



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Cases No: 4103601/20 and 4107569/20**

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**Held on 16 and 17 August 2021**

**(By Video Conference, CVP)**

**Employment Judge: R Gall**

10 **Ms H Fletcher**

**Claimant  
Represented by  
Mr D Cobb –  
Advocate  
Instructed by –  
Mr D Waplington  
Naswt Officer**

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**Aberdeenshire Council**

**Respondent  
Represented by Ms A Bennie –  
Advocate  
Instructed by –  
Ms K Sutherland-George  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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1. The Judgment of the Tribunal is that the claims of unfair dismissal brought in terms of the Employment Rights Act 1996 and of breach of contract are both unsuccessful.

**REASONS**

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1. This Case was heard on 16 and 17 August 2021. The hearing was conducted by video conference (CVP) with agreement of the parties. Mr Cobb appeared

**E.T. Z4 (WR)**

for Ms Fletcher. Ms Bennie appeared or the respondents. A joint bundle or file of documents was produced.

2. The case started after lunch on 16 August due to other case commitments resulting in there being no availability of an Employment Judge in the morning of 16 August. With agreement of the parties, the hearing on 17 August started earlier than is generally the case, had a shortened break for lunch and continued beyond the time at which cases normally conclude for the day. This enabled the case to be completed within the time allocated for the hearing. I am grateful to parties and representatives for their co-operation in achieving this.
3. Witness statements had been ordered and were submitted on behalf of all witnesses as their evidence in chief. They were taken as read for each witness. Evidence was heard from the respondents' witnesses and from Ms Fletcher. The respondents' witnesses were:-
- Carol Irvine, Head Teacher at Fraserburgh South Park primary school. Ms Irvine was responsible for line managing all peripatetic visiting specialist staff in the Fraserburgh cluster from June 2017. This included line management responsibility for the claimant who was such a peripatetic visiting specialist teacher.
  - Vincent Docherty, Head of Education and Chief Education Officer at the respondents' organisation. Mr Docherty took the decision to dismiss the claimant.
  - Anne Simpson, Councillor with Aberdeenshire Council and Chair of the appeals committee of the respondents. The committee chaired by Ms Simpson refused the appeal made by the claimant against her dismissal.
  - Robyn Clelland, HR Adviser with the respondents. Ms Clelland had given advice to decision makers at different times during the currency of matters with which this hearing was concerned.

4. Other relevant people are mentioned at this time. Those are:-

- Dr Turner. He was the psychiatrist assisting Ms Fletcher.
- Dr Rodgers. She was the doctor who was the Occupational Health (“OH”) Physician who issued the OH report in relation to Ms Fletcher on 12 March 2020, pages 256 and 257 of the file.
- Ashleigh Howden. She was the Occupational Health Nurse who issued the report in relation to Ms Fletcher on 22 November 2019, pages 209 and 210 of the file.
- Carrie-Ann Duthie. She was Care Manager with responsibility for Ms Fletcher. She worked within the respondents’ organisation, her area of work being in Community Substance Misuse.
- Dr Grainne McGrath. She was the doctor who completed an Occupational Health report in relation to Ms Fletcher on 31 January 2020, with associated fitness to return to work certificate, pages 238 and 239 of the file.
- Darren Waplington. he was the Trade Union representative of Ms Fletcher. He engaged in relevant correspondence on her behalf and attended the dismissal and appeal hearings with her.

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5. There had been a case management Preliminary Hearing on 11 February 2021. That had resulted in the case management orders made in respect of statements. It had also seen both cases brought by Ms Fletcher combined. There had initially been claims of unfair dismissal, discrimination (disability being said to have been the protected characteristic) and breach of contract made. The claim of discrimination had been withdrawn and subsequently had been dismissed.

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6. The claims proceeding were therefore of unfair dismissal and of breach of contract. The breach of contract claim was founded upon Ms Fletcher’s position that she was fit for work from 14 March 2020 until her dismissal on 2 July 2020, being willing to return to work. The respondents had refused her

permission to return to work. She alleged that this was breach of contract on their part.

5 7. Ms Fletcher is a teacher. Her subject is physical education. It was accepted by Ms Fletcher that she is an alcoholic. Her position was that there was medical evidence that she was fit to return when she was dismissed. She said that the respondents had not updated the medical report they had in March 2020 prior to the decision to dismiss her in July of that year. During the hearing she developed, through cross examination of the respondents' witnesses, an argument that she ought to have been redeployed rather than dismissed. It was said by her that the decision to dismiss was one no reasonable employer would have taken in the circumstances.

15 8. The respondents said that they had obtained appropriate information in relation to Ms Fletcher's health prior to the decision to dismiss being taken. They had met with her. Ms Fletcher had been absent from work for some considerable time prior to dismissal. The medical evidence was of a relapse on the part of Ms Fletcher with drinking occurring. It also was their position that Ms Fletcher latterly appeared to be concealing her drinking. That was a matter of real concern. Whilst suggestions had been made by OH as to possible steps with a view to Ms Fletcher returning to work, one of those was that there be supervised teaching. That, however, was not a reasonable course to follow, particularly in circumstances of the pandemic when on-line teaching was taking place. Medical information later than that relied upon by Ms Fletcher was available and altered the position from that relied upon by her. It provided a proper basis for dismissal, the respondents said. The medical information they had was sufficiently proximate to dismissal. Ms Fletcher had not asked for or presented any more up to date medical information. Ms Fletcher had not been fit for work between March and July 2020, notwithstanding her view to the contrary.

30 9. It was confirmed to me at the outset by Mr Cobb that the facts as set out in the respondents' ET3 were agreed by Ms Fletcher. Those facts are therefore recorded as agreed facts.

10. In this section of the Judgment the relevant and essential facts as admitted or proved are set out. The contents of paragraphs 11 to 41 are the facts within the ET3 and therefore those confirmed by Ms Fletcher's advocate as agreed. References to page numbers within the file of documents referred to have been added. Where the agreed facts as set out in form ET3 referred to Ms Fletcher as the claimant, that has been altered to detail her as Ms Fletcher, in line with the rest of the Judgment.

## 10 **Facts**

### *Agreed Facts*

11. The Respondent is Aberdeenshire Council, a local authority constituted under the Local Government etc (Scotland) Act 1994. The Respondent is the Education Authority for the Aberdeenshire area and thereby responsible for the administration of state funded schooling in the area.

12. Ms Fletcher was employed by the Respondent on 29 January 2009 as a Visiting Physical Education Specialist. Ms Fletcher worked within the Fraserburgh Children's Services Network and was employed to work at various schools within this cluster according to the requirements of the Respondent.

13. Ms Fletcher's General Teaching Council for Scotland (GTCS) registration allowed her to teach in secondary schools but she was working towards the transition of her registration to primary level which allowed her to also teach within Fraserburgh primary schools. Ms Fletcher was based at South Park School. Ms Fletcher delivered Physical Education (PE) lessons within South Park school for three days, one day at the St Andrews School, half a day at St Combs school and the remaining half at Fraserburgh North school.

14. Ms Fletcher was signed off sick from work from 4 February 2019. Ms Fletcher remained off sick until she was dismissed by the Respondent on the grounds of capability on 2 July 2020, which is the Effective Date of Termination.

15. Ms Fletcher was responsible for planning, assessing and teaching PE to approximately 4-6 classes of Children per day. Ms Fletcher's role was peripatetic and as such having a driver's licence was an essential criteria of the post.
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16. Ms Fletcher has a significant history of alcohol dependency. On 6 February 2014 Ms Fletcher was signed off work from her role with the Respondent for a period of 18 months due to alcohol dependency related issues. The respondent had commenced disciplinary proceedings at that time as it was alleged Ms Fletcher was under the influence of alcohol while at work. A year prior in February 2013, Ms Fletcher received a final written warning from the Respondent following a disciplinary hearing due to having been convicted in 10 January 2012 of driving while under the influence of alcohol and failing to provide a breathalyser sample. On 31 August 2015, Ms Fletcher was made subject to a Conditional Registration Order by the GTCS for a period of two years following a hearing before the Fitness to Teach Panel. This was in 15 respect of Ms Fletcher's driving conviction. The Respondent supported Ms Fletcher back to work in June 2017.
- 20 17. In November 2018, December 2018 and January 2019 Ms Fletcher was signed off work by her GP for short spells of between 3 to 7 days due to sickness (Laryngitis). The Respondent raised its concerns informally with Ms Fletcher at that time regarding the impact of her absences on the delivery of PE to the children within the schools that she taught. Ms Fletcher was supported during this informal process by her line manager Ms Carol Irvine, 25 Head Teacher at South Park school in Fraserburgh.
18. On or around 7 January 2019 Ms Fletcher disclosed to the Respondent that she was struggling with alcohol dependency again. Ms Fletcher also disclosed that she was at risk of having her driving licence retained by the DVLA. Ms Fletcher requested a meeting with the Respondent which was scheduled for 30 the 4 February 2019. However, Ms Fletcher did not attend for work that day.

