimant was invited to a second formal Absence Review Meeting. The letter warned the claimant that the outcome might be a final written caution. Unlike the first two invitations to the first Absence Review Meeting, this letter gave the claimant the option of making written representations or sending members of her family as representatives in her place.

203. The meeting took place on 26 June 2019. Present, as previously, were Mrs Gaunt, Mrs Prosser, Mr Tierney and Mrs Sanderson. Mrs Gaunt acknowledged that there had been a misunderstanding at the previous meeting about whether or not an occupational health physician should be involved. She said that the proposed referral to a physician had been merely a recommendation, which implied that she had declined to follow it. Neither Mr Tierney nor Mrs Sanderson pressed the point. They informed Mrs Gaunt that the claimant still had 12 sessions left with the psychologist, but was currently unfit to return to work.

204. The formal outcome of the meeting was a Final Written Caution, issued to the claimant on 8 July 2019. The substance of the warning was conveyed in the following paragraph:

> "If you are not fully back to work by the commencement of the new academic year 2019/2020, then you will be referred to the Final Absence Reviewer which could lead to the termination of your employment on notice following a further Formal Absence Review Meeting."

205. The letter gave the claimant the option of appealing against the warning, but the claimant did not appeal.

Grievance appeal

206. The claimant appealed against the initial grievance outcome. Appointed to hear the appeal was Mrs Kate Green, the Chair of Governors. The appeal meeting took place on 9 July 2019 at a different school. The claimant herself attended the meeting, accompanied by her husband. (Mrs Green's initial position has been that the claimant's husband would be an inappropriate companion, but she had relented by the time of the meeting.) Shortly before the meeting started, the claimant had a panic attack, but was able to compose herself sufficiently to participate for the full duration of the meeting.

207. There followed an exchange of e-mails in which the minutes of the meeting were revised. By letter dated 25 July 2019, Mrs Green informed the claimant that her appeal was unsuccessful. Her letter engaged in detail with the points that the claimant had made.

Final Absence Review Meeting

208. By the start of the new term in September 2019, the claimant was still too unwell to return to work. Mrs Gaunt wrote to the claimant on 12 September 2019 asking her to attend a further occupational health appointment with Ms Lewis on 20 September 2019. The consultation went ahead as planned and Ms Lewis reported back the same day. In summary, Ms Lewis related that, whilst the claimant was slowly improving, she still continued to present with a moderate to severe level of anxiety and depression. Any contact with the school was still triggering painful and distressing emotions. The claimant's nightmares about work and disturbed sleep were persisting, even whilst the claimant was on holiday. According to the report, the opinion of both the claimant and Ms Lewis was that the claimant would not be returning to her post for the foreseeable future.

209. Having read the latest occupational health report, Mrs Gaunt caused a letter dated 7 October 2019 to be written to the claimant. The letter invited the claimant to an Absence Review Meeting with the "final absence reviewer" (that is to say, Mrs Gaunt herself) for the purpose of considering whether or not the claimant's employment should be terminated.

210. The claimant replied by letter dated 14 October 2019. In her letter, the claimant indicated that her mother and Mr Tierney would be attending in her place as she would be unable to cope with another face-to-face meeting. She made some sensible practical requests incidental to the anticipated termination of her employment, for example, for a suitable reference and for an opportunity to collect her belongings. She did not suggest that her employment should be prolonged. Nor did she ask for ill-health retirement as an alternative to dismissal.

211. On 22 October 2019, the claimant's mother and Mr Tierney met with Mrs Gaunt and Mrs Prosser for the final time. The claimant's mother confirmed that there was currently no likely chance of a return to work for the claimant. Nobody mentioned the possibility of ill-health retirement.

212. Following the meeting, Mrs Gaunt asked her Business Manager to look into the possibility of ill-health retirement. The Business Manager contacted Teacher Pensions and was advised that the procedure was for the claimant to make an application on the Teacher Pensions online portal. She was advised that it would be unlikely that the claimant would satisfy the criteria.

213. Mrs Gaunt then made her decision, which was communicated to the claimant by letter dated 24 October 2019. Her decision was to dismiss the claimant with notice. In support of her decision, Mrs Gaunt reiterated the point about the effect of the claimant's absence on the teaching of GCSE Spanish. She also considered the impact on A-levels. A further factor was the impaired ability of the school to attend to students' welfare without a substantive Head of Year who knew and understood the students well. Again, we find that these were genuine and well-founded concerns.

214. The claimant did not appeal, despite having been reminded in the letter of her opportunity to do so.

215. On 31 December 2019, the claimant's notice period expired and her employment came to an end.

Further psychotherapist report

216. In January 2020, the claimant obtained a report from Ms Viriri. The report stated,

> "She has made some progress in her recovery but unfortunately the anxiety and the stress of how the school has handled her absence has thwarted her recovery significantly. Furthermore, the way the school has dealt with her case since she has been off sick has impacted greatly on her recovery. This includes incidents of requesting meetings which went against medical advice and suggesting meetings in her own home when she could not even receive mail from the school in her own home. She felt some of the information in response to her grievances was not accurate and in some cases false and biased. The school also continued to send e-mails and letters at the weekend when she had specifically asked them not to for the distress it caused her. [The claimant] also felt that her distress was worsened by the fact that the school did not follow up their own medical advice when Occupational Health requested a follow up call and a referral to an Occupational Health Physician. [The claimant] was also left feeling vulnerable after the breaches of confidentiality."

217. We have quoted this passage at some length, because part of it was cited by Ms Casserley in her written submissions about PCP11. As already foreshadowed in our discussion of the issues, the claimant's formulation of PCP11 left us guessing as to what it was, precisely, about the respondent's sickness absence policy that put the claimant at a disadvantage. We take Ms Casserley, by citing Ms Viriri's generalised conclusion, to be impliedly endorsing Ms Viriri's specific examples on which that conclusion was based.

Relevant law

Duty to make adjustments

218. Section 39(2)(d) of EqA prohibits employers from discriminating against employees by subjecting them to detriment. Section 21 provides that a breach of the duty to make reasonable adjustments in relation to a disabled person amounts to discrimination against that person.

219. Section 39(5) of EqA provides that the duty to make adjustments applies to an employer. By section 20 of EqA, incorporating the relevant provisions of Schedule 8, the employer's duty comprises three requirements.

220. We are concerned only with the first requirement, which is contained in section 20(3). Where a provision, criterion or practice (PCP) of the employer's puts a disabled employee at a substantial disadvantage in relation to the employer's employment in comparison with persons who are not disabled, the first requirement is to take such steps as it is reasonable to have to take to avoid the disadvantage.

221. In *Lamb v The Business Academy Bexley* UKEAT 0226/15 the EAT commented that the term "provision, criterion or practice" is to be construed broadly "having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability".

222. In *United First Partners Research v Carreras* [2018] EWCA Civ 323 the Court of Appeal held that an expectation that the Claimant work longer hours – rather than a requirement as such – was sufficient to amount to a PCP.

223. A PCP should not be defined by reference to the adjustment that should allegedly have been made: *FirstGroup plc v. Paulley* [2014] EWCA Civ 1573 (overturned by the Supreme Court on other grounds).

224. A disadvantage is substantial if it is more than minor or trivial: section 212(1) of EqA.

225. Assessment of disadvantage does not involve comparing the disabled person to a real or hypothetical comparator. Where, for example, the PCP consists of an attendance policy that prescribes for action to be escalated on an employee's absence reaching defined trigger points, it is not necessary for the tribunal to ask whether a non-disabled person would be any better off under the policy if their absence reached the same trigger points. The PCP puts the disabled employee at a disadvantage where, as is often the case, that employee's disability makes them more likely than a non-disabled person to be absent from work: *Griffiths v. Secretary of State for Work and Pensions* [2015] EWCA Civ 1265.

226. Schedule 8, paragraph 20, of EqA provides that an employer is not subject to a duty to make reasonable adjustments if the employer does not know, and could not reasonably be expected to know that the disabled employee is likely to be placed at the disadvantage referred to in the first requirement.

227. The Equality and Human Rights Commission's *Code of Practice on Employment* gives further content to the knowledge provisions in paragraph 20. In the context of knowledge of an employee's disability, paragraph 6.19 states that, to avail themselves of the knowledge defence, employers must "do all they can reasonably be expected to do to find out" about the disability. Tribunals should bear in mind the need for dignity and privacy. In our view, this guidance not only tells employers – quite rightly – to handle disability enquiries sensitively and confidentially, it also informs the extent to which an employer may be reasonably be expected to make an enquiry in the first place. Many employees would not welcome the intrusion of their employer making proactive enquiries about their mental health. We consider that the guidance is of equal relevance when examining the question of the employer's knowledge of a substantial disadvantage.

228. Paragraph 6.28 of the Code lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

228.1. Whether taking any particular steps would be effective in preventing the substantial disadvantage;

228.2. The practicability of the step;

228.3. The financial and other costs of making the adjustment and the extent of any disruption caused;

228.4. The extent of the employer's financial and other resources;

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

228.6. The type and size of employer.

229. Before a respondent is required to disprove a failure to make adjustments, there must be sufficient facts from which the tribunal could conclude not just that there was a duty to make adjustments, but also that the duty has been breached. By the time the case is heard before a tribunal, there must be a broad indication of what adjustments it is alleged should have been made: *Project Management Institute v. Latif* UKEAT 0028/07.

