EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109080/2021

Final Hearing Held Remotely by Cloud Video Platform on 29 and 30 November, and 1, 2, 3, 6 and 7 December 2021

Employment Judge A Kemp
Tribunal Member J McCaig
Tribunal Member N Richardson

Mrs Gillian Ewart-Bannister	**Claimant** **Represented by** **Mr A Bannister** **Husband**
Aberdeenshire Council	**Respondent** **Represented by** **Ms K Stein** **Advocate** **Instructed by** **Ms K George** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that:

1. **The claimant was dismissed by the respondent under section 95(1)(c) of the Employment Rights Act 1996 ("the 1996 Act").**

2. **That dismissal was unfair under section 98(4) of the 1996 Act.**

3. **The respondent dismissed the claimant under section 39 of the Equality Act 2010 ("the 2010 Act").**

4. **That dismissal was in breach of sections 15 and 21 of the 2010 Act.**

5. **The Tribunal makes a declaration under section 124 of the Equality Act 2010 that the said dismissal was in breach of its terms.**

6. **The claimant is awarded the sum of FIFTEEN THOUSAND SEVEN HUNDRED AND SEVENTY FIVE POUNDS (£15,775) payable by the respondent.**

REASONS

Introduction

1. This Final Hearing was arranged to address claims of constructive unfair dismissal and disability discrimination under sections 15 and 20 of the Equality Act 2010. The claimant's status as a disabled person has been admitted by the respondent at an earlier stage prior to a Preliminary Hearing to address the issue, and the respondent further accepted that it had the actual or imputed knowledge of that from 17 June 2020.

2. There have been three earlier Preliminary Hearings, after which the claimant provided further specification of her claims under section 20.

3. The hearing was arranged to be held by Cloud Video Platform. It was however delayed in its start as there was a network outage caused by Storm Arwen in the area in which the claimant resides. She had had no power since the previous Friday evening, had no internet provision, and that was expected to continue for some days. The hearing was adjourned on 29 November 2021 to the following day to see what alternative could be arranged, the claimant's husband having attended the hearing by telephone after driving to near Aberdeen to secure a signal. On 30 November 2021 the claimant and her husband had arranged internet access at business premises near Aberdeen, and the hearing was able to take place accordingly. The claimant did not move an application to adjourn the Final Haring fully that solicitors acting on her behalf had sought in an email on 29 November 2021. The hearing therefore commenced on 30 November 2021. It was conducted successfully on that remote basis.

Preliminary Matters

4. The claimant sought a number of adjustments for the hearing, on the basis of a letter tendered from her General Practitioner. There was a discussion about them. Although one adjustment put forward for consideration was to have questions and answers in writing the Judge explained that that was not likely to be within the overriding objective save where there was sufficiently clear medical evidence to support it, which he did not consider the GP report provided. The claimant's husband did not suggest that such an arrangement was required, but proposed that it would be reasonable to proceed with firstly evidence in periods of thirty minutes with a break after each such period, with the length of that break discussed at the time, and secondly whenever the claimant wished to seek a break during her evidence the ability to make an application for that. The respondent confirmed that it was also content with such adjustments, and the Tribunal considered that doing so was in accordance with the overriding objective. Breaks were taken regularly on that basis by agreement of the parties.

5. The respondent had in an earlier email referred to seeking strike out of the claims but as the hearing was able to proceed Ms Stein confirmed that she did not move it at that stage.

6. Prior to the hearing of evidence the Judge explained to the claimant and her husband how the Final Hearing would be conducted. He explained about the reference to the written witness statement as evidence in chief, and that if a party wished to seek to supplement it that permission to do so could be sought. He explained that the witness would be cross-examined, and that doing so covered firstly evidence that was challenged as to its accuracy but also if it did not cover matters understood to be within the knowledge of that witness but not covered in the witness statement. He explained that the Tribunal could ask questions, and that re-examination permitted further questioning on matters raised only in cross examination or by the Tribunal's questions. The Judge explained that documents before the Tribunal should be referred to where relevant, including identifying the part of the document

considered to be relevant. He explained that after the evidence for the claimant was given, she being her only witness, the claimant's case would be closed and that the respondent's evidence would be given, and subject to the same process. Once the respondent's case was closed, it was only in exceptional circumstances that further evidence was permitted, and therefore this was the opportunity to give evidence whether oral or written. Following the closure of the respondent's case there would be an opportunity to make submissions on the law, the facts, and the application of the law to the facts, and the Tribunal would then consider matters and issue a written Judgment, which would be sent to parties and then added to the online Register of Judgments. Neither side had any further issues to raise at that stage.

The evidence

7. The parties had prepared documentation in the form of three lever arch files, most but not all of which was spoken to in evidence. Evidence in chief was given by way of written witness statements that the parties had exchanged. The claimant gave her evidence first. For the respondent evidence was given by; Ms Julie Rogers, Head Teacher at Tarland Primary School; Mrs Lilian Field, Head Teacher at Strathdon School; Mr Peter Wood, Quality Improvement Manager; Ms Marian Youngson, Quality Improvement Officer; and Mrs Nicola Shiels (nee Robertson) HR Adviser. The claimant introduced a late production being an envelope, which was received of consent on the basis that the witness to which it related, Ms Rogers, could provide a supplementary statement to address it. That was also permitted of consent, and a short supplementary statement dated 30 November 2021 was tendered and accepted. The respondent later submitted a supplementary inventory of productions which was received without objection.