19. The Respondent was concerned for Ms Fletcher's welfare and made attempts to contact her. When the Respondent eventually managed to get hold of Ms Fletcher by phone later that day she seemed distressed and in need of help. The Respondent contacted the Police to carry out a safe and well check and they supported her to attend the pharmacy to collect her medication. It is understood Ms Fletcher had not taken her prescribed medication for 10 days due to an alleged error in the prescription arrangements by the pharmacy.
20. On 7 February 2019, the Respondent sought the advice of an Occupational Health ("OH") specialist at IQARUS, the Respondent's OH provider in accordance with the Respondent's Attendance Management Procedure. The purpose was to better understand the reasons for Ms Fletcher's absence, understand its effect on her ability to carry out her duties together with gaining a prognosis as to the likelihood of Ms Fletcher being able to return to work. Ms Fletcher spoke with OH on 20 February 2019. There was a delay in the Respondent obtaining a copy of this report for a number of reasons, not all of which were in the Respondent's control (such as technical issues between Ms Fletcher and the OH Provider). In the meantime, the Respondent sought to meet with Ms Fletcher during March 2019 within the school for informal counselling meetings. On each occasion just prior to the meeting taking place Ms Fletcher advised the Respondent she was not fit enough to attend.
21. The Respondent received the OH report on 14 May 2019. Within the report Ms Fletcher confirmed she had been on sickness absence related to her alcohol dependency and was in receipt of specialist support from a Psychiatric Team and alcohol services. Ms Fletcher had also informed OH that there were alleged issues with her prescription arrangements from the pharmacy. The OH report advised that Ms Fletcher was not fit for work at that time. The OH recommendation was for a review to be carried out in 4 weeks to see whether Ms Fletcher would benefit from the therapeutic effects of the prescribed medication.

22. During May 2019. the Respondent continued to try to have informal counselling meetings with Ms Fletcher to discuss potential supports that could be provided to facilitate a return to work. However, Ms Fletcher again advised she did not feel able to attend them. The Respondent did eventually manage to meet with Ms Fletcher on 20 May 2019 at which she advised she was keen to aim for a potential return to work around August 2019.
23. In June 2019. the Respondent arranged two further counselling meetings to discuss facilitating Ms Fletcher's return to work. However, on both occasions Ms Fletcher informed the Respondent prior to the meetings that she felt unable to attend due to stress.
24. The Respondent sought a further review from its OH Provider on 3 July 2019. The OH report, dated 16 July 2019, stated that Ms Fletcher was actively retching for the first two minutes of the call and that she admitted to having suffered a relapse with her alcohol use since the beginning of the year. The OH recommendation at that time was that Ms Fletcher was unfit to resume any form of work and that a further OH review should be carried out in 8 weeks' time.
25. This OH review was carried out on 10 September 2019. The subsequent OH report was received by the Respondent on 2 October 2019. Ms Fletcher felt she had improved significantly over the last few months and continued to have input from Psychiatric specialists and alcohol services. However. the OH report advised that given Ms Fletcher's role involved working with children there were additional safeguarding issues to be considered before she could return to work. In addition, as Ms Fletcher's role was peripatetic it was important to ensure that there were no concerns around her ability to drive. The report suggested a period of sustained abstinence from Ms Fletcher would be required for several months as well as evidence from her clinicians that she was engaging with medical advice and support diligently. As such, the OH recommendation was that they seek a report from Ms Fletcher's treating psychiatrist and thereafter have a further review with Ms Fletcher.



26. The Respondent met with Ms Fletcher at St Andrews School on 18 November 2019 where she reported she was continuing to do well in her recovery. Ms Fletcher was hoping to return to work in January 2020. The Respondent discussed their continued concerns with Ms Fletcher in light of the contents of the most recent OH report. Due to the length of time Ms Fletcher had been absent from work at this stage the Respondent advised that it would be prudent to seek an updated report from OH to assist them with facilitating her return to work at the beginning of next year.
27. The Respondent sought a further OH review on 22 November 2019. The OH report advised that despite Ms Fletcher's alleged abstinence from alcohol since October and having a positive outlook she remained temporarily unfit to work. The OH recommendation was that Ms Fletcher required to demonstrate a further period of stability prior to returning to work. Ms Fletcher therefore remained unfit to work at this time. The OH Specialist continued to try to seek a report from Ms Fletcher's Psychiatrist as regards her wellbeing, but Ms Fletcher had not provided her consent for them to do so. The Psychiatry report was eventually received by OH at the end of December 2019.
28. On 7 January 2020 the Respondent met with Ms Fletcher at St Andrews school to discuss a phased return to work with a proposed start date of 23 January 2020. However, on 9 January 2020 the Respondent received an email from Ms Carrie-Ann Duthie, Ms Fletcher's Care Manager within the Substance Misuse Team, who had been working with Ms Fletcher to address her alcohol dependency issues. Ms Duthie spoke to Ms Fletcher on 7 January 2020 by phone. Ms Fletcher advised that she was down to a 1/4 pint of beer a day with the hope of being totally abstinent by 23 January 2020 to return to work. Ms Duthie also visited Ms Fletcher at her home on 9 January 2020 and observed an empty bottle of vodka beside a chair. Ms Duthie felt from her interactions with Ms Fletcher that she may have been under the influence of alcohol. Due to the nature of Ms Fletcher's role working with children. Ms

Duthie sought to inform the Respondent that Ms Fletcher appeared to her to still be consuming alcohol.

- 5 29. The Respondent emailed Ms Fletcher on 13 January 2020 to discuss the concerns raised by Ms Duthie and advised that a further OH referral would be sought/requested before any phased return to work would be implemented. The Respondent also recommended Ms Fletcher visit her GP to seek an extension of her fit note until such time as the updated OH report was received.
- 10 30. Ms Fletcher submitted a fit note to the Respondent on 14 January 2020 which stated she may be fit to return to work and that she would benefit from a phased return to be agreed with the Respondent. The respondent was concerned about conflicting accounts they had had about Ms Fletcher's recovery at that time. together with her lengthy period of absence for almost 15 a year by this stage. They therefore sought another updated report from OH prior to implementing any potential return to work to ascertain what conditions, if any, needed to be applied to Ms Fletcher's return.
- 20 31. The OH review was carried out with Ms Fletcher on 16 January 2020. The OH Specialist was unable to conduct the consultation due to Ms Fletcher being incoherent. The recommendation was that Ms Fletcher would benefit from a face to face appointment instead. The OH advice was that Ms Fletcher remained unfit for work at this time.
- 25 32. A further face to face OH review was carried out with Ms Fletcher on 31 January 2020. The OH Report advised of a satisfactory report having been received from the Ms Fletcher's Psychiatrist, dated 10 December 2019, pages 402 and 403 of the file, but also noted the conflicting account of the 30 more recent concerns raised by Ms Duthie, Support Worker, regarding Ms Fletcher's ongoing alcohol consumption. Ms Fletcher denied that this was the case.

33. Given the concerns raised by the Respondent, the OH recommendation was that a blood test be carried out with the consent of Ms Fletcher so as to give an indication if hazardous alcohol consumption had occurred over the preceding weeks. If the test was satisfactory, OH would be supportive of a phased return to work for Ms Fletcher. The OH Specialist then provided a fitness to return to work certificate, also dated 31 January 2020, which confirmed that Ms Fletcher was unfit to return to work in any capacity at that time.
34. Ms Fletcher refused to provide her consent for the blood test to take place. The Respondent sought a further guidance from OH and arranged another consultation which was carried out on 12 March 2020. OH submitted a Report, dated 27 March 2020, to the Respondent following the consultation. The OH report stated that Ms Fletcher admitted to having last drunk heavily 6 weeks ago which would have been around the time she wished to return to work. Ms Fletcher also admitted to having had a small amount to drink 2 weeks prior to the consultation. The Respondent was concerned to note this.
35. The OH report stated that whilst a return to work may benefit Ms Fletcher from a psychological point of view, significant concerns remained due to her complex underlying psychological difficulties and her alcohol dependency. The OH report also raised a concern that Ms Fletcher may have been concealing the degree of her alcohol use in recent months from the Respondent.
36. The recommendation from this latest report was that a phased return to work for Ms Fletcher could be attempted by the Respondent, provided Ms Fletcher could meet the following 5 conditions:-
- She should engage regularly with Occupational Health review if her employer requests it.
  - She should not undertake any unsupervised work with children initially, another member of staff must be present at all times.

- She should meet on a regular basis, preferably weekly, with her line manager to discuss how she is feeling and whether she has had any difficulties at work.
- She should not, under any circumstances, come to work having had alcohol in the preceding 12 hours or if she is feeling the effects of alcohol withdrawal.
- She should engage fully with medical and psychological services and attend appointments as required.

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37. The Respondent considered these conditions reasonable and necessary to enable Ms Fletcher to return to work on any basis.

38. On 20 March 2020 the UK Government imposed a nationwide lockdown due to the ongoing public health crisis. This resulted in the Scottish Government closing all schools in Scotland on 20 March 2020.

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39. The Respondent wrote to Ms Fletcher on 29 April 2020 inviting her to attend a Capability Hearing on 13 May 2020 under the Attendance Management Procedure at which her views would be sought about her possible dismissal. Ms Fletcher was offered the right to be accompanied. As Ms Fletcher's Trade Union representative was unavailable in May the Respondent wrote to Ms Fletcher again to rearrange the hearing for 2 July 2020.

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40. The Capability Hearing took place on 2 July 2020 and was chaired by Mr Vincent Docherty, Head of Education. Ms Fletcher was accompanied by her Trade Union Representative, Mr Darren Waplington of NASUWT. Ms Fletcher was consulted about the Respondent's proposal to dismiss her on the grounds of capability and had the opportunity to put forward her case, including challenging the medical evidence and suggesting adjustments to her role.

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41. The Respondent wrote to her on 7 July 2020 terminating her employment by reason of ill health capability. Ms Fletcher received eleven weeks' notice pay. Ms Fletcher was informed of her of her right of appeal.