230. It may be reasonable for an employer to have to take a step that the employee never suggested whilst they were in employment. To put it another way, the employer may be under a duty to make an adjustment proactively, without waiting for the employee to ask for it. During the course of the parties' final submissions, the employment judge sought the parties' views on a slightly different point. Is it permissible for the tribunal to take into account that the employee never asked for a particular step as a relevant factor when considering whether or not it was reasonable for the employer to have to take that step? Both parties' representatives agreed that such an approach would be permissible, although the claimant's counsel asked us not to hold that factor against the claimant in the circumstances of this case.

231. A failure to consider whether a particular adjustment would or could have removed the disadvantage amounts to an error of law. The Court of Appeal put the matter this way in *Griffiths v Secretary of State for Work and Pensions* [2017] ICR 160:

> "So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness."

<u>Discrimination arising from disability</u>

232. Section 15(1) of EqA provides:

> (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.

233. Langstaff P in *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14 (19 May 2015, unreported) explained (with emphasis added):

> "The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently

> expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages."

234. Treatment is unfavourable if the claimant could reasonably understand it to put her to a disadvantage.

235. These principles have been affirmed in *Pnaiser v. NHS England* [2016] IRLR 174.

236. It is no defence to a complaint under section 15 that the employer did not know that the reason for the unfavourable treatment had arisen in consequence of the employee's disability: *City of York Council v. Grosset* [2018] EWCA Civ 1492.

237. When considering the justification defence (now found in subsection (1)(b)), the tribunal must weigh the discriminatory effect of the treatment against the reasonable needs of the business: *Hardy and Hansons Plc v Lax* [2005] ICR 1565, applying *Allonby v. Accrington & Rossendale College* [2001] ICR 1189.

238. In *Hensman v Ministry of Defence* UKEAT/0067/14, Singh J held that, when assessing proportionality, while a tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

239. The *Code* offers guidance on the interrelationship between the making of adjustments and the proportionate means defence. The following extract appears to us to be relevant:

> "5.20 Employers can often prevent unfavourable treatment which would amount to discrimination arising from disability by taking prompt action to identify and implement reasonable adjustments…
> 5.21 If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified. …"

240. Paragraph 5.21 of the *Code* is consistent with the following statement made by Simler J in *Dominique v. Toll Global Forwarding Ltd* UKEAT/0308/13 (concerning the Disability Discrimination Act 1995) at paragraph 51:

> "….where there is a link between the reasonable adjustments said to be required and the disadvantages …being considered in the context of ….disability-related discrimination, it is important to ensure that any failure to comply with a reasonable adjustment duty is considered as part of the balancing exercise in considering questions of justification. This is because it is difficult to see as a matter of practice how a disadvantage that could have been addressed or prevented by a reasonable adjustment that has not been made can, as a matter of practical reality, be justified."

Time limits

241. Section 123 of EqA provides, so far as is relevant:

> (1)… proceedings on a complaint [of discrimination or harassment in the field of work] may not be brought after the end of—
>
> > (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> >
> > (b) such other period as the employment tribunal thinks just and equitable.
>
> …
>
> (3) For the purposes of this section—
>
> > (a) conduct extending over a period is to be treated as done at the end of the period;
> >
> > (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> > (a) when P does an act inconsistent with doing it, or
> >
> > (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

242. In *Commissioner of Police of the Metropolis v Hendricks* [2002] EWCA Civ 1686; [2003] ICR 530, a police officer alleged racial and sexual discrimination Mummery LJ, with whom May LJ and Judge LJ agreed, gave guidance on the correct approach to "an act of extending over a period".

> 48. [the claimant] is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an 'act extending over a period'…
>
> 52. ... The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would be given to run from the date when each specific act was committed"

243. A one-off act with continuing consequences is not the same as an act extending over a period: *Sougrin v Haringey Health Authority* [1992] IRLR 416, [1992] ICR 650*, CA.*

244. In considering whether separate incidents form part of "an act extending over a period", one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents: see *British Medical Association v Chaudhary*, EAT, 24 March 2004 (unreported, UKEAT/1351/01/DA & UKEAT/0804/02DA) at paragraph 208, cited with approval by the Court of Appeal in *Aziz v. FDA* [2010] EWCA Civ 304.

245. In *Matuszowicz v. Kingston on Hull City Council* [2009] EWCA Civ 22, the Court of Appeal held:

245.1. that an ongoing failure to make adjustments is not an act "extending over a period"; it is a "failure to do something", the date of which is to be determined according to the statutory provisions (now in section 123 EqA);

245.2. if the respondent does not assert that the time limit started to run from a date earlier than that put forward by the claimant, the tribunal should proceed on the basis of the claimant's alleged date; and

245.3. that where confusion over the time limit provisions causes an unwary claimant to delay presenting the claim, the confusion can be taken into account as a factor making it just and equitable to extend the time limit.

246. It follows from *Matuszowicz* and section 123(4) that, where an employer acts inconsistently with the duty to make adjustments, the time limit runs from the date of the inconsistent act. If there is no such act, time begins from when the date on which claimant contends a reasonable period of time expired for the making of the adjustment, unless the respondent argues – and the tribunal accepts - that the reasonable period in fact expired sooner.

247. The "just and equitable" extension of time involves the exercise of discretion by the tribunal. It is for the claimant to persuade the tribunal to exercise its discretion in his favour: *Robertson v. Bexley Community Centre* [2003] EWCA Civ 576. There is, however, no rule of law as to how generously or sparingly that discretion should be exercised: *Chief Constable of Lincolnshire Police v. Caston* [2009] EWCA Civ 1298. The discretion to extend time is "broad and unfettered": *Abertawe Bro Morgannwg University v. Morgan* [2018] EWCA Civ 640.

248. Tribunals considering an extension of the time limit may find it helpful to refer to the factors set out in section 33 of the Limitation Act 1980 (extension of the limitation period in personal injury cases): *British Coal Corpn v. Keeble* [1997] IRLR 336. These factors include:

248.1. the length of and reasons for the delay;

248.2. the effect of the delay on the cogency of the evidence;

248.3. the steps which the claimant took to obtain legal advice;

248.4. how promptly the claimant acted once he knew of the facts giving rise to the claim; and

248.5. the extent to which the respondent has complied with requests for further information.

249. In *Adedeji v. University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, the Court of Appeal warned against using section 33 as a checklist. The statutory test is whether or not the extension is just and equitable.

Burden of proof

250. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person ("A") contravened

the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

251. In *Igen v. Wong* [2005] EWCA Civ 142, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in legislation preceding EqA. They warned that the guidance was no substitute for the statutory language:

> (1) … it is for the claimant who complains of … discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination ... These are referred to below as "such facts".
>
> (2) If the claimant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of … discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
>
> (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
>
> (5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
>
> (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
>
> (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a [statutory questionnaire].
>
> (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts…This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
>
> (9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
>
> (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

> (11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.
>
> (12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
>
> (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

252. We are bound by at least two Court of Appeal authorities to hold that the initial burden of proof is on the claimant: *Ayodele v. Citylink Ltd* [2017] EWCA 1913 and *Royal Mail Group Ltd v. Efobi* [2019] EWCA Civ 18. The Supreme Court has recently heard an appeal against the Court of Appeal's decision in *Efobi.* Judgment on that appeal is currently awaited.

253. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Conclusions – duty to make adjustments

Our approach

254. There are many alleged PCPs, each of which is said to have given rise to multiple disadvantages, and each of which allegedly triggered the duty to take multiple steps. In relation to each PCP, disadvantage, and step, there is a series of jurisdictional and substantive issues that we must determine. It would be wholly disproportionate to go through every issue under every heading. That would involve us asking ourselves literally hundreds of repetitive questions. Rather, we start by applying the law to the facts in relation to one in-work PCP and one absence PCP, the resulting disadvantages, the steps which, it is claimed, the respondent should have taken to avoid those disadvantages, and our jurisdiction to determine that complaint. Thereafter, we have considered the remaining permutations of PCPs, disadvantages and steps only where we thought that it would contribute appreciably to the analysis. Where it was clear to us that a particular complaint lacked merit, we did not generally consider whether it would also fail separately because of the statutory time limit. We have determined jurisdictional questions in the context of specific parts of the claim which we considered might succeed in substance.

The in-work PCPs

255. We start with the first in-work PCP.

PCP1 - To work to a timetable with limited time for Heads of Year to perform tasks in administration.

256. There is no dispute that PCP1 existed, but it is important to be clear about what it means. We understand the phrase, "tasks in administration" to mean something wider than the pure administrative tasks defined and deprecated in STPCD. That was the respondent's understanding, too. In her helpful and thorough written submissions, Mrs Skeaping engaged with this PCP on the understanding that it encompassed the "additional work", incidental to the claimant's role, that STPCD requires teachers to do. We take this to mean the aspects of the Head of Year teacher's role which do not involve being specifically timetabled to be in lessons, assemblies or meetings. Such work would include some element of administration, such as report-writing, logging incidents and answering e-mails, but would not be confined to purely administrative tasks.

257. The time available to a 0.8 full-time equivalent Head of Year to do those tasks varied slightly, and was somewhere between 7.4 and 9.4 hours per fortnight: see paragraph 56. In addition, the Head of Year would have one or more hours of Supervised Study that would enable them to get on with such tasks. That would take the total, in academic year 2017-2018, to somewhere between 8.4 and 10.4 hours. This time was also time that could be used for preparation, planning assessment of curriculum teaching. The more of the time was taken up with Head of Year work, the less time would remain for curriculum work, and the more non-directed time the Head of Year would need to spend on these tasks.