8. In the evidence there was reference to various pupils at the School at which the claimant taught. They are children, some very young. They have been referred to in the Judgment where that has been necessary by a single letter. The parties had arranged to do so in their own documentation, although on occasion there was reference to someone

by name either in written documentation or oral evidence. The Tribunal considered that it was appropriate to grant an order that the names of children referred to in the case, or the names of their parents or carers, or their initials, from which the child may be identified, should not be disclosed and should be anonymised, in order to respect their privacy. Doing so is in accordance with the overriding objective and is made under the terms of Rule 50(3)(b). The law relating to such issues was summarised and considered in ***Fallows and others v News Group Newspapers Ltd 2016 ICR 801*** and ***A v Secretary of State for Justice [2019] IRLR 108***.

The Issues

9. At the commencement of the hearing the Tribunal proposed the following as the issues in the case:

(i) Did the respondent dismiss the claimant in terms of section 95(1)(c) of the Employment Rights Act 1996 ("the 1996 Act") and in that regard has the respondent, without reasonable and proper cause, conducted itself in a manner calculated or likely seriously to damage or to destroy the relationship of trust and confidence between the respondent and claimant?

(ii) If so, what was the reason or principal reason for the dismissal?

(iii) If that reason was potentially a fair one under section 98 of the 1996 Act was it fair or unfair under section 98(4) of that Act?

(iv) Was the dismissal of the claimant something arising in consequence of the claimant's disability under section 15(1)(a) of the Equality Act 2010 ("the 2010 Act")?

(v) If so has the respondent shown that the dismissal was a proportionate means of achieving a legitimate aim under section 15(1)(b) of the 2010 Act?

(vi) Did the respondent apply any of the provisions, criteria or practices on which the claimant founds to her?

(vii) If so, did doing so put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

(viii) If so, did the respondent take such steps as it was reasonable for them to have taken to avoid that disadvantage under section 20 of the 2010 Act and if not is the respondent in breach of duty under section 21?

(ix) In the event that any claim succeeds to what remedy is the claimant entitled having regard to (i) losses sustained, (ii) mitigation, (iii) contribution, (iv) whether there could have been a fair dismissal from a different process, and (v) any failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

10. The parties approved that draft after having an opportunity to consider it.

The facts

11. The claimant is Mrs Gillian Ewart-Bannister.

12. The respondent is Aberdeenshire Council.

13. The respondent is responsible for the provision of primary school education for pupils in Aberdeenshire.

14. The respondent employed the claimant as a Primary School Teacher. Her employment commenced on 24 March 2014. She worked as a supply teacher initially. She worked at various schools. On 23 April 2016 she was appointed as a Temporary Cover Supply teacher at Strathdon School. On 5 January 2017 she was appointed as Principal Teacher at Strathdon School initially acting up, and on a permanent basis from 9 July 2018. The respondent issued a Job Profile for the role of Principal Teacher.

15. The claimant has over 25 years' teaching experience, initially in England.

16. The claimant's contract of employment with the respondent set out the terms of her employment. It stated as "Place of Work: Strathdon Primary School or at such other place of employment in the service of Aberdeenshire Council as decided by the Council and subject to operational and service needs, and in accordance with the compulsory transfer policy." It included provisions as to sickness absence such that after five years of continuous service the claimant was entitled to six months on full pay and six months on half pay in any period of 12 months. It referred to a "wide range of Employee Policies" which could be accessed online.

17. The Policies developed by the respondent included the following: Attendance Management for Teachers and Associated Professionals, which was revised in 2014 ("the 2014 Policy") but superseded on 1 September 2019 by an Attendance Management Procedure effective from that date ("the 2019 Policy"); Disciplinary Procedures for Teachers and Associated Professionals; a Procedure for Handling Allegations against Teaching Staff; a Disciplinary Policy; a Flowchart for the Disciplinary Process; a Stress and Wellbeing Policy; Guidance on Stress and Wellbeing; and a Policy on Violence at Work. It provides counselling and support services for its staff.

18. The 2019 Policy has the following terms material to the present claim:

> "Aberdeenshire Council values all its employees and is committed to providing support and assistance to them in the management of ill health or incapacity….
>
> Long term absences are….characterised by a continuous period of absence from work for at least 4 weeks…When long term absences …occur, capability may be considered regardless of whether sick pay has been exhausted or not…
>
> Reasonable adjustments …..Factors such as the cost and practicability of making the adjustments and the resources available should be taken into account when deciding what is reasonable…"

Reference was made by way of hyperlink to a Disability Leave Scheme.

> "Capability – Each case should be considered on an individual basis taking into consideration the frequency of absences, length of the current absence, nature of absence, the likelihood of recovery, or the potential to work consistently. Dismissal on the grounds of capability could be based on
>
> - Inability to sustain