5 **Other relevant and essential facts**

*Medical Reports and information*

42. As mentioned above, Ms Fletcher was absent from work from 4 February 2019 until her dismissal on 2 July 2020. During the time of her absence the respondent obtained medical information. This was from OH. OH also  
10 received medical information from the psychiatrist being consulted by her, Dr Turner. A copy of his report sent on 13 December 2019 appeared at pages 402 and 403 of the file.

43. OH reports were obtained by the respondents as follows

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- 20 February 2019, pages 123 and 124 of the file
  - 16 July 2019, summary of report sent to respondent, page 175 of the file
  - 11 September 2019, page 186 of the file
  - 22 November 2019, pages 209 and 210 of the file

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  - 31 January 2020, page 238 of the file
  - 12 March 2020, pages 256 and 257 of the file

44. Those were the OH reports before the respondent when the decision to dismiss was taken and when the appeal hearing took place. The decision to dismiss followed upon a hearing on 2 July as detailed below. Ms Fletcher and  
25 her representative did not request any further updated medical report before that hearing or prior to the appeal hearing. There was no information from them, whether at the time of dismissal or appeal stage, that the situation in relation to Ms Fletcher's health had changed since the OH report of March 2020. Ms Fletcher did not ask at time of dismissal or at appeal that she be  
30 permitted to present any medical information from any medical practitioner with whom she was consulting.

45. A fitness to work certificate was completed on 31 January 2020 in respect of Ms Fletcher. This confirmed that Dr McGrath, OH physician, considered that Ms Fletcher was at that date “*Unfit to return to work in any capacity*”. A copy of that document appeared at page 239 of the file.

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46. On 7 and 9 January 2020 there was interaction between Ms Fletcher and Ms Duthie. Ms Duthie was care manager with Community Substance Misuse. Ms Duthie sent an email to Ms Irvine on 9 January following upon that interaction. A copy of that email appeared at page 222 of the file.

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47. The email from Ms Duthie said:-

*“Upon discussing this with my line manager, I have made the decision to contact you in relation to Helen Fletcher, whom I'm aware is a colleague whom you would line manage.*

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*Both myself and Helen Nicol (Detox Support) has (sic) been working with Helen towards addressing her substance misuse, which she has been very eager to reach total abstinence for the purpose of returning to work. Helen has informed us that she is due to return on the 23<sup>rd</sup> of January which is good news as she has been looking forward to her return. Out of the interest of child safety, I am just passing on that Helen appears to continue to consume alcohol. I spoke to Helen on the phone on the 7<sup>th</sup> of Jan where she informed me that she was down to 1/4 a (sic) pint of beer and was weaning herself off with the plan of being totally abstinent for returning back to work. My colleague Helen Nicol (detox support) has went to visit Helen today where she observed an empty bottle of vodka beside her chair and thought she was possibly under the influence.”*

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48. On receipt of this email Ms Irvine submitted an OH referral. She did this on 15 January. A copy of the referral appeared at pages 230 to 234 of the file. This referral led to the OH report of 31 January referred to above.

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49. The OH reports above contained the following extracts, the dates of the reports being those mentioned before each extract:-

(a) 20 February 2019, page 123.

5 *“Ms Fletcher told me that currently she has experienced significant disturbance in her sleep and low mood. She is exhausted during the day and feels unable to drive to pick up her prescription from the pharmacy, Ms Fletcher advised that she had used alcohol for one day only, over 4 weeks ago and does not feel that that this is a relapse of her previous alcohol addiction.*

*Ms Fletcher confirmed her job role, as stated on your referral form.*

10 *Referring to your specific advice required:*

*Is the employee fit to undertake the job for which they were employed?  
Not at present.*

15 *When will the employee become fit for normal work duties?  
Once her prescription issue has been rectified. It could take approximately 4 weeks before she would start benefiting from the therapeutic effect; in which case, she is likely fit to return to normal duties in approximately 4 weeks.*

20 *However, if the prescription issue is not sorted. her current absence period is likely to be longer.*

25 *Unfortunately, it is out of Ms Fletcher’s control.”*

(b) 16 July 2019, page 175

30 *“Ms Fletcher was actively retching for the first two minutes of my telephone call. She admitted to having a relapse with alcohol use and merely finished consuming a large amount of alcohol few minutes prior to my call.*

*Unfortunately. it seems that Ms Fletcher is struggling with her condition and much medical input is required. Based on the above, she is unfit to resume to any form of work at present.”*

35 (c) 11 September 2019, page 186

40 *“Further to my colleague's last report. I am pleased to say that Ms Fletcher feels that she has improved significantly over the last few months. She continues to have input from psychiatric services and alcohol services and indeed is due to have a review appointment with the psychiatric specialist on 11/09/2019.*

45 *We discussed her health and it does appear Ms Fletcher is making good efforts to bring about her recovery. Her condition has however not yet completely stabilised and I do not feel that she is ready as yet to return to work.*

*As her role involves working with children. there are additional safeguarding issues and it is imperative that we ensure that her condition*

*has stabilised, and that she has remained well for a period of time. before we allow her to return to work. I have discussed this with Ms Fletcher.*

5 *We would require that she is abstinent from alcohol for several months and that we have evidence from the clinicians involved in her care that she is engaging with the services, attending regularly and following medical advice diligently.”*

(d) 22 November 2019, page 209

10 *“As you are aware Helen has had recent issues with alcohol misuse. However, she reports today that she has been abstinent since the beginning of October 2019. Helen engaged in a two week home detox which she states went well. She continues to engage with her Detox worker on relapse prevention and she also has support from a community care worker. Helen advises that she had a meeting on Monday with management and HR on Monday, She is looking towards a return to work in January. Helen has agreed with management that a phased return would be beneficial. She is also hopeful that she will have a teaching assistant in her class whilst undertaking her phased return as a way of*  
15 *having further support.*  
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*Is the employee fit to under the job for which they are employed?  
It is my professional opinion that Helen remains temporarily unfit for work. She reports abstinence from alcohol since the beginning of October. I believe that she requires a further period of stability prior to returning to post.*  
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*However. it is worthy to note that Helen does appear bright in mood and spoke very positively about the future.”*  
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(e) 31 January 2020, page 238

*“Ms Fletcher does not report ongoing alcohol consumption today...*

35 *Considering the concerns raised in your management referral, I would recommend an investigation in the form of a blood test with Ms Fletcher's consent, which should give an indication if hazardous alcohol consumption has occurred over the preceding weeks. If this test is satisfactory, it will be supportive of a return to work.”*

The claimant did not consent to a blood test and so no blood test was undertaken.

40 (f) 12 March 2020, page 256 of the file

*“Since she was last reviewed by one of my colleagues. she tells me that she has managed to continue to significantly reduce her alcohol intake and at last drank heavily 6 weeks ago. She did, however, have a small amount to drink 2 weeks ago.*



*We have received a report from her specialist which outlines some of her difficulties. The specialist feels that a return to work would be beneficial for her from a psychological point of view.*

5 *I discussed the issues in depth with Ms. Fletcher and outlined with her my concerns that she is still drinking, although she reports it is infrequently, and that her role involves supervision of children undergoing physical activity and therefore she requires a clear head at all times in order to risk assess situations continuously.*

10 *She tells me that she is very careful with this and has never gone in to work under the influence of alcohol and reports that there have been no concerns regarding her behaviour while at work. She is adamant that she would not put the safety of the children under her care at risk.*

15 *I would agree with the specialist, the GP and Ms. Fletcher that a return to work would be likely to have a beneficial effect on her health and reduce the likelihood of relapse into heavy drinking. I do however have significant concerns regarding the situation due to the fact that Ms. Fletcher has complex underlying psychological difficulties and a known problem with alcohol abuse. There is also a concern that she may have been concealing the degree of her alcohol use in recent months.”*

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It was in this report that Dr Rodgers set out the 5 conditions which she regarded as requiring to be met if the claimant was to return to work. Those are as detailed above.

25 50. In November 2019 Ms Fletcher and Ms Irvine had a discussion as to a possible return to work for Ms Fletcher. Ms Irvine sought an OH report to try to assist with this. Ms Irvine was concerned to ensure that Ms Fletcher had a period of stability and of sustained abstinence from alcohol use before Ms Fletcher returned to work.

30 51. The report which Ms Fletcher obtained from Dr Turner appeared at pages 402 and 403 of the bundle. It contains the following:-

35 *“She also remains abstinent from alcohol. Helen prognosis (sic) remains good if she continues to be abstinent from alcohol and engages with services.”*

40 52. Prior to the report of 31 January from OH, Ms Irvine had been contacted by OH on 16 January via an email which appeared at page 235 of the file. It read:-

*"I phoned Helen as scheduled at 1pm on 16" January 2020. However, I was unable to conduct the consultation due to my concern she did not appear to be coherent. Unfortunately, I do not have consent to provide any further information.*

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*It is my professional opinion that Helen may benefit from a face to face assessment with an Occupational Health Physician."*

53. The OH report of 31 January followed upon a face to face consultation between Ms Fletcher and Dr McGrath, the OH physician.