Disadvantage

258. From January 2018, PCP1 put the claimant at a substantial disadvantage when compared with non-disabled persons. We would describe the disadvantage as follows:

258.1. The claimant was struggling with her workload generally. Although the focus of her anxiety was the particular tasks associated with the Head of Year role, such as report writing, logging incidents and the forthcoming EPQ students, those tasks cannot be viewed in isolation. The claimant also had to devote a considerable amount of time to planning, preparing and assessment for her Spanish lessons. Having a limited time of up to 10.4 hours in which to do all the "tasks in administration" (which included all these aspects of her role) meant that the longer it took her to do all those tasks, the more non-directed time she would have to devote to them. That meant her working more hours during breaks, evenings and weekends.

258.2. The stress of having to work the additional hours caused a re-emergence of anxiety symptoms, which was more likely to happen to the claimant than to a non-disabled person.

258.3. To complete the vicious cycle, her re-emerging anxiety symptoms meant that it was harder for her than for a non-disabled person to carry out her role in the time available.

259. That disadvantage was more than minor or trivial by the evening of 9 January 2018. The claimant cried uncontrollably and, shortly afterwards, told her trade union representative that she was overwhelmed.

260. We consider this description of the disadvantage to be consistent with, and encompassed by, at least two the disadvantages alleged by the claimant. It is not necessary for us to consider the other alleged disadvantages. To our minds, they do not add anything. Not, at any rate, when considering PCP1.

261. We did not make any finding about whether PCP1 put the claimant to any substantial disadvantage prior to January 2018. If there was a disadvantage, it was of a different nature. As we have found, the claimant's anxiety symptoms in connection with workload did not re-emerge until January 2018. She had been "extremely anxious" on occasion before that time, but her anxiety had been provoked by situations of confrontation, not by work pressure. Of course, prior to January 2018, there was always a *risk* that, with the increased vulnerability caused by her disability, the claimant might relapse if she was overworked. But we did not think it worthwhile to try to assess the magnitude of that risk, which would be a necessary preliminary step to determining whether the disadvantage to the claimant was more than minor or trivial. We declined to determine this issue because, in any event, we were sure that if this disadvantage existed, the respondent had no reason to know about it. In coming to this view, we have taken account of the claimant's conversation with Mrs Gaunt on 14 July 2017. As we found at paragraph 87, the focus of this conversation was not about the claimant's mental health, or her ability to cope with her workload. It was about perceived unfairness in the distribution of lessons. It did not make it reasonable to expect the respondent to know that the claimant was likely to be at a significantly-increased risk of relapse.

Knowledge of disadvantage

262. Although the burden of proof is on the respondent to disprove knowledge, we did not need to resort to the burden of proof in this instance. We were able to make a positive findings on the evidence.

263. In our view, the critical date, sometimes called the "date of knowledge", is 2 February 2018. Prior to that date, the respondent did not know, and could not reasonably have been expected to know, that the claimant was likely to be placed at the disadvantage caused by PCP1. Nobody on the SLT knew that the claimant's anxiety condition had become symptomatic and nobody on the SLT could reasonably have been expected to know that fact. In our view, whatever Ms Cano knew about the claimant's illness cannot be attributed to the respondent. The claimant only told Ms Cano confidentially in her capacity as a friend and peer. The mutual understanding was that Ms Cano would not act on the information unless the claimant asked her to do so, which she did not do. Nobody on the SLT knew, prior to 2 February 2018, that the claimant was struggling with her workload to the extent that it might affect her health. Nor did they know that the claimant's mental health was making it harder for her to complete "tasks in administration" within the confines of the school timetable. In our view, the respondent could not have been expected to know any of these things. Up to that point, the claimant had not said anything to alert the respondent to these possibilities; not even enough to make it reasonable to expect Mrs Young to make pro-active enquiries into the claimant's health. Even if such enquiries had been made prior to January 2018, it is highly likely that the claimant's response would have been consistent with what she later

told Ms Lewis – at that stage, she was not symptomatic and would have told the respondent so.

264. All that changed with the meeting on 2 February 2018. From that time onwards, Mrs Young knew that the claimant was likely to be placed at the substantial disadvantage. In particular, she knew that the claimant was having difficulty coping with her workload and had made the conscious connection between the need to act quickly to resolve that difficulty and the claimant's history of depression and anxiety. In any event, we would find that knowledge of those facts would make it reasonable to expect Mrs Young to know of the likely disadvantage.

265. The respondent argues that, even after 2 February 2018, it could not reasonably have been expected to have the knowledge of the disadvantage. Mrs Skeaping reminded us of Mrs Young's supervision meeting with Ms Cano just before the meeting with the claimant. Ms Cano did not raise any concerns about the claimant at that time. Ms Skeaping argues that the respondent could not reasonably be expected to guess that any disadvantage existed when none had been mentioned by Ms Cano. We disagree. This argument ignores what the claimant told Mrs Young during the meeting and what Mrs Young herself thought about it.

Step 1(a) – providing the claimant with additional protected non-teaching time by providing her with 3 periods of PHSE and not 4

266. Read literally, this suggested step makes no sense. The claimant, as a Head of Year, did not teach PSHE at all. What we suspect the claimant means is that one of her Monday morning assembly periods or Friday morning sessions (when she used to visit her students in their form period) should have been converted into a non-contact period.

267. It would never have been reasonable for the respondent to have to convert the Friday morning form period into non-contact time. It would have worsened, not avoided, the disadvantage caused by PCP1. If the claimant did not visit students on Friday mornings in their form periods, she would have had to go and find them at some other time. Speaking to members of her year group was an essential part of her role. Since the claimant would not have been able to speak to them during lessons, or assemblies, or meetings, she would have needed to find some non-teaching time or break time in which to go and find them. If anything, that exercise would have caused more, not less, disruption to the claimant's ability to get on with her work, because the students would not be grouped together and would be harder to locate.

268. We considered whether it would have been reasonable for the respondent to have to excuse the claimant from attending assembly once per fortnight, so as to make room for an additional non-contact period. In our view, that would have been expecting too much of the respondent. The claimant never suggested this possibility at either of her meetings with Mrs Young, despite making other quite detailed proposals for reducing her workload. Whilst the claimant's failure to mention it does not by itself absolve an employer of its legal duty, it helped us to conclude that there was little if any prospect of it lessening the disadvantage. It also accords with the reality. If the claimant did not go to assembly, she would need to spend time familiarising herself with what had been discussed during

assembly with her year group. And, just as with Fridays, she would be deprived of the opportunity to find students easily so she could go and speak to them. We are sure that, for reasons such as these, the claimant herself did not believe that skipping assembly was a realistic option.

Step 1(b) – ensuring that the Supervised Study period be converted into non-contact protected time

269. We concluded that it was not reasonable for the respondent to have to convert the claimant's Supervised Study period into non-contact protected time. It would have had no prospect of avoiding the PCP1 disadvantage. Supervised Study was already ringfenced time in which the claimant could do her "tasks in administration". Converting it to non-contact time would just mean that there would be nobody in the claimant's classroom whilst the claimant got on with the same tasks. It would not give the claimant any additional time to manage her workload. Doubtless for this reason, the claimant declined this option when it was offered to her.

Step 1(c) – removing both EPQ students - jurisdiction

270. Before expressing our conclusion on whether the respondent should have removed the EPQ students, we first decide whether we have jurisdiction to consider that question in the first place. That involves considering the statutory time limit.

271. For the purpose of section 123 of EqA, the failure to remove AD was "done" shortly after 2 February 2018, when Mrs Davies and Mrs Young agreed that the claimant would continue to have responsibility for AD (see paragraph 108). Under section 123(4), the failure to remove CD must be treated as having been done on the expiry of a reasonable time for doing it. In our view, that time expired prior to the second meeting with Mrs Young on 23 March 2018. Seven weeks had gone by since the last meeting and nobody had told the claimant that she was no longer responsible for CD.

272. If the failure to take this step was a discriminatory failure to make adjustments, the time limit for bringing a complaint in respect of that contravention expired, at the latest, by 22 June 2018. The first claim was not presented until 18 July 2019, over a year later.

273. In our view, this failure to make adjustments – if that is what it was – was not part of the same ongoing state of affairs as any alleged failure to make adjustments occurring after 18 March 2019, or indeed any failure occurring during any other part of the claimant's sick leave. This is because the nature of the PCPs was different, the nature of the steps was different and the person responsible for any failures during sick leave was Mrs Gaunt, not Mrs Young. The claimant needs an extension of over a year.

274. We have decided that, despite the long delay, it would be just and equitable to extend the time limit for this particular step. The claimant was extremely unwell and was in no fit state to begin early conciliation or to present her claim before April 2019 when she first wrote directly to Mrs Gaunt. In our view, the delay has not significantly affected our ability to determine this part of the claim fairly on its merits. The cogency of the evidence has not diminished and the facts are clear. We know what Mrs Young knew at that time, what they discussed about EPQ

students, when the relevant decisions were made and when they were acted upon. So far as the failure to remove EPQ students is concerned, we have jurisdiction to consider the claim.

Step 1(c) – removing both EPQ students - merits

275. In our view it was reasonable for the respondent to have to remove both EPQ students from the claimant promptly and to inform the claimant that this had been done. Mrs Young knew that the EPQ students were a particular focus of the claimant's anxiety (a "pinch point", in Mrs Young's words) over her workload. If it was impractical to alter the timetable, it would have been relatively easy to reallocate AD to another teacher. That might have required another teacher to take more than their fair share of EPQ students (until it became clear that AD was not going to complete the EPQ course), but the duty to make adjustments sometimes requires the employer to treat a disabled person more favourably than others. We also think that it was reasonable for Mrs Young, having decided to take CD as an EPQ student, to have to inform the student, the claimant and Mrs Davies that this had happened. Only then could the claimant relinquish responsibility and stop worrying about it. But nothing was said to the claimant until late March 2018.

276. By failing to take these steps, the respondent breached the duty to make adjustments and must therefore be treated as having discriminated against the claimant.

Step 2 – additional administration support

277. Because of the delay in presenting the claim, we found it difficult to make clear findings about what additional administrative support could have been provided to the claimant: see paragraph 67. We also thought that the passage of time had created an obstacle to our finding about whether or not the claimant had requested a Dictaphone on 2 February 2018 - paragraph 106 records this difficulty.

278. We were able to find (also at 67) that the claimant already had additional help in making telephone calls to parents. It was also our finding (at paragraph 89) that, from the autumn of 2017, the claimant was given more accessible attendance information to help her compile Head of Year report. By February 2018, Mrs May believed (as we found in paragraph 107) that she provided more support to the claimant than to any other Head of Year. These findings were not enough, by themselves, to enable us to reach a conclusion as to whether or not it was reasonable for the respondent to have to do more.

279. If pushed towards making a finding, we would incline towards the view that it was not reasonable for the respondent to have to provide any further administrative support.

280. We thought it safer, however, to decline jurisdiction to consider this aspect of the claim at all. This is because of the statutory time limit. As we have already found in relation to Step 1(c), if there was a breach of the duty to make adjustments, it was altogether different from any later alleged discrimination whilst the claimant was absent on sick leave. Any discriminatory failure to provide additional administrative support must be treated as having been "done" when Mrs Young decided upon it prior to the 23 March 2018 meeting. If we are wrong about that, the time limit must have begun to run, at the very latest, by June 2018 when

the claimant's sickness absence began. From that time onwards, no amount of administrative support could assist the claimant back to work. She needs the time limit to be extended by many months. Although the claimant had a good reason for the long delay, the effect of the delay has been to hamper our ability to find the facts. The effect on our ability to reach a fair conclusion means that is not just and equitable to extend the time limit.

Step 3 – formally ensure effective cover for the claimant's day off

281. By contrast with Step 2, we did not need to resort to the statutory time limit when considering Step 3. The evidence was clear enough for us to dismiss this part of the claim on its merits. It would not be reasonable for the respondent to take the step of formally ensuring effective cover for the claimant's day off. There was already some formalised cover in place. The claimant did not have to teach on Tuesdays, which meant that she did not need to do any planning or marking for any lessons that took place on that day. There was also informal cover: generally, incidents that took place on a Tuesday were dealt with there and then: see paragraph 63.

282. The only remaining step to be taken would be to appoint someone formally to cover the role of Head of Year on the claimant's day off, so that they could attend to the aftermath themselves without the claimant having to deal with it on a Wednesday morning. But there are two reasons why it would not be reasonable for the respondent to have to make such an appointment.

282.1. First, it would not have significantly alleviated the disadvantage caused by PCP1. This is because there was very little evidence that the Wednesday morning e-mails contributed substantially to the claimant's workload: see paragraph 64.

282.2. Our second, and more fundamental, reason is that the claimant herself did not want this step to be taken. We found at paragraph 104 that Mrs Young offered to make someone responsible as Head of Year on the claimant's day off, and the claimant rejected the offer.

Step 4

283. We did not understand it to be the claimant's case that PCP1 gave rise to the duty to take Step 4. For good measure, we would find such an argument difficult to accept. Supporting the claimant at meetings would not avoid the disadvantage caused by having to do administrative work within a limited timetable.

<u>PCP2 – To work to a timetable which did not provide pro rata equivalent protected time for part-time staff as for full-time staff</u>

No PCP

284. PCP2 did not exist. We did not find it easy to understand exactly what the claimant meant by "protected time", but on any measure that we could think of, the claimant's pro-rata timetable was at least as generous as it was for full-time Heads of Year. In particular,

284.1. We imagined that "protected time", might mean the total teaching timetable during which a Head of Year was not required to be in lessons. Applying that definition, the claimant was very slightly better off than a full-time

Head of Year. She had to teach 35 lessons out of 48 periods of directed time, meaning that 27.1% of her time was protected time. A full-time Head of Year would have to teach 44 out of 60 periods, meaning that their protected time was 26.7% of the teaching timetable.

284.2. In case we misunderstood what the claimant meant, we considered, as an alternative definition of "protected time", the whole of the Head of Year's directed time during which they were not required to be in lessons, meetings or assemblies. The precise amount of protected time (according to that definition) could not be calculated, because we did not have figures for the duration of time between the end of assembly and the first teaching period (see paragraph 56). But we had enough information to know that the claimant would still have proportionally more protected time than a full-time Head of Year. We had no reason to suppose that these short, variable amounts would benefit full-time Heads of Year any more than they would benefit a part-time Head of Year. One quantifiable period of protected time – namely the 25 minutes on a Wednesday morning – was available to the claimant in full, despite the fact that she only worked part-time hours.

Disadvantage

285. We have another reason for dismissing the part of the claim that is based on PCP2. Even if PCP2 existed, it did not put the claimant to any disadvantage that was not already caused by PCP1. This is not a case where the claimant alleges that her disability made it harder for her to cope with perceived unfair treatment (whether based on part-time worker status or otherwise). Some specific learning disabilities undoubtedly have that effect, but that disadvantage is not even hinted at in the claimant's long list of alleged disadvantages set out in paragraph 12. In the statutory language, if it was not reasonable for the respondent to have to take a step to avoid the disadvantage caused by PCP1, there was nothing about the disadvantage caused by PCP2 that would make it any more reasonable for the respondent to have to take that step. Put more crisply, PCP2 did not trigger any additional duty to make adjustments.

<u>PCP3 – For Heads of Year to be on call to pupils at lunch, during breaks and before and after school</u>

No PCP

286. PCP3 overstates what Heads of Year were required do during lunchtimes and breaks. They were expected to be generally visible and approachable, but, except whilst on the rota, they had the freedom to choose when to make themselves available to students (see paragraphs 61 and 62).

Disadvantage

287. Rather than dismiss the claim based on PCP3 altogether, we examined whether or not there was any disadvantage caused by the reality of a Head of Year's responsibilities and their intrusion into break and lunch times. In our view, there was some disadvantage to the claimant. The expectation we have just mentioned meant that she had less time available during breaks and lunchtime during which to carry out the non-contact parts of her role. This would inevitably mean additional time spent at home. The claimant's disability meant that she

found the stress of the additional work harder to bear than a non-disabled person would find it. But the root cause of the disadvantage was still PCP1 – having only a limited amount of directed time in which to perform administrative tasks.

Knowledge

288. If PCP3 caused any disadvantage beyond what was already caused by PCP1, we cannot see how the respondent knew or ought to have known about it before she went on sick leave. The claimant did not specifically alert Mrs Young to any particular problem associated with having to be available to speak to students during lunchtime and breaks (see paragraph 100).

Reasonable steps

289. In view of our conclusions in relation knowledge, it is not strictly necessary for us to consider the claimant's proposed reasonable steps. We do so relatively briskly. In our view, there was nothing in PCP3, or the reality of intrusion into break times, that would extend the duty to make adjustments to include taking any step that was not already required by PCP1.

<u>PCP4 - For Heads of Year to deal with complaints of teachers about disruptive pupils</u>

PCP

290. It was certainly the case, as alleged in PCP4, that Heads of Year were required, as part of their role, to deal with teachers' complaints about disruptive students in their year group.

Disadvantage

291. The only occasion on which we found PCP4 to put the claimant at any disadvantage was on 24 May 2018, when the claimant was informed of the incident between SAC and CS. On being informed of what had happened, she was anxious and resentful in a way that a person without an anxiety disability would not be. Her deteriorating mental health meant that she raised her voice at CS the following day when dealing with the aftermath.

292. Our understanding was that, prior to 24 May 2018, although the claimant had difficulty in dealing with parents, she did not struggle to manage disruptive students at the respondent's school.

Knowledge

293. The respondent did not know that PCP4 was likely to put the claimant at the disadvantage until 25 May 2018, the claimant's final day in work. Nor could the respondent have been reasonably expected to have found out. The claimant did not mention it as a problem. See, again, paragraph 100. By the time the respondent was in any position to know about the likely disadvantage, there was no time to make any adjustments.

Reasonable steps

294. Once again, because of our findings in relation to knowledge of disadvantage, we can briefly summarise our conclusion on the claimant's proposed adjustments. With the exception of Step 4, none of the identified steps could have avoided the disadvantage caused by PCP4. In Step 4, the claimant contends that the respondent should have provided "support in dealing with difficult parent and pupil

meetings." The natural reading of Step 4 is that it should be confined to meetings at which a parent was present. But even if we widen it to include meetings with students without parents, the claimant has still left us guessing at what support she says the respondent should have provided. If it was a member of SLT to sit in on the meetings, we do not think it was reasonable for the respondent to have to take that step. The claimant never asked for it. Just as with other steps, such as being excused from assembly, we have reminded ourselves that the absence of a request does not absolve the respondent from the legal duty, but it is a telling indicator that the claimant herself did not think that the step would be of much benefit.

PCP5 - For Heads of Year to deal with parent and teacher meetings about complaints and disruptive pupils

PCP, disadvantage and knowledge

295. Nobody disputes that PCP5 existed. It was part of the Head of Year role to meet with parents to discuss a parent's complaint or their daughter's disruptive behaviour. Owing to the claimant's anxiety condition, these meetings were significantly more difficult for her than for a non-disabled Head of Year.