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### **Policies**

54. The respondent has an alcohol and drug misuse policy. A copy of that was at pages 64 to 74 of the file.

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55. In terms of that policy the emphasis is upon support and recovery. Paragraph 13 at page 72 of the file contains the following:-

*"If an employee who has responded satisfactorily to a recovery programme has a recurrence of alcohol, drugs or other substance related problems which affect their work performance the case will be considered and, if appropriate, the Head of Service or other Nominated Officer will be responsible for deciding if it is appropriate to agree to a second and final opportunity of a recovery programme. Otherwise, the employee will be dealt with in accordance with the Council's disciplinary procedures".*

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56. The respondent has an attendance management policy. A copy of that appeared at pages 75 to 88 of the file. At page 87 of the file, the part of that policy dealing with redeployment appears. The relevant provision reads:-

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*"The Council's Occupational Health Advisors may advise that an employee can no longer undertake the duties of their job and recommend that the employee is considered for redeployment. The Occupational Health Advisors may provide guidance in respect of identifying what a suitable post may be under the redeployment procedure for the employee.*

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*Employees covered by the Scottish Negotiating Committee for Teachers may be considered for inclusion in this procedure on a case by case basis at the discretion of the Director of Education and Children's Services in relation to the circumstances detailed below."*

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There is then a reference to the Redeployment Procedure. That procedure was not in the file.

57. Redeployment is something considered by the respondent when an employee has confirmed that he or she is unfit to do the job held by them or when he or she has been so deemed by the respondent, after appropriate information has been assessed. Ms Fletcher's position was that she was fit to carry out her role. She relied upon the view of Dr Turner in his December report and upon the discussion held with Ms Irvine on 7 January as to a phased return, and the arrangements then agreed. At that meeting on 7 January, it had been agreed that, all being well, Ms Fletcher's phased return would start on 23 January 2020.

58. There was no recommendation by OH that Ms Fletcher be considered for redeployment. Ms Fletcher did not suggest or request redeployment.

### **Dismissal Meeting**

59. As detailed above, the capability hearing was initially arranged for 13 May 2020. Unfortunately, Ms Fletcher's trade union representative was unable to attend that day. It was therefore rearranged for 2 July.

60. The note of the capability meeting appeared at pages 294 to 302 of the file. Ms Fletcher was accompanied by Mr Waplington, her trade union representative.

61. Mr Docherty was the decision maker at the capability hearing. The hearing commenced by Ms Irvine providing a report on the background.

62. Mr Docherty stated that the meeting was to address the fact that Ms Fletcher had been absent from work since 4 February 2019 due to complex underlying psychological difficulties and a known problem with alcohol abuse for which she had been accessing appropriate treatment and support. He noted that

there was a concern expressed by the OH Physician that Ms Fletcher may have been concealing the degree of her alcohol use in the recent months.

5 63. Mr Waplington and Ms Fletcher responded. Mr Waplington confirmed that he agreed with a lot of the facts. He said there was significant dispute as to the position from March of 2020. Ms Fletcher had been fit to return to work from that date, he said. She was due payment from that time given that this was so. He accepted that Ms Fletcher had an issue with alcohol. She had never presented for work under the influence of alcohol. Comments made in 10 January as to there being an empty vodka bottle were based on assumptions as to recent consumption. A reference at that time to Ms Fletcher being under the influence of alcohol was made by someone not familiar with Ms Fletcher. The OH report in March confirmed that Ms Fletcher was fit to return to work with reasonable adjustments and conditions. Ms Fletcher referred to medical 15 opinion being that she was fit to return to work. She was not a risk to children, it was said. She was not abusing alcohol at the time of the meeting.

64. After adjournment Mr Docherty intimated his decision. He said:-

20 *"I have significant concerns due to Helen's complex psychological issues and history of alcohol abuse and I do feel that any return to work would be pose a significant risk to the children. I am of the opinion that Helen is not fit to return to work. and I have therefore made the decision that the outcome of today's hearing will be dismissal from the employment of Aberdeenshire Council with 25 immediate effect."*

65. In reaching this view, Mr Docherty had considered whether it would be possible to accommodate the OH recommended adjustments to Ms Fletcher's role so that she could potentially return to work, whether at the school in times 30 when there was no lockdown, or from home during lockdown. He concluded that it would not be possible to do so because the respondent could not satisfy itself that Ms Fletcher could meet the proposed conditions from OH. It was not possible for the respondent to ensure that Ms Fletcher would be supervised at all times while she undertook work with children from her home. 35 Restrictions prevented anyone else being within the same property as Ms Fletcher. Numbers of teachers available as a resource meant that dedicating

a teacher to being present, even online, when Ms Fletcher was teaching, as the OH report had recommended, was not possible. It was not possible to assign another teacher to be present with Ms Fletcher if she was working within the school. Staff resources did not permit this. Given concerns as to Ms Fletcher safely supervising physical exercise of children, their safety was potentially at risk if there was no supervision of Ms Fletcher taking place while she was teaching.

5  
66. For remote learning it is of particular importance that the teacher in that situation has a good working knowledge of the pupils being taught. Ms Fletcher did not have that knowledge and relationship with children at school at the time of consideration being given to her potential dismissal. This was due to her absence from work since February 2019.

10  
15 67. There was also concern on the part of Mr Docherty given the point raised by OH that Ms Fletcher was concealing the extent of her alcohol consumption in recent months from them as well as from the professionals involved in her care. Ms Fletcher carrying out her role from home was therefore an issue. Supervision by another teacher being present was impossible to achieve as mentioned, whether teaching was being done remotely or in person.

20  
25 68. The concerns of the respondent were also heightened by the contents of the OH report referring to Ms Fletcher being abstinent from October 2019. That implied that she had been drinking prior to that time. Ms Fletcher's position in January 2020 was that she had not been drinking when Carrie-Ann Duthie had expressed her concerns in her email of 9 January to Ms Irvine. That was undermined by her acceptance as disclosed to OH and referred to by them in the report of 12 March in that Ms Fletcher had said to OH that she had drunk heavily 6 weeks prior to that time. It was this situation which emphasised the respondent's concerns as to concealment of drinking by Ms Fletcher and/or a failure by her to recognise the reality of the issue.

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69. Ms Fletcher's position that she had not been drinking on 7 or 9 January 2020 was also undermined by the information in the email of 16 January referred to above in which it was said that Ms Fletcher was not coherent when a call took place on 16 January 2020. That email is at page 235 of the file, as mentioned above.

70. The outcome of the capability meeting was confirmed by Mr Docherty in a letter of 7 July 2020. A copy of that letter appeared at pages 304 and 305 of the file.

71. In addition to confirming the decision on dismissal and reasons for that, Mr Docherty also dealt with a point raised at the end of the capability meeting by Mr Waplington. Mr Waplington had stated that there had been an unlawful deduction of wages in relation to the period from 14 March 2020 to date of dismissal.

72. Mr Docherty decided there was no sum due to Ms Fletcher. He said in the letter:-

*"With reference to your Union Representative claim that there has been an unlawful deduction of wages from 14 March 2020, whilst your GP stated in the fit note dated 14 January 2020 that you were fit to return to work on a phased return in agreement with management, subsequent reports from Occupational Health and your Care Manager in January 2020 indicated that you were unfit for work. Carol Irvine requested that you return to your GP at this time, however, no further fit note was provided by you. Your occupational sick pay has been exhausted on 27 January 2020. I do not, therefore, believe that there has been an unlawful deduction of wages and that you were not fit for work in March without considerable adaption and risk."*

### **Appeal**

73. Ms Fletcher set out her basis of appeal. She did this on 30 July 2020 in a form which appeared at pages 306 to 308 of the file.

74. The appeal hearing took place on 12 March 2021. Ms Simpson was the chair of that meeting. Ms Fletcher and Mr Waplington were present at the of the meeting.

- 5 75. Mr Docherty set out the background and the decision he had reached at the capability hearing. An oral statement on behalf of Ms Fletcher was made. The contents are at page 387 to 391 of the file. A statement which Ms Fletcher herself made appears at page 392 of the file.
- 10 76. The appeal process within the respondent is a review rather than a re-hearing. The role of the appeal body is to determine whether in its view the decision made was reasonable or not.
- 15 77. Having heard respective submissions and having considered the papers, the view of the committee hearing the appeal was that it was not upheld. Their view was that the decision by Mr Docherty to terminate the employment of Ms Fletcher on the ground of ill health capability was reasonable. The committee was unanimous in its view. It concluded that there was no evidence to indicate that Ms Fletcher could sustain a period of abstinence from alcohol allowing a safe return to work, safe for her and for pupils and colleagues. It was the view of the committee that there was a wealth of medical evidence before Mr Docherty supporting the position that Ms Fletcher was not fit to return to work in any capacity.
- 20 78. The committee recognised that Ms Fletcher thought otherwise. The committee concluded, however, that the decision of Mr Docherty was reasonable given the longstanding issues Ms Fletcher had with alcohol, her relapses, her attendance record and the risks perceived to exist to children within any class of which she was in charge.
- 25 79. The decision of the appeals committee was communicated to Ms Fletcher by email of 26 March 2021. A copy of that email was at page 444 of the file.