296. As we have found at paragraph 81, from September 2015, after the EM meeting, the respondent could at least have been reasonably expected to know that the claimant was likely to be put at this disadvantage.

Steps 1-3

297. We cannot see how Steps 1-3 could have helped to avoid the disadvantage caused by PCP5. Even if the claimant had been supported to be completely on top of her workload, she would still have found the parent meetings just as difficult.

Step 4 - support in dealing with difficult parent and pupil meetings

298. In our view, it was reasonable for the respondent to have to take Step 4. That is what the respondent did, both before and after September 2015. On each occasion when the claimant had a challenging meeting with a parent, a member of the SLT accompanied her to that meeting. The claimant knew about the purpose of the meetings in advance. In short, there was a duty to make the proposed adjustment, but the respondent did not breach that duty.

PCP6 - For Heads of Year to carry out what had been the learning mentor's role

No PCP

299. We have found at paragraph 70 that the Heads of Year did not carry out the responsibility of the learning mentor's role. They never did the day-to-day work of a learning mentor, such as organising the breakfast clubs and the homework spaces. Nor did they provide the direct special needs intervention that one of the ex-learning mentors supplied in her temporary Teaching Assistant role.

No additional disadvantage

300. If this conclusion is found to be wrong, and it is held that PCP6 existed, we would add that it did not cause any disadvantage that would add appreciably to the general disadvantage caused by PCP1. If Heads of Year had to take on additional responsibilities in 2014, it would have the effect of increasing the amount of work

that Heads of Year had to do that was not lessons, assemblies or meetings. But we have already found that the claimant was struggling with her overall workload. See our analysis of the PCP1 disadvantage. If some of that workload happened to have been inherited in 2014, we do not see how it would change the nature of the disadvantage. At any rate, we fail to understand how any altered disadvantage would make any difference to whether or not it would be reasonable for the respondent to have to take Steps 1 to 4.

PCP7 - To produce weekly meeting notes, attendance reports, provision maps and logs

301. For similar reasons, we can deal quite briefly with PCP7. This is another PCP which, we think, adds nothing to the analysis. That is not to say that the PCP did not exist – the tasks listed here were part of the Head of Year's responsibilities. But the disadvantage PCP7 caused was no more than a component of the overall disadvantage caused by PCP1. There was nothing in particular about the tasks themselves that put the claimant at a disadvantage. They just formed part of the claimant's overall workload which, because of the constraints of the timetable, meant that she was working long hours of non-directed time.

PCP8 - For those with Year 12 study periods to take on EPQ students.

PCP

302. PCP8 was, in our view, a provision, criterion or practice. It was an expectation that all teachers with a period of Supervised Study should take responsibility for one or more EPQ students.

303. The respondent argues that this was not a PCP for two reasons. First, Mrs Skeaping says, the respondent did not force the claimant take this responsibility. Second, she argues, when the claimant expressed her concern, the EPQ students were taken away from her.

304. In relation to the first argument, we prefer the submission of Ms Casserley that a PCP does not necessarily involve any form of compulsion. As we are reminded by the Court of Appeal in *Carreras,* that would be setting the bar too high for the claimant. It is enough that the relevant teachers were *expected* to take on EPQ students, even if they were not *required* to do so.

305. As for the second argument, we believe that the respondent is conflating two distinct elements of the legal test. Just because steps were allegedly taken at a later stage to remove the harmful effect of a PCP does not mean that the PCP did not exist in the first place.

Disadvantage

306. PCP8 put the claimant to two kinds of substantial disadvantage when compared to persons who were not disabled. One kind of disadvantage was merely a subset of PCP1 – a contribution to her overall workload with which she was struggling. No more needs to be said about that.

307. To our minds, though, PCP8 also put the claimant at a disadvantage that was both substantial and materially different from the overall PCP1 disadvantage. Because of her anxiety disability, the claimant became fixated in her own mind with:

307.1. the value of her Supervised Study period (relative to other periods of non-teaching time)

307.2. the burden of the particular task of supervising EPQ students and

307.3. a perceived equation whereby responsibility for EPQ students in some way cancelled out the valuable benefit of the Supervised Study lesson.

308. We did not consider that we needed any expert evidence in order to reach this conclusion. It is borne out by the claimant's immediate reaction, the odd way in which she expressed the problem to Mrs Young, and the claimant's witness statement and oral evidence, which repeat the association in her mind between Supervised Study and EPQ.

309. Even if we are wrong about that, and the claimant's disability did not *cause* the claimant to think this way, the *effect* of these thoughts was to increase her levels of anxiety. Because of her mental health condition, those anxiety levels weighed more heavily on her than they would on a non-disabled person.

Knowledge of disadvantage

310. Our view is that, by the end of the meeting on 2 February 2018, Mrs Young could reasonably have been expected to know that the claimant was likely to be placed at this disadvantage. It should have been clear to Mrs Young that the link between Supervised Study and EPQ students was a particular source of anxiety for the claimant. That knowledge could reasonably be expected to be combined with what Mrs Young was already thinking about the claimant's mental health history, and her linked knowledge that the claimant was struggling to cope with her workload.

Reasonable Steps

311. Our analysis of the proposed adjustments is focused solely on the specific disadvantage caused by PCP8, and not its general contribution towards the overall PCP1 disadvantage. Of Steps 1-4, the only step that could have avoided the specific disadvantage was Step 1(c) – removing the EPQ students.

312. We think that the additional disadvantage caused by PCP8 strengthens our existing conclusion that the respondent was under a duty to take Step 1(c) and to take it promptly. It was all the more important for Mrs Young to act swiftly to remove the claimant's responsibility for EPQ students. For the reasons we have already given, we do not consider that action was taken quickly enough.

313. This is another route to our conclusion that the respondent breached the duty to make adjustments by failing to remove the EPQ students within a reasonable time and, therefore discriminated against the claimant.

<u>The absence PCPs</u>

314. Having considered all the in-work PCPs, we now turn our attention to those PCPs that are said to have applied whilst the claimant was absent on sick leave.

<u>PCP9 - That the employee maintain a certain level of attendance at work in order to avoid the risk of disciplinary or other sanctions</u>

PCP

315. The respondent has rightly conceded that PCP9 existed. Paragraph 9.2 and 11.1, when combined, clearly exposed an employee who was absent for more than four weeks to the risk of a Formal Caution.

Disadvantage

316. In passing, we observe that PCP9 would put the claimant to exactly the same disadvantage as identified by the Court of Appeal in *Griffiths.* Her disability prevented her from working for more than four weeks; a non-disabled person would be much less likely to need to take so much sick leave. One of the complicating features of this case, however, is that this is *not* one of the three disadvantages that is said to have been caused by any of the absence PCPs. Our task is to adjudicate on the issues that are actually before us, rather than to imagine issues that would be more convenient ways of disposing of the case. So we must turn our attention to the three alleged disadvantages.

317. The first alleged disadvantage is that the claimant was unable to attend Absence Review Meetings and was caused significant distress. The second alleged disadvantage seems to us to be another way of re-stating the first. (We do not consider the third disadvantage at this stage, as it is based on the claimant's ability to deal with written correspondence.)

318. In our view, the first disadvantage is made out. Although PCP9 concerns "disciplinary or other sanctions", a necessary precursor to such a sanction would be an Attendance Review Meeting. We accept the claimant's contention that, throughout her absence, her illness was so severe that she could not face the prospect of attending an Absence Review Meeting. That was a difficulty that a non-disabled person would be unlikely to have.

Knowledge

319. The respondent's written submissions do not appear to maintain any denial of knowledge of the disadvantages caused by the absence PCPs. In any case, the respondent knew of the disadvantage following the occupational health reports of 28 November 2018 and 16 January 2019. Ms Lewis' opinion could not have been clearer.

320. We now consider the steps which, the claimant says, the respondent should have taken to avoid the disadvantageous effect of PCP9.

Step 5 - Not to contact the Claimant to arrange absence management meetings during the period that Occupational Health advised she was not fit to attend meetings

321. In our view it was not reasonable for the respondent to have to take Step 5. It would be expecting too much of the respondent to dispense with Absence Review Meetings indefinitely until the claimant was well enough to attend. Our reasons are essentially twofold:

321.1. The potential benefits of the step were doubtful. Ms Lewis' reports did not offer any timebound prognosis. The respondent had no way of knowing how long the claimant would be too unwell to attend a meeting. For all the respondent knew, the claimant's continued absence could be making her health worse, rather than better.

321.2. The cost of taking that step would be open-ended disruption to students' education. Unless a meeting took place, the respondent could not issue any kind of formal caution under paragraph 11 of the Policy and could not progress to a review of the claimant's continued employment. It would be obliged to let the claimant's absence drift for an unknowable period. Our findings at paragraph 185 illustrate Mrs Gaunt's very real concern about the impact that the claimant's absence was having.

322. The claimant argues that the 30 January 2019 invitation to an Attendance Review meeting was premature, because the respondent had not yet referred the claimant to an occupational health physician in accordance with Ms Lewis' recommendation. We disagree. One of the stated purposes of the meeting was to consider whether or not further medical evidence would be helpful. The respondent was reasonably entitled to consider that question as part of a formal absence management process, with a mechanism for seeking the claimant's point of view, and then making a decision about whether or not to engage a physician. In the language of section 20, it was not reasonable for the respondent to have to take the step of doing things the other way round.

Step 6 - Deal with absence management without the need for meetings with information being provided in writing

Merits

323. Step 6, on its face, is ambiguous. It could mean:

323.1. Dealing with absence management in ways which did not depend (under paragraph 11 of the Policy) on the respondent holding an Absence Review Meeting. This step would effectively prevent the respondent from being able to issue a Caution or consider dismissal.

323.2. Dispensing with the need for the claimant to attend a meeting before considering action such as a Caution, but giving the claimant the opportunity to make written representations before a decision was taken.

324. We take the claimant to be arguing for the latter interpretation of Step 6. Otherwise, there would be no need for Step 5. In case we are wrong about that, we would conclude that the respondent could not be reasonably have been expected to take Step 6 (interpreted in that way) for the same reasons as we have given for rejecting Step 5.

325. Applying our interpretation to Step 6, we have concluded that it was reasonable for the respondent to have to take that step. This is because:

325.1. The occupational health advice was very clear. The claimant was too unwell to attend a meeting.

325.2. Taking the step of allowing written representations would have enabled the claimant to get her point of view across without having to attend a meeting. It would have lessened the claimant's anxiety and would therefore have helped to avoid the disadvantage caused by PCP9.

325.3. It would have cost the respondent very little to invite the claimant to make written representations as an alternative to attending a meeting. Written representations were sought in relation to the Absence Review Meetings in

April and June 2019. The Sickness Absence Policy itself envisaged that written representations might be acceptable, albeit in circumstances in which the employee's companion was unavailable, rather than when the employee was too ill to attend altogether.

326. The respondent argues that it was not reasonable for it to have to invite written representations explicitly, because it had already taken all the steps that it was reasonable for it to have to take. In particular, the respondent relies on the fact that the invitation letter of 30 January 2019 gave the claimant the option to request reasonable adjustments to the meeting on account of her disability. In our view, this part of the letter did not go nearly far enough to avoid the disadvantage caused by PCP9. When read as a whole, the letter demonstrated a clear expectation that the claimant should be present at the meeting. In that context, an opportunity for the claimant to request adjustments to that meeting could not reasonably be read as any kind of reassurance that the claimant could avoid attendance altogether. It looked as if the respondent was looking for suggestions for how the meeting could be made easier for her once she was in the room.

327. Subject to the issue of time limits, therefore, we would hold that this complaint of failure to make this adjustment was well founded.

Step 6 - jurisdiction

328. There is no evidence of Mrs Gaunt, or anyone else, having taken a positive decision not to invite written representations as an alternative to a meeting. The time limit therefore started to run when the respondent did an act that was inconsistent with the duty to take that step. In our view, that act was done with the invitation letter on 30 January 2019 and again on 28 March 2019.

329. We regard the two letters as being part of the same act extending over a period. To be clear, we have not fallen into the trap (exposed in *Matuszowicz*) of thinking that either *failure* was by itself a continuing act. Rather, we have identified two failures, both done on separate dates, which together formed part of a continuing state of affairs. In each case the PCP was the same, the disadvantage was the same, and the neglected steps were the same.

330. In case we are wrong in our conclusion about an act extending over a period, we would need to consider whether or not it would be just and equitable to extend the time limit by approximately 6 months. Our conclusion is that such an extension would be just and equitable. Here are our reasons.

330.1. The claimant has good reasons for much of the delay. Six weeks of the delay (from 1 May 2019 onwards) are explained by the claimant going through the internal grievance procedure and ACAS early conciliation process. The claimant was represented by her trade union during the months of February and March 2019, but the claimant herself was too unwell to face the respondent in a meeting or deal with correspondence directly. It was not until April 2019 that she was able to write to the respondent.

330.2. We do not find any significant disadvantage to the respondent caused by an extension of the time limit. The duty to make adjustments is objective. Subject to the knowledge defence, which would be unsustainable for this part of the claim, there is no need to examine the subjective thinking of the alleged

discriminator. We were in any event able to find the facts clearly so far as this particular failure to make adjustments is concerned. During the period relevant to this part of the claim, the parties were communicating with each other in writing, aided by written occupational health reports. If there were any witnesses who needed interviewing whilst events were fresh in their minds, the respondent knew from 8 April 2019 that the claimant was complaining about being invited to a meeting so it had an opportunity to investigate whilst events were fresh in people's minds.

330.3. When considering the extent of any disadvantage to the respondent, we found the respondent's own analysis to be telling. According to the respondent, the critical distinction for time limit purposes was between the events pre-dating the claimant's sickness absence and those which took place during her sick leave. This suggested to us that the respondent believed itself to be at a greater disadvantage in defending the in-work allegations than those which arose at a later time.

331. We therefore have jurisdiction to consider this complaint of failure to make adjustments. For the reasons already given, that complaint succeeds.

Step 7 - Acknowledge that the Claimant was struggling and to put measures in place as set out above to ensure her mental health was not affected

332. Mrs Casserley's written submissions candidly refer to this step as a "catch-all" for the other steps in the list. There is no suggestion that this step would have any added beneficial effect. The submissions under this heading make particular reference to the need to explain the occupational health procedure, but this is separately dealt with under the heading of Step 10.

333. We do not think Step 7 merits further consideration, either in connection with PCP9 or any other PCP.

Steps 8-10, 12 and 13

334. In view of our findings so far, we can take Steps 8 to 10 and Step 12 at greater speed. It was not reasonable for the respondent to have to take these steps in order to avoid the disadvantage caused by PCP9. As we see them, these steps appear to be aimed at other disadvantages, which we will examine later.

Step 11 – Make clear what adjustments were being provided

335. It is worth giving Step 11 a separate mention.

336. Initially we had misgivings about its inclusion in the claim at all. This was because, on its face, Step 11 would require us to examine all the adjustments that the respondent provided and determine whether or not the respondent adequately explained them to the claimant.

337. Happily, the claimant's closing submissions brought Step 11 into much sharper focus. Ms Casserley is essentially using this step as another line of attack on the 30 January 2019 and 28 March 2019 invitation letters. Her point is that, if adjustments were available to the claimant at the proposed Absence Review Meetings, those adjustments were of no use to the claimant because she did not know what they were. This seems to us to be another way of saying that the PCP9 disadvantage was not adequately addressed by inviting the claimant to suggest

adjustments to the meeting. What was needed was for the respondent to explain that the claimant did not actually have to attend the meeting, but could make written representations instead. By declaring the claim based on Step 6 to be well-founded, we have already accepted that argument in the claimant's favour. To that extent – but no further – we also find that it was reasonable for the respondent to have to take Step 11. This part of the claim also succeeds on this limited basis. To avoid doubt, our conclusions in relation to time limits are exactly the same as they were for Step 6.

Step 13

338. In our view, there is little to be gained from analysing Step 13 under this heading. Our understanding of the claimant's case was that *all* correspondence concerning absence management was difficult for her to deal with at weekends and during holidays. There was nothing in particular about the Absence Review Meeting invitations that meant that they were any more apt than other correspondence for being sent during the week.

Step 14 - alter the letters sent so that the Claimant did not have to request adjustments (such as her mother attend meetings on her behalf)

339. Step 14 is slightly oddly worded. What we take it to mean is that the respondent should have pro-actively offered the adjustment of the claimant's mother attending on her behalf. We agree with the claimant that it was reasonable for the respondent to have to take that step. It was a relatively straightforward offer to include in the letter and the respondent did in fact make that offer ahead of the next Absence Review Meeting.

340. For the same reasons as we have given in relation to Step 6, we do not think that it was sufficient to leave it to the claimant to request adjustments. This was particularly true when the letter, read as a whole, strongly suggested that the claimant herself was expected to participate.

341. By failing to take this step, the respondent breached the duty to make adjustments and must be treated as having discriminated against the claimant.

342. We believe that we have jurisdiction to reach this conclusion. Our reasons are set out under the heading of Step 6.

<u>PCP10 – To attend Absence Review Meetings</u>

343. Our analysis of PCP10 has led us to the same conclusions as PCP9, albeit by a somewhat straighter road. There is no dispute that PCP10 existed. It put the claimant to the same disadvantage as PCP9, but did so more directly. (The claimant's particular source of anxiety was the prospect of having to attend the meetings themselves, which is what PCP10 is all about. PCP9, which concerned the potential *outcome* of the meeting, caused the same disadvantage, but in a more roundabout way: the Policy provided that there could be no management action unless there had first been a meeting.) Having established that the disadvantage was the same for both PCPs, we determined the remaining issues for both PCPs consistently. Which is to say, the respondent failed in its duty to take Steps 6 and 14 and, to a limited extent, Step 11, but did not breach any duty to take other steps.

PCP 11 – Following the absence management process, including a requirement to deal with the respondent in writing OR "not following an absence management process which enabled the Claimant to engage in a way she was able to with those making decisions"

Which formulation?

344. We have decided not to allow the claimant to recast the formulation of PCP11 in the way that is set out in Ms Casserley's written submissions. This is for two reasons. First, it still leaves us guessing about what specific aspects of the Sickness Absence Policy put the claimant at a disadvantage. Second, the proposed PCP is defined by the adjustments that the claimant says the respondent should have made, namely such adjustments as would enable the claimant to engage with the decision-makers.

345. Our approach to interpreting PCP11 was to draw upon the claimant's specific criticisms of the process in Ms Viriri's report and in the claimant's witness statement, so far as they appeared to us to be relevant and were not specifically mentioned in other PCPs. What we are left with was:

- *PCP11(a)* - Requiring the claimant to engage with occupational health; and
- *PCP11(b)* - Communicating with the claimant for the purposes of attendance management.