**Other Relevant Facts as admitted or proved**

- 5  
80. There had been complaints from parents as to the teaching of Ms Fletcher. There were, however, no complaints that she was drunk or under the influence of alcohol.
- 10  
81. Ms Fletcher had expressed a wish to become a primary teacher. She had discussed this with Ms Irvine. Various meetings had taken place in relation to advancing this objective. Ms Fletcher had delivered areas of the curriculum to primary pupils from August 21017 in order to assist her potential conversion to primary teaching.
- 15  
82. During the ill-health absence from school of Ms Fletcher, Ms Irvine had arranged for supply teachers to cover her role. It was not possible to achieve consistency in identity of the supply teacher involved. There were different teachers therefore delivering the PE classes to pupils. Fit notes were being submitted monthly by Ms Fletcher, so there was no ability for any supply teacher to plan more than 4 weeks in advance or to secure the services of a supply teacher for more than a 4 week period.
- 20  
83. On 7 January 2020 when Ms Fletcher met with Ms Irvine a phased return to work for Ms Fletcher was agreed. This was however prior to the email from Carrie-Ann Duthie of 9 January, referred to above, and the subsequent OH report of 31 January as detailed above. The information obtained from both of those sources led to a reassessment of Ms Fletcher's possible return to work. The certificate issued by Dr McGrath on 31 January confirmed that Ms Fletcher was unfit for any work at that time.
- 25  
84. A statement of fitness to work was completed by Ms Fletcher's GP on 14 January. A copy of it appeared at page 228 of the file. It confirmed that Ms Fletcher "*may be fit for work*" and might benefit from a phased return to work, as agreed with management. It was said that this would be the case for 2 months.
- 30



85. Ms Fletcher was alerted to the information which the respondents had received from Ms Duthie. Ms Fletcher replied to information in terms of an email of 14 January 2020. It appeared at page 229 of the file and read:-

5                   *"Hi Carol,  
I managed to get a doctor's appt. this afternoon and have been given  
the ok to a phased return, the return is as of today, 14th. I need to go  
back in 2 months time for a check-up. As i continue to be abstinent  
and have been since last summer I am really shocked that after only  
10                   knowing Carrie-Ann for a short period of time she has made such  
judgements about me. She knows very little about my history and has  
made assumptions based on no evidence whatsoever. I talked to the  
doctor about my abstinence and he was really pleased that i.m making  
good progress. It's encouraging to have some positivity.*

15                   *I'm hoping that OH will be speedy with their appointment for me.*

*Kind regards,  
Helen"*

- 20                   86. The concern of Ms Irvine, the information from Ms Duthie and the certificate issued by and the reports from OH, all required to be considered by the respondent, together with the views of Ms Fletcher and also the report in December 2019 from her specialist, Dr Turner.

- 25                   87. Around this time and at time of the capability meeting being arranged and taking place, there was a very real worry on the part of the respondent that Ms Fletcher had not only relapsed into drinking but was also concealing the fact that she was drinking. It appeared to Ms Irvine that Ms Fletcher did not appreciate the reality of the situation.
- 30

88. In September 2015 during a phased return to work, there was, as part of the support arrangement provided by the respondent, a teacher present with Ms Fletcher for a period. This was mentioned by Ms Irvine in her presentation to the capability meeting on 2 July 2020. The relevant passage in the notes of that meeting appeared at page 294 of the file.
- 35

89. The recommendations in the OH report of 12 March 2020, pages 256 and 257 of the file, included that Ms Fletcher did not undertake any unsupervised work

with children initially, with another member of staff requiring to be present at all times.

- 5 90. To put this provision in place in early March of 2020 would have required that an additional member of staff required to be hired by the respondent. That would not have been possible to achieve. The respondent had staff shortages in the Fraserburgh cluster, that being where Ms Fletcher worked. In addition, after lockdown was imposed, it would not have been possible for a member of staff to be physically present with Ms Fletcher.
- 10 91. The decision as to whether the recommendations of OH could be accommodated by the respondent was recognised in that OH report as being ultimately one for the respondent as employer.
- 15 92. The provisions as to payment to Ms Fletcher while absent through ill-health were that she was to receive full pay for 6 months and then half pay for the next 6 months. Ms Fletcher was absent from 4 February 2019. She received full pay for 6 months from then, followed by half pay for the subsequent 6 month period. Payment of salary to her ceased on 4 February 2020. From  
20 that date until her dismissal on 2 July, Ms Fletcher remained unfit for work for health reasons, notwithstanding her own view as to being fit to return to work.

### **The Issues**

- 25 93. The issues for the Tribunal were whether the dismissal of Ms Fletcher by the respondent was unfair and whether Ms Fletcher was entitled to pay for the period from mid-March 2020 until dismissal on 02 July 2020. It was accepted that the reason for dismissal was capability through ill health.
- 30 94. The Tribunal would require to consider, if the dismissal was unfair, what compensation was to awarded to Ms Fletcher. To determine that, it would require to consider what impact, if any, upon it decision the following had: - the principles detailed in *Polkey v A E Dayton Limited* 1988 ICR 142 ("*Polkey*"), whether there had been contributory conduct such that a reduction

in any award made was considered to be just and equitable and whether reasonable steps had been taken in relation to mitigation of loss.

- 5 95. If the Tribunal concluded that Ms Fletcher was due to be paid in respect of the period from mid-March until dismissal, the appropriate sum would require to be calculated and found to be due to her.

### Applicable Law

- 10 96. In terms of Section 94 of the Employment Rights Act 1996, it is for a respondent to show the reason for dismissal. Capability, the reason advanced in this case, is a potentially fair reason for dismissal.

- 15 97. The question of fairness of the dismissal is one for determination by the Tribunal, the onus being neutral.

- 18 98. A Tribunal must not substitute its own decision for that of an employer. That is confirmed in the case of *HSBC Bank Plc (Formerly Midland Bank Plc) v Madden* 2000 ICR 1283. Rather, it must find the facts. It must then consider whether a reasonable investigation has been carried out by the employer. The test in that regard is whether the investigation falls within the band of reasonable investigations which would be carried out by a reasonable employer. If that has been the case in the view of the Tribunal, the Tribunal requires to consider the procedural steps taken. Are those such that the dismissal was unfair? It must then go on to consider whether dismissal lay within the band of reasonable responses of a reasonable employer.
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- 25

- 30 99. Whilst in terms of *East Lindsey District Council v Daubney* 1977 ICR 566 “the true medical position” should be established before dismissal occurs, the case of *DB Schenker Rail (UK) Ltd v Doolan* (“Schenker”) EATS 0053/09 confirms that what is required is that a reasonable investigation is carried out. *Daubney* does not mean that a higher standard of enquiry is required in this type of situation as compared to that required in a misconduct dismissal. That was confirmed in *Schenker*. This is in accordance with the principles in *British*

*Home Stores Ltd v Burchell* (“*Burchell*”) 1980 ICR 303. Those principles are applicable to a case such as this where dismissal is said to arise on the basis of ill-health resulting in incapability.

5 100. In terms of the *Burchell* principles, the employer must genuinely believe in its stated reason for dismissal, having conducted a reasonable investigation which yields reasonable grounds for the employer’s conclusion.

10 101. *Iceland Frozen Foods Ltd v Jones* 1983 ICR 17 is the well-known case which confirms that the test for the reasonableness of the dismissal is whether the decision to dismiss lay within the band of reasonable responses of a reasonable employer.

15 102. If a dismissal is considered to be unfair due to what are often labelled “procedural failings”, then a Tribunal must consider the principles of *Polkey*. That involves an assessment of the percentage chance of a fair dismissal resulting had appropriate procedures being followed.

20 103. If a claim is successful, then it may be appropriate to consider whether there has been contributory conduct by the employee meaning that a reduction in compensation awarded is appropriate. In assessing the compensatory award, ERA requires that compensation be such amount as the Tribunal considers to be just and equitable.

25 104. A basic award is also appropriate in the case of an unfair dismissal. That can also be reduced in the circumstances detailed in Section 122 of ERA.

30 105. If an employee is fit and able to work, however is prevented from working by an employer, then wages are due to that employee for any such period when he/she is fit to work, but is prevented from working by an employer. If an employee is unfit for work, then any pay arrangements during such a time of being unfit for work are governed by contractual provisions between the parties, save as may be imposed by law.

**Submissions***Submissions for the respondents*

- 5 106. Ms Bennie made oral submissions for the respondents. Those are now summarised. Given the decision reached, her submissions in relation to *Polkey*, mitigation of loss and contributory fault are not set out.
- 10 107. Ms Bennie said that the main dispute between the parties was as to the fairness of the decision to dismiss. Many of the facts were not in dispute.
- 15 108. There was an acceptance by the claimant that the respondents had been very supportive during earlier episodes of alcohol abuse by her. Ms Irvine in particular had been accepted as having been supportive. The respondents accepted that the claimant had not had complaints involving allegations by parents that she had been drinking at work.
- 20 109. Ms Bennie went through the OH reports obtained and the contents of those reports.
- 25 110. The claimant had herself raised issues with lapses in relation to alcohol, having resumed drinking. This had resulted in her absence from work.
- 30 111. During 2019, appropriate management of the claimant's absence by the respondents had gone on. OH reports had been obtained at relevant times. In the report from Dr Chin in July 2019, page 175 of the file, it had been noted that Ms Fletcher said she had been consuming alcohol until a few minutes before the call. She had been actively retching during the first 2 minutes of the call itself. There had been a serious relapse.
112. The respondents had been supportive of the claimant during this time. The claimant had been given the chance to submit information from her GP.