PCP11(a) – Requiring the claimant to engage with occupational health

PCP

346. The claimant was undoubtedly required to cooperate with occupational health.

Disadvantage

347. It is clear that PCP11(a) put the claimant at a substantial disadvantage when compared with persons who were not disabled. She found the occupational health consultations very difficult because of her poor mental health. We have found that during occupational health consultations the claimant became distressed and tearful and had a panic attack. One consultation was so traumatic for her that she needed about two weeks to recover.

348. Occupational health consultations which took place during school holidays put the claimant at an increased disadvantage, because the claimant did not want to get upset whilst her daughter was at home.

Knowledge

349. The respondent knew that the claimant was likely to be placed at this disadvantage. Ms Rycroft informed the school in June 2018 that the claimant was not ready to engage with occupational health. On 24 June 2018, the claimant's husband had written to Mrs Young informing her that an occupational health consultation would cause the claimant to re-live experiences with which she was still finding it very difficult to come to terms. Ms Lewis' report of 24 October 2018 referred to the claimant's panic attack.

350. One particular aspect of the disadvantage was unknown to the respondent. This was the increased disadvantage caused when the consultation took place during school holidays. But the respondent could reasonably have been expected

to know that this disadvantage was likely. Mrs Young and Mrs Gaunt knew that the claimant had a school-age daughter who would be likely to be at home during school holidays.

Reasonable steps

351. In our view, the only steps which could have avoided the disadvantage caused by PCP11(a) were Steps 9, 10 and 12.

Step 9 - not link co-operation with/engagement in occupational health and sickness absence to pay in written correspondence

352. In substance, Step 9 is a legal challenge to the occupational health appointment letters, which started in October 2018 and which contained a warning that the claimant's sick pay could be adversely affected by non-cooperation with occupational health. In our opinion that warning was fully justified. Occupational health advice is highly valuable both to employers and employees. It is the employer's main source of information in deciding what to do with an employee who tells them that she is too ill to work. No doubt this is why the parties to the collective agreement known as the Burgundy Book agreed that cooperation with occupational health should be a condition of occupational sick pay.

353. The importance of occupational health input was increased in this case by the fact that the claimant, through no fault of her own, was not communicating orally or in writing with the respondent. The respondent had already delayed the first occupational health consultation by four months. Of course, the respondent could have chosen to wait and see if the claimant would cooperate of her own accord. But that approach could easily have made things worse for the claimant. If the claimant did not participate in the occupational health consultation, the respondent would then have had to choose between letting the matter drift (which would not have helped anyone), reissuing an invitation with a warning about sick pay (which would have led to further delay), or stopping the claimant's sick pay without warning, which could have come as a nasty shock to the claimant. The claimant herself had told Ms Rycroft that she preferred to be able to anticipate what the respondent would do rather than receive an unpleasant surprise.

354. For these reasons, we are satisfied that it was not reasonable for the respondent to have to omit this warning from its written correspondence.

Step 10 - Make clear what the occupational health procedure was

355. Were it not for Ms Casserley's closing submissions, it would have been difficult for us to know what exactly the respondent was supposed to have done in order to comply with Step 10. Thankfully, Ms Casserley identified two particular instances of the claimant being confused about the occupational health procedure. We focus on those two instances.

June 2018 referral

356. The first relates to the early occupational health referral, for which Mrs Young sought the claimant's consent on 7 June 2018. It is the claimant's case that she could not understand why the respondent wanted such an early appointment when she had only been on sick leave for four days. Her confusion was allegedly increased by Mrs Young describing the referral as "standard practice", when the

Sickness Absence Policy merely stated that referral was at the respondent's discretion.

357. Our findings at paragraph 149 dispose of this argument. Taking the step of setting out the procedure correctly would not have avoided any aspect of the disadvantage caused by PCP11(a). Whilst the claimant was undoubtedly anxious about having to re-live her experiences with occupational health, and suspicious of Mrs Young's motives, she was not troubled by whether an early occupational health referral was a standard practice or not.

358. In any case, we find that it would not have been reasonable for the respondent to have had to delete the reference to "standard practice" from the 7 June 2018 letter. It was not misleading or confusing. We happen to know that it is common human resources practice, where an employee is absent with work-related stress, to try to intervene at an early stage and discover the causes. Just because early referral was not expressly referred to in the Sickness Absence Policy did not mean that it was not standard practice. The Policy gave the respondent the discretion to request a referral. It did not indicate how that discretion would be exercised. Absent any rubric to the contrary, it ought to have been obvious to anyone reading the Policy that the school would want to intervene early in any case where a teacher was absent with work-related stress.

Occupational health physician

359. The second area of confusion highlighted by Ms Casserley concerned the recommended referral to an occupational health physician. We have found that there was a dysfunctional conversation about occupational health at the Absence Review Meeting on 16 April 2019. Mrs Prosser did not understand the point that Mrs Sanderson and Mr Tierney were making. Prior to that meeting, the respondent had not clearly explained its position in relation to whether it would engage an occupational health physician or not. Had the respondent done so more clearly, it is less likely that the misunderstanding on 16 April would have occurred.

360. Nevertheless, we have reached the conclusion that it was not reasonable for the respondent to have to set out its position in relation to an occupational health physician any more than it actually did. In coming to this view, we have separately analysed two periods of time:

360.1. <u>From 19 January to 8 February 2019</u> – In our view, the respondent adequately set out its position in the 30 January 2019 invitation letter to the Absence Review Meeting. The question of whether or not to obtain further medical evidence was to be discussed at the meeting itself. Mrs Gaunt was reasonably entitled to assume that the claimant would understand that this was what she was saying. It was not reasonable for her to have to spell out that "medical evidence" might include the recommended referral to a physician.

360.2. <u>From 9 February 2019 onwards</u> – It is arguable that, once the 8 February 2019 meeting was adjourned, the respondent should then have expressly informed the claimant whether or not it would seek to make progress with the referral to a physician in advance of the re-scheduled meeting, or whether it would insist on the meeting happening first. But even if that step would have prevented any confusion, it would not have avoided the disadvantage caused by PCP11(a). Once she received the 30 January 2019 letter, the claimant felt

"let down" by the respondent over occupational health. This was not because the respondent had not been clear enough, but because Mrs Gaunt wanted her to attend an Absence Review Meeting before further medical evidence would be considered. From then on, the claimant did not want any more occupational health referrals of any kind. Her 8 April 2019 letters (see paragraph 184) tell us that this is what she was thinking. It would have done the claimant no good for the respondent to tell her when she could have a referral that she did not want.

Step 12 - Not make appointments during school holidays

361. Taking Step 12 would have gone a small way towards reducing the disadvantage caused by PCP11(a). Nevertheless, in our view it was not reasonable for the respondent to have to take Step 12. This is for the following reasons:

361.1. The beneficial impact of Step 12 would have been relatively slight. Had appointments been offered during term time, her daughter would not have been at home when the consultation took place. But the claimant would still have been very upset, and her daughter would undoubtedly have witnessed her distress on her return home from school and at weekends. It took the claimant up to two weeks to recover from the October consultation.

361.2. There is no evidence that the initial appointment slots were chosen by the respondent, as opposed to the occupational health provider. It is possible that the school may have been able to request particular appointment times when making the referral. That, in our view, would be holding the respondent to the standards of perfection rather than reasonableness. The respondent did the next best thing. Through its occupational health provider, it allowed the claimant to re-schedule to a more suitable date with no questions asked. As paragraph 194 records, Mrs Sanderson was able to obtain a new occupational health appointment in term time without the need for any explanation or justification.

<u>PCP11(b) – Communicating with the claimant for the purposes of attendance management</u>

PCP

362. The respondent sent various communications to the claimant under the Sickness Absence Policy. Nobody suggests otherwise.

Disadvantage

363. These communications put the claimant at a disadvantage when compared to persons without a mental health disability. Her anxiety was such that she could not cope with letters sent directly to her home. That disadvantage was clearly more than minor or trivial.

364. In the autumn of 2018, the claimant was still so unwell that she was distressed even by a supportive message passed to her via a colleague and friend Ms Cano whilst they were out walking.

365. The disadvantage caused by written correspondence was particularly acute if she was informed about it over a weekend. This is because it was more difficult for

her to obtain advice at weekends and because her daughter might have to witness her getting upset. As we have found at paragraph 201, this particular element of the disadvantage stopped being more than minor or trivial by the end of May 2019.

Knowledge

366. Mrs Young was informed of the former disadvantage by the claimant's husband in his letter of 26 June 2018.

367. The respondent has satisfied us that it did not know, and could not reasonably have been expected to know, that the claimant would be distressed by a message of support relayed to her by Ms Cano. This was quite a different type of communication from the ones that the claimant's husband had been getting at in his letter.

368. We are also persuaded that the respondent had no reason to know, after May 2019, of any disadvantage caused by direct correspondence or by the timing of correspondence at weekends or shortly before holidays. As with our finding that there was no substantial disadvantage, we base our conclusion on the facts set out in paragraph 201.

Reasonable steps

369. We have gone back over Steps 5 to 12, viewed now through the prism of the PCP11(b) disadvantage. As we see it, the only steps worthy of fresh detailed consideration are Steps 8 and 13. In coming to this view, we make the following observations:

369.1. We have already reached conclusions about Steps 5 and 6 in the context of two other PCPs. PCP11(b) does not, in our opinion, alter that analysis. Although Steps 5 and 6 could have helped to avoid the PCP11(b) disadvantage, there is nothing about the nature of this particular disadvantage (when compared to PCPs 9 and 10) that would make a difference to whether or not it was reasonable for the respondent to have to take those steps.