113. Ultimately, in discussion with Ms Irvine and in light of the medical report from Dr Turner, a return to work plan was discussed and agreed with Ms Fletcher. This was in early January 2020.
- 5 114. It was significant that the report from Dr Turner, whilst positive, was conditional in setting out that positive position. The prognosis was described as remaining good if Ms Fletcher continued to abstain from alcohol.
- 10 115. The OH report obtained in November 2019 referred to Ms Fletcher having abstained from alcohol since the beginning of October. The implication was that she had been using alcohol until that time.
- 15 116. When early January 2020 came, it was accepted that there had been a discussion between Ms Fletcher and Ms Irvine as to the claimant returning to work. What had caused a revision to that, however, was the email from Ms Duthie of 9 January (page 222) and the OH report following upon that. Ms Duthie had spoken with the claimant. Ms Nicol had visited the claimant. The email of 9 January set out their concerns as to the claimant having resumed drinking. It was an email sent only after discussion by Ms Duthie with her line manager. It was sent given the interests of child safety.
- 20
117. Ms Fletcher had responded to the terms of that email being sent to her in an email of 14 January, page 229 of the file. That email had demonstrated, however, the complete lack of insight the claimant had into her own situation.
- 25
118. In light of the information they now had, the respondents had no option but to refer the matter to OH. They did that. They obtained an OH report. That essentially supported their position. It also reported that Ms Fletcher did not report any ongoing alcohol consumption. That was of relevance given the reference in the later report in March to the claimant having been consuming alcohol in the preceding 6 weeks. It was also relevant that a blood test was recommended. The claimant had refused to undergo such a test.
- 30

119. The respondents had sought the OH reports when appropriate. They had looked, after January 2020, to obtain a report in the absence of a blood test. That report had been dated 12 March 2020.

5 120. The report in March 2020 was the one which referred to Ms Fletcher returning to work providing certain conditions were met. The respondents considered those conditions. Mr Doherty had confirmed that and the claimant had accepted that the respondents did indeed do that. Mr Docherty and Ms Irvine had addressed them at the hearing before this Tribunal as well as at the  
10 capability meeting itself.

121. The OH report of 12 March expressed significant concerns. It referred to the claimant's complex underlying psychological difficulties. It stated that there was concern as to the claimant possibly having concealed the degree of her  
15 alcohol abuse. It said the claimant had last drunk heavily 6 weeks previously. She had had a drink 2 weeks before the report. 6 weeks would have taken the timing back to the end of January 2020. This contrasted with the picture the claimant had sought to present. It illustrated her lack of insight into her drinking.

20 122. The claimant had said to the Tribunal that she was always honest with her employer about her drinking. It appeared however that she had not been honest at the time when she was seeking to return to work. In her personal statement to the appeal hearing, page 392 of the file, she had said that she  
25 had been sober from March to the end of term 4. The OH report however contradicted this when it reported the claimant herself as having confirmed that she had had a drink in in March.

123. There was therefore a pattern of concealment, Ms Bennie said.

30 124. Although the claimant said that medical information could have been updated, and that was so, the claimant had not suggested this. She had not obtained any up to date information from Dr Turner or her GP.

125. Ms Bennie next addressed the timeframe in relation to the capability hearing.

126. The report from OH was dated 12 March. The pandemic had resulted in lockdown for schools on 20 March. The claimant had been written to asking about possible discussion of the OH report. The capability hearing had been set during April for 13 May. It had been postponed as the claimant's representative could not manage the date initially proposed. The first available alternative was 2 July when it took place.

127. The Tribunal should accept Mr Docherty's evidence as to the reason for dismissal being capability. There were safeguarding concerns on the part of the respondents. Dr Rodgers had referred to those in her report in March 2020. Those were legitimate. The claimant herself had talked in her statement of activities she had introduced such as leap frog and the buck. Risk to the children through the continuing employment of the claimant was a proper consideration of the respondents.

128. The claimant had a less than clear or consistent abstinence from alcohol. Again the PH reports and the information from Ms Duthie and Ms Nicol supported that view.

129. In short, Ms Bennie said, Mr Docherty had given full consideration to all relevant information. Support similar to that offered to the claimant in 2015 was not possible. The evidence again confirmed that. The respondents had sought at all times to be supportive to the claimant. She had had access to the head teacher, there had been OH input and she had been supported whilst on sick leave. Discussion had taken place as to return to work. Circumstances had then altered. Again the respondents had reacted appropriately, Ms Bennie submitted.

130. Mr Docherty had approached the capability hearing with a clear and open mind. The claimant was not fit for work. Redeployment was therefore not appropriate as an alternative.



131. Similarly, Ms Bennie said, Ms Simpson had reviewed the paperwork as she should have done in relation to the appeal. She and the committee of which she was chair had listened to what was said. They had considered whether the decision taken by Mr Docherty was reasonable.

5

132. The claimant had not asked at any stage about redeployment. She had always wished to return to work or, at appeal, to get her job back. She had not said that she was not fit to teach but could do other work. Her position had always been that she was fit to teach.

10

133. The Tribunal should conclude that the dismissal was fair.

134. Ms Bennie referred to *Spencer v Paragon Wallpapers Limited* 1976 IRLR 373. That case confirmed that there came a point where an employer could not reasonably be expected to keep a job open for an employee. An employer should show sympathy, understanding and compassion. The respondents here had done that, Ms Bennie said. The needs of the organisation had been balanced in the decision making of Mr Docherty. There was an impact of absence. The potential for ongoing absence was relevant. Mr Docherty had taken account of all else before him too, the OH reports and the claimant's own information.

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135. It was notable that the claimant herself did not say that the respondents should wait longer. Her position was that she was fit to return to work. The reality however was that the OH report and the information from Ms Duthie did not confirm that. It raised legitimate concerns.

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136. Mr Docherty had therefore concluded that the claimant's issue with alcohol and with relapsing were not behind her. The decision to dismiss was fair, as was the process followed.

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137. Ms Bennie then made a submission in relation to *Polkey*, failure to mitigate loss and contribution. This part of her submission is not set out given the claim being found to have been unsuccessful.

5 *Submissions for the claimant*

138. Although, during the submissions for the respondents the claimant had absented herself from the video conference, Mr Cobb and Mr Waplington confirmed that they were content to continue and to conclude submissions notwithstanding that. It was unclear whether the claimant had opted to leave  
10 the video hearing or whether her connection had gone down. Mr Waplington did try unsuccessfully to contact the claimant by telephone.

139. At time of submission, Mr Cobb confirmed once more that the narration of facts by the respondents in form ET3 was not disputed by the claimant. The  
15 case for the claimant turned on relatively narrow points, he said. Those were the assessment of Ms Fletcher's situation and also the capability hearing.

140. It was not disputed, Mr Cobb said, that the reason for dismissal was capability. It was, however, disputed that dismissal lay within the band of reasonable  
20 responses.

141. Mr Cobb said he did not take issue with the legal analysis set out by Ms Bennie. She relied on inferences, he said, most of which were negative from the point of view of Ms Fletcher.  
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142. Although, for example, Ms Irvine had said that, looking back now, the absences of Ms Fletcher prior to January 2019 could be seen as potentially having been drink related, that was only the view adopted now by Ms Irvine. Her view at this time did not mean that the absences were in actual fact so  
30 related.

143. The medical evidence which the respondents had did not, Mr Cobb said, all point one way. There was the report from Dr Turner. Dr Rodgers had also

issued her report prior to lockdown. That report had suggested a pathway forward.

5 144. The Tribunal should consider the position of the claimant as at July 2020 and not as she was now. She had been dismissed a year prior to this Tribunal hearing and was currently struggling with psychological issues. That had been clear from her manner and her evidence at this hearing.

10 145. The issues described by Ms Irvine in her statement at paragraph 25 as to the impact of absence were accepted. It was accepted that the respondents had been caring and supportive to an extent. It appeared, however, that the previous problems experienced with the claimant may have influenced the approach of the respondents, Mr Cobb submitted.

15 146. The two arguments advanced by Ms Fletcher were set out by Mr Cobb. Those were firstly that the balance struck by the respondents was not the correct one. Secondly, there was a means of potential redeployment.

20 147. The evidence which the respondents had before them extended, via OH, to the information from Dr Turner. They also had the claimant's GP's fit note of 12 January. There had been the discussion between the claimant and Ms Irvine. That had identified specific dates when resumption of work would take place. The claimant was therefore very close to a return to work at that point. There had then been the information from Ms Duthie. That contained second  
25 hand information from her colleague.

30 148. The claimant had said she was a functioning alcoholic. She had attended work without ever having any complaints as to having consumed alcohol. The complaints mentioned by the respondents related to her manner, not to alcohol consumption.

149. Mr Docherty had chaired a disciplinary meeting with the claimant in 2015 yet said he did not recall her. He recalled, however, his view that the claimant had

been disheveled in July 2020. It was not clear that he had not been influenced by his earlier involvement.

5 150. It seemed that the issue with the elements required for return to work of the claimant as set out in the OH report of March 2020 was that of supervision. Mr Docherty had dismissed that strongly as not being possible. That was not appropriate.

10 151. He also did not have up-to-date medical information. He had not been prompted by Ms Cleland to seek an up to date report. He had not himself regarded that as being advisable. Given the lapse of time since March that had caused potential unfairness.

15 152. Arranging the meeting had proved problematic. Lockdown had been imposed. Those elements all meant time had passed. That underlined the need for an update. Ms Fletcher could have provided an updated report. She did not, however, have access to the respondents' OH advisers.

20 153. At the appeal hearing Mr Waplington had highlighted this point as to there being no recent medical information. Despite the passage of 3 months, no updated report had been sought. Mr Docherty had said that in his view the report from March was up to date. He did not appear to have given the point much thought. He said he had considered all factors. This was one that he had not considered, however. He did not have, Mr Cobb submitted, an open  
25 mind.

30 154. That was also shown in consideration, or lack of it, given to redeployment. It appeared Mr Docherty had ruled it out. His mindset was closed against it. Although OH had not mentioned redeployment, that did not exclude it being an option explored by Mr Docherty. The possibility was certainly worthy of more thought than it was given by Mr Docherty, Mr Cobb submitted.

155. For there to have been a fair assessment, redeployment ought to have been considered.

5 156. In these circumstances it could not be said that dismissal was a reasonable decision. It did not lie within the band of reasonable of a reasonable employer.

157. Ms Simpson had said in evidence that redeployment was not something considered in the appeal. Neither Ms Cleland or Mr Docherty had regarded it as an option to be pursued.

10 158. Mr Docherty had apparently regarded there as being a risk to children in Ms Fletcher resuming work. There was a means open to him and to respondents to remove that through redeployment. It was not, however, pursued.

15 159. Mr Cobb then a made a submission in relation to mitigation of loss, *Polkey* and contribution. As with the respondents' submission, those elements are not set out, for the same reason given above.

20 160. Mr Cobb summarised the claimant's position as being that there were 2 lost opportunities. The decision to dismiss had been taken almost 4 months after the assessment, with no update of that assessment. Redeployment out of the classroom setting had not been explored.

*Brief reply for the respondents.*

25 161. Ms Bennie said in reply that Mr Docherty had been clear that he had considered all the relevant avenues. As to the point made about the claimant today and the claimant in July 2020, that was speculation. The reliable evidence was from Mr Docherty. Ms Bennie also commented upon part of Mr Cobb's submission dealing with loss.

**Discussion and Decision***Preliminary comments*

- 5 162. The conduct of this case proved somewhat difficult. As is often the case, the airing of the issues and the evidence from one side, in this case from the respondents, was something to which the other party, in this case the claimant Ms Fletcher, found it hard to listen.
- 10 163. Ms Fletcher has documented mental health issues. She found it very hard to control herself as evidence was being given by the respondents' witnesses and as she was being cross examined. Witness statements had been prepared and presented for all witnesses, including Ms Fletcher. They stood as the evidence in chief of the witnesses. The witnesses were cross examined.
- 15 164. Whilst the respondents' witnesses were being cross examined, Ms Fletcher made various comments expressing her disagreement with the answers being given and giving her view of the witnesses. I explained that I understood the importance of the case to her and that she would have her view of the facts of the case. I said that I accepted that she no doubt disagreed with the position of the respondents' witnesses. I urged her, nevertheless, to refrain from making such remarks as she had been making. When she continued in that vein despite my remarks, I again underlined to her that she must not so behave. Unfortunately, Ms Fletcher persisted in this behaviour and I took the decision to mute her microphone. I may say that this was something which Mr Waplington indicated he was going to suggest had I not taken that step.
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- 25
- 30 165. At the start of proceedings on the second day, Ms Fletcher apologised for her behaviour the proceeding day and confirmed she recognised that it was not at all appropriate.
166. During the course of the second day, Ms Fletcher was cross examined. She clearly struggled with that process. She could not simply answer what were very often straightforward questions. She wished to answer by giving her view

on matters about which she had not been asked. She said she regarded the questions as being bullying. I sought to reassure her that I would not permit questions which were in my view of that type. In addition, I highlighted that her advocate would also no doubt object if he formed that sort of opinion. Mr Cobb had not objected, and did not object, to any questions asked in cross examination.

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167. It proved difficult to obtain from Ms Fletcher any evidence of relevance. The witness statement she had given was also unfocussed and contained much material which was not of relevance to the case. I appreciate that Mr Waplington, who had transcribed the statement, had simply set out what Ms Fletcher had wished to say in her statement.

15  
168. I had concern as to Ms Fletcher's ability to participate in the proceedings at some points. She became very upset at one point when her evidence strayed into some of the history involving attendance at her property, something about which she had not been asked. I offered a break, which she declined. She recovered her composure and continued.

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169. The second day started at 9.30 with a view to ensuring that we finished the case if possible in the allotted time. It had not proved possible to commence the case until 2pm on the first allotted day of hearing. The early start was fixed after consultation with parties and representatives.

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30  
170. At around 12.50 Ms Fletcher was in course of being cross examined. Mr Cobb sought a brief adjournment so that, he accepted unusually, Mr Waplington could engage with Ms Fletcher as to her interaction/engagement in conduct of the case. Ms Bennie did not object to that being undertaken for this limited purpose. I decided that it would be appropriate to adjourn for a slightly longer period, rolling the brief adjournment sought into the lunch period. I proposed that we resume at 1.30. Ms Fletcher was most displeased at there being a lunch break and expressed herself very strongly on that point. I concluded that to have a break from screens, to allow the consultation mentioned, for

comfort and to obtain a snack, it remained appropriate for there to be a 40 minute break in proceedings. That is what happened. Ms Fletcher was present when the hearing resumed and completed the cross-examination phase of the case.

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171. During submissions for the respondents, Ms Fletcher again found it impossible to refrain from comment. Once more her language was strong and she could not manage simply to listen, despite a reminder that the evidence was over and both parties were now summing up via submissions. Again, I required ultimately to mute Ms Fletcher. Shortly after I did so, she left the video conference call. This is mentioned above when it is confirmed that Mr Cobb and Mr Waplington were content to conclude submissions in the absence from the video conference of Ms Fletcher.

15 172. The above is set out to record the position and to reflect the concern which I had as to Ms Fletcher's reactions to the evidence and to being cross examined. I wish however to emphasise that, although her behaviour was very unsatisfactory, as she recognised in her apology on the second day, the decision I have reached in this case has been reached on the facts and the law. It has not been influenced in any way by Ms Fletcher's personal conduct during the hearing.

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#### *The decision*

173. It was a matter of agreement that the dismissal of Ms Fletcher was on the grounds of her capability. It was not said that she could not do her job in the sense that there were performance issues. Rather, her absence and concerns as to her ability to return to work lay behind the decision taken.

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174. Capability is a potentially fair reason in terms of ERA.

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175. As reflected above in the submissions, there were essentially two areas which led to the position for Ms Fletcher being that her dismissal was unfair. This meant that there was little requirement to weigh the evidence of Ms Fletcher



as against the evidence from the respondents' witnesses. Where that was necessary at any point, I preferred the evidence of the respondents' witnesses. Ms Fletcher was certainly not reliable in her recollection in my view. She had her own view that she had been badly treated. The vast majority of the issues she had and about which she gave evidence were, however, irrelevant to the issues before this Tribunal.

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176. In relation to credibility, again there was little evidence in relation to which that was a critical matter. Insofar as there was any need to prefer the evidence from a witness for one party over that from a witness for the other party, I did not find Ms Fletcher to be convincing in her recall or assessment of events. I found the respondents' witnesses both credible and reliable. I preferred their evidence as far as any element of relevant competing evidence made it necessary to do so. I did not find Ms Fletcher to be either reliable or, in some instances, credible.

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177. As mentioned, two points were made for Ms Fletcher. Firstly, she said that the medical information held by the respondents was not as clear as they regarded it to be. An up-to-date medical report ought to have been obtained given the time which had elapsed between the report of 12 March and the decision being taken on 2 July.

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178. Secondly, redeployment ought to have been considered by the respondents. Although no objection was taken to the topic of redeployment being raised with the respondents' witnesses, it was not something raised as a possibility or as something which ought to be considered at the capability hearing or at the appeal. The decision to dismiss was not attacked on the basis of failure to redeploy or to consider redeployment when the appeal took place. It is not advanced in the claim form or in the further and better particulars as a basis on which it is said that the dismissal was unfair. At this hearing the position advanced was that the dismissal was unfair due to redeployment not being a matter at least considered in relation to Ms Fletcher.

179. The other element of claim was in respect of wages for the period from March to July. The position for Ms Fletcher was that she was fit for work however did not work due to the decision of the respondents not to permit her to work.

5 180. There was no dispute as to the applicable law. It was accepted therefore that what is required was that there had been a reasonable investigation. It was accepted that, if there had been a reasonable investigation, the dismissal would be fair if dismissal lay within the band of reasonable responses of a reasonable employer.

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*Was there a reasonable investigation?*

181. Looking at the issue of medical information, it was undoubtedly the case that a further report could have been sought. The most recent report before Mr Docherty was that dated 12 March 2020. The capability meeting was held on  
15 2 July. It is recognised that it was intended to hold the capability meeting in May. It was rearranged to accommodate Ms Fletcher's representative. That, however, does not mean that the point cannot be taken.

182. What is required is a reasonable investigation, one within the band of  
20 investigations which a reasonable employer would carry out. It is relevant, in my view, that there was no suggestion made by Ms Fletcher that her health or her medical position had altered since 12 March. She did not urge the respondents to obtain an up-to-date report on that or any other basis. She did not offer to provide one.

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183. It is recognised that the fact that an employee has not requested that an up-to-date medical report be obtained does not mean that an investigation without such a report being obtained is therefore a reasonable one. The question of what is a reasonable investigation must be considered looking to  
30 the what the respondents did and to the resultant information on which they relied. Nevertheless, it would be relevant had Ms Fletcher made a request for a report and had that request been ignored or refused.