369.2. We have already examined Step 10 in detail under the heading of PCP11(a). PCP11(b) adds nothing new.

369.3. Steps 11 and 14 would also have helped in connection with PCP11(b), but they would not have achieved anything beyond avoiding the disadvantage that was caused by PCPs 9 and 10. We come to this conclusion because, in Ms Casserley's written submissions, the only examples of potential benefits of Steps 11 and 14 were in connection with the claimant's participation in Absence Review Meetings.

Step 8 - not contact the claimant directly e.g. for example, passing message through Lola in October 2018

370. It was reasonable for the respondent to have to refrain from writing to the claimant's home address between 26 June 2018 (the date of her husband's letter) and 1 April 2019 (when the claimant started writing directly to the respondent). The respondent took this step. All correspondence to do with the Sickness Absence Policy was sent to Mrs Sanderson. The claimant's evidence that the respondent wrote to her home during this period is simply incorrect.

371. Because of its lack of knowledge, the respondent was not under a duty to hold back from passing supportive messages via Ms Cano.

372. In any case, we have considered whether it was reasonable for Mrs Gaunt to have had to refrain from sending Ms Cano to pass on her best wishes. In our view, such a conclusion would be harsh on the respondent and we reject it. For one thing, the message was not a communication for the purpose of absence management. It was meant to remind the claimant that she was a valued member of the school community. Preventing such messages was not, therefore, a step to avoid the disadvantage caused by PCP11(b).

373. Even if we are wrong about that, in the sense that we have construed PCP11(b) too narrowly, we would still have found that it was not reasonable for the respondent to have to take Step 8. Employers in the respondent's position are in a dilemma. An employee who has been absent for many weeks because of depression and anxiety may find that reminders of workplace stressors can aggravate their mental health. But their depression and anxiety may be made even worse by perceived isolation. Without occupational health advice, which the respondent had been unable to obtain, it is difficult for the employer to know what to do for the best. In those circumstances we find it hard to imagine a more supportive step than for Mrs Gaunt to ask a trusted friend and colleague to pass on her best wishes.

Step 13 - Not send letters at weekend and before school holidays when getting advice harder for the Claimant and the Claimant was caused further distress when with her daughter

374. This part of the claim can be broken down into two time periods:

374.1. 26 June 2018 to end May 2019 - It was not reasonable for the respondent to have to take Step 13. This was because the respondent had already done all it could reasonably be expected to do by sending all correspondence to Mrs Sanderson. Any reasonable person reading the claimant's husband's 26 June letter would think that the claimant wanted her mother to be put in charge of receiving correspondence, not only so that the letters were not physically present in the claimant's home, but also so that her mother could pick the right moment to inform the claimant of the contents. Mrs Sanderson, as the claimant's mother, would be much better placed than Mrs Gaunt to know when best to raise these difficult subjects with the claimant. All the timescales in Mrs Gaunt's letters allowed enough time for Mrs Sanderson to wait for the weekend to pass if that is what she thought was best.

374.2. June 2019 onwards – our findings about lack of disadvantage and lack of knowledge mean that there was no duty to take this step.

Conclusions - discrimination arising from disability

Was dismissal a means of achieving the legitimate aims?

375. We remind ourselves of the common ground. The respondent treated the claimant unfavourably by dismissing her and was motivated to do so by the claimant's long-term absence which had arisen in consequence of her disability. The respondent has identified three aims allegedly achieved by the dismissal – these were running the school efficiently, reducing costs and providing a good

standard of teaching and pastoral care. Everyone agrees that these aims were legitimate.

376. We are persuaded by the respondent that dismissing the claimant was a means of achieving those aims. The claimant's closing submissions argue that the respondent has not provided evidence of the reduction in costs or the standard of teaching having suffered in the claimant's absence. We disagree. This is not a case where the employer has merely paid lip service to the legitimate aim. Our finding at paragraphs 185 and 213 was that the claimant's absence was genuinely detrimental to teaching provision within the Spanish department and to effective pastoral care for the claimant's year group. It also seemed obvious to us that, even on zero pay, the claimant's continued employment would represent a cost to the school's budget in terms of holiday pay, pensions and ongoing external human resources assistance.

Proportionality

377. The only remaining question is whether or not dismissal was proportionate.

378. Our starting point is that the discriminatory impact of the dismissal on the claimant was stark. The only reason for dismissal was her absence, which was directly caused by her disability. Dismissal could only be justified if the aims were important and only then if those aims could not reasonably be achieved by other means, such as the making of reasonable adjustments.

379. We agreed with the respondent that its aims were of high importance. The claimant's absence was affecting an entire year group of students and, even more importantly, all the Spanish students that the claimant would have been teaching, including those sitting their GCSEs and A-levels. By the time of the dismissal decision, the claimant had been absent on sick leave for 17 months. The respondent's aims were difficult to achieve unless that absence could be brought to an end, either by her returning to work or by her ceasing to be an employee so they could recruit somebody else.

380. Next, we looked to see if these aims could have been achieved by action short of dismissal.

381. First, we considered whether or not the respondent could reasonably have been expected to wait for the claimant to return to work. Such a course would have frustrated the legitimate aims – there was no real prospect of a return to the respondent's school.

382. Second, we looked at ill-health retirement. We are satisfied that ill-health retirement was not a realistic option in the claimant's case. It would have had the effect of ending her teaching career at a relatively young age. In our view, if the claimant had thought that ill-health retirement would work to her advantage, she would have said so before she was dismissed. She could have made the point in a letter, such as the one she wrote on 14 October 2019. Or Mrs Sanderson or Mr Tierney could have raised it at one of the Absence Review Meetings. Prior to April 2019, Ms Rycroft could have explored it on her behalf and, once she had instructed solicitors, they could have made that point for her. In any case, as Teacher Pensions advised Mrs Gaunt's Business Manager, dismissal did not prevent the claimant from applying for ill-health retirement.

383. Next, we addressed an argument put forward by the claimant that, as an alternative to dismissal, the respondent should have made a referral to an occupational health physician. In our view, such a referral would not have helped the respondent to achieve its legitimate aims. This is for two reasons:

383.1. The claimant did not want the respondent to get any more medical evidence. She felt let down by being invited to an Absence Review Meeting before being referred to a physician. From that time onwards, she did not want any further occupational health referral to be made.

383.2. Even if the respondent had managed to secure the claimant's cooperation with a referral to a physician, the overwhelming likelihood is that the physician would have reported that the claimant was unlikely to be well enough to return to work for the foreseeable future. That was not just the clinical opinion of Ms Lewis, but also the lay opinion of Mrs Sanderson and Mr Tierney, who had the most day-to-day knowledge of the claimant's health.

384. Finally, we assessed the significance of the respondent's breaches of the duty to make adjustments. Could those adjustments have enabled the respondent to achieve their legitimate aims without dismissing the claimant? We are sure that they could not have had that effect. The latest three failures to make adjustments related to the Absence Review Meeting invitation letters. The claimant's mental health was already in a poor state before the first letter was written. Had the respondent taken Steps 6, 11 and 14, the claimant may not have been as badly affected as she was, but she would undoubtedly have felt upset, anxious, let down and disaffected with occupational health. Being offered the opportunity to make written representations and/or to send a proxy representative to the Absence Review Meeting would have been of significant benefit to her, but it would not have removed an important source of distress, which was the fact that the meeting was taking place at all. The claimant wanted it delayed altogether, pending referral to a physician. We have found that it was not reasonable for the respondent to have to take that step.

385. We have another reason for thinking that the failure to make adjustments represented only a blip in the overall progression of the claimant's mental health. Our additional reason stems from what actually happened over the weeks and months after the duty to make adjustments was breached. Following the 30 January 2019 letter, her health deteriorated, but during March 2019 improved to the point where she was able to write letters directly to Mrs Gaunt on 1 April 2019, three days after the second discriminatory invitation letter. For subsequent Absence Review Meetings, the required adjustments were made, yet the claimant still showed no sign of becoming well enough to return to work.

386. As for the first failure to make adjustments (not promptly removing the claimant's EPQ students), this also had only a minor effect on the start of the claimant's sickness absence and a negligible effect on its duration. There were many other steps that the claimant has unsuccessfully argued that the respondent should have taken, and many other sources of perceived injustice and anxiety, none of which were the product of any breach of legal duty on the respondent's part. By the time the claimant commenced her sick leave, she knew that would not have any further responsibility for either EPQ student. Immediately removing both EPQ students in February 2018 would not have avoided the need for the

respondent to dismiss the claimant in October 2019 in order to achieve their legitimate aims.

387. We have reminded ourselves that the burden of proving proportionality is on the respondent. Having balanced the importance of the aim against the discriminatory impact on the claimant, and taken into account the alternatives available to the respondent, we are satisfied that the respondent has discharged that burden. Dismissal was a proportionate means of achieving the legitimate aims identified by the respondent. In dismissing the claimant, the respondent did not discriminate against her.

Next steps

388. There will now need to be a hearing to determine the claimant's remedy. A separate case management order accompanies this judgment. Before proceeding to a remedy hearing, however, we would encourage both parties to reflect on our conclusions at paragraphs 384 to 386. These conclusions will necessarily have a bearing on the claimant's award of damages.

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Employment Judge Horne

8 June 2021

SENT TO THE PARTIES ON

Date: 9 June 2021

FOR THE TRIBUNAL OFFICE