184. In my opinion, on the evidence I heard and looking to the required standard of a reasonable investigation by a reasonable employer, there was nothing further required by way of investigation to meet that test. Passage of time might in certain circumstances, looking to the length of time elapsed, be a reason of itself why it might be concluded that a reasonable investigation had not been carried out. I did not see that as being the position here. There was just over a 15 week period between the report being issued and the capability hearing taking place. That is not ideal, however in the circumstances of this case, the absence of update did not take the investigation outwith the band in my view.
185. In coming to this conclusion, I bore in mind that there had been several medical reports obtained. There was therefore a history and a context for the report of 12 March, which appeared at page 256 of the file. The illness of the claimant is a very unfortunate one and one with which she requires to live. It is not the kind of physical issue, for example, in which there would be a real likelihood of a difference in ability to carry out the role after a few weeks pass.
186. Had the situation continued with more time passing, there would come a point where a reasonable investigation would have necessitated an updated report. I did not regard the time which had passed in this case as being self-evidently such that a reasonable investigation would involve an updated report. Equally I heard nothing in the evidence, whether in chief or through cross examination, which would give me a basis for concluding that no reasonable employer would not have sought an up to date report.
187. It must be borne in mind that Ms Fletcher was a teacher. This point shades into the reasonableness of the decision to dismiss, I realise. Irrespective of any medical update, a decision would still require to be made as to the basis on which she might return to work, if that was to be a possibility. A supervised return would seem to be likely to be recommended at any stage given that this had occurred some years ago and had been one of the conditions detailed in the OH report of 12 March. Supervision was not possible pre lockdown and

became even more problematic during lockdown given the inability for anyone, even had there been staff availability, to be physically with Ms Fletcher during her working time.

- 5 188. The respondents were in my view in the position of having conducted a reasonable investigation when the decision on Ms Fletcher's employment came to be made on 2 July.

*Decision to dismiss*

- 10 189. The respondents were faced with a situation where Ms Fletcher had been absent for a considerable time. Conditions were recommended for her return. The OH report had referred to the Ms Fletcher as still drinking. There was concern that she had been concealing her drinking over recent months. OH also stated in their report that with supervision of children undergoing physical activity being involved in Ms Fletcher's role, she required a clear head at all times in order to risk assess situations continuously. They highlighted the  
15 unfortunate fact that Ms Fletcher has complex underlying psychological difficulties. They expressed concern that Ms Fletcher may have been concealing the degree of her alcohol use in the months prior to the report.

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190. Those points all caused concern to the respondents. The latter one caused a question mark in their minds about the accuracy of information given to them by Ms Fletcher, particularly as to the information given at the end of January. The respondents also had the information from Ms Duthie and Ms Nicol and  
25 the reaction of Ms Fletcher to that.

191. There was also reference in the OH report to the beneficial impact of a return to work. It was also noted that a return to work would be likely to reduce the likelihood of relapse into heavy drinking. Ms Fletcher said she had never gone  
30 to work under the influence of drink. The respondents had no information that she had ever done that. Those points were all before Mr Docherty.

192. Similarly, there was a condition stipulated by OH that Ms Fletcher should not undertake any unsupervised work with children initially, with a requirement that another member of staff be present at all times. Prior to lockdown and certainly in lockdown, it was not possible for the respondents to provide such supervision.
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193. Mr Docherty had the information that Ms Fletcher had been drinking heavily around the end of January and had also consumed alcohol in March. The medical evidence from Dr Turner and Ms Fletcher's GP's fitness certificate were both issued before that. The report from Dr Turner, incorporated into the OH report of which Mr Docherty had sight, was issued before the submission of the report of Ms Duthie as to concerns she and Ms Nicol had.
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194. Mr Docherty was particularly concerned about the safety of children potentially being taught by Ms Fletcher, given her relapses referred to in the OH report, those being based on information from Ms Fletcher.
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195. I considered the conclusion reached by Mr Docherty upon the information from all the sources before him. I was satisfied that he had considered the documents and representations made to him. He had not recollected having encountered Ms Fletcher in a disciplinary setting some 5 years previously. I accepted his evidence on that point. He explained in evidence how it was that he had come to the view that dismissal was to be the outcome of the meeting. He was able to articulate his reasons and reasoning process in a coherent and straightforward way. I accepted that he had an open mind at the start of the meeting and also that had any new evidence been presented to him he would have considered it.
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196. Lockdown meant that if Ms Fletcher was to return to teaching at that point, she would have required to be unsupervised. She would not know the children with whom she was engaging virtually.
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197. During Ms Fletcher's lengthy absence there had been difficulty caused in providing teaching for children who would have been taught by Ms Fletcher

had she been at work. Using supply teachers on short work arrangements with extensions on a 4 weekly basis, was not at all ideal.

5 198. In all the circumstances, Mr Docherty concluded that with the information and history before him, the respondents could not take the continue Ms Fletcher's employment. I concluded that with the information the respondents had, this could be said to have been a decision outwith the band of reasonable responses of a reasonable employer.

10 199. The possibility of redeployment might have been a basis on which it could be said that dismissal lay outwith the band. That would be on the basis that dismissal when redeployment was an available and potentially workable route meant that deciding to dismiss without exploring redeployment was something no reasonable employer would do.

15 200. As mentioned above, redeployment was not something suggested until this hearing. Ms Fletcher was keen to retain and to regain her job as a teacher. She had been engaged in training as a primary teacher. She showed no signs of looking to be redeployed.

20 201. That does not of course preclude the respondents from offering redeployment to an employee such as the claimant. There was, however, no role immediately available. In any event the issues of absence and the illness of the claimant with the ramifications of alcohol abuse and all of the history and concerns raised in the OH report would be very much still present in any exploration of redeployment. As stated in the agreed facts, and reflected in  
25 paragraph 37 above, the conditions detailed by OH in their March report, including therefore supervised working, were considered by the respondents to be reasonable and necessary for Ms Fletcher to return to work on any basis.  
30 Supervision was therefore something which would have been involved in any redeployment undertaken.

202. I did not see the failure to look at redeployment in the circumstances of this case as meaning that dismissal lay outwith the band of reasonable responses of a reasonable employer.

5 203. It is not for the Tribunal to substitute its decision for that of the employer. In this case the illness by which Ms Fletcher is affected is a very difficult one with which to live. It is very disruptive to all aspects of life. I have every sympathy for Ms Fletcher as an individual trying to cope. As a matter of law, however, I cannot see that the decision to dismiss Ms Fletcher is one which lies outwith  
10 the band of reasonable responses of a reasonable employer.

### *Appeal*

204. I considered the appeal process and decision as part of my assessment of whether the decision lay outwith the band.

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205. The information before the appeals committee was full. The hearing of the appeal involved a very thorough process. The appeal meeting lasted some 2 hours. Every opportunity was given to Ms Fletcher and Mr Waplington to make their case in favour of the original decision being overturned.

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206. I was impressed by the evidence of Ms Simpson. She was able to explain what had been in the mind of the committee and why it was that the committee had not overturned the decision taken by Mr Docherty.

25 207. The appeal was a review rather than a rehearing. The committee had considered the information it had as to relapses on the part of Ms Fletcher. It was conscious of the support given by the respondents and of the role which Ms Fletcher had as a teacher, with responsibility for children. It had regard to the reasoning process of Mr Docherty which had weighed those elements and  
30 which had also had regard to the medical information and to the disruption caused by absence on the part of Ms Fletcher.

208. The committee had considered the information from and submission by MR Waplington for Ms Fletcher. He had underlined his view of the fitness to return to work of Ms Fletcher from January 2020 onwards.

5 209. The conclusion reached by the committee was that the decision of Mr Docherty was a reasonable one.

210. There was, in my judgment, nothing in the appeal hearing or decision making processes which gave me cause for concern that the decision to dismiss lay outwith the band of reasonable responses of a reasonable employer.

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**Breach of Contract claim.**

211. Ms Fletcher sought pay for the period 14 March 2020 to date of dismissal on 2 July 2020. Her position was that she was fit for work following upon the OH report of 12 March 2020, albeit that conditions were attached to her proposed return to work. As the respondents had not permitted her to return to work 15 they were obliged to make payment of her salary to her given that was fit, able and willing to return to work at that point, she said.

212. This area was not subject of submission by either party to any real extent.

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213. The view to which I came is that the respondents were not in breach of contract in refusing to permit Ms Fletcher to return to work in the period just mentioned. She may have been willing to return to work. The report from OH of 12 March 2020 did not however give what might be labelled a “green light” 25 to return to work. That document was at pages 256 and 257 of the file. It referred to it being acceptable for Ms Fletcher to attempt to return to work on the basis that conditions could be met. Whether the conditions could be met was a matter for the respondents. It was an agreed fact, as set out in paragraph 37 above, that the respondents considered these conditions 30 reasonable and necessary to enable Ms Fletcher to return to work on any basis.



214. I concluded that the respondents had a proper basis for their view that Ms Fletcher could not return to work, notwithstanding her own opinion that she was fit for work. The respondents bore in mind the need for supervision of Ms Fletcher and the impossibility of that at that point. They had regard to the possibility of concealment by Ms Fletcher of the degree of her alcohol use at that time. They kept in mind the work scenario of Ms Fletcher having responsibility for supervision of children undergoing physical activity. They had the OH report of March with the conditions involved if a return to work was to be possible. The position of Ms Fletcher as a teacher and the responsibility for safety of children who were to taught by her was something which gave them a proper basis for the position adopted by them, in my view. The medical information which Ms Fletcher relied upon had been overtaken by events and subsequent information before the respondents.

215. In my view there was no breach of contract on the part of the respondents in not making payment to Ms Fletcher of salary. Their decision that she could not return to work was a rational and appropriate one as her employer given the background medical and factual information which they had.

## **Conclusion**

216. For the reasons given this claim was unsuccessful on all elements brought before the Tribunal.

**Employment Judge**

**Judge R Gall**

**Date of judgment**

**30 August 2021**

**Date sent to parties**

**31 August 2021**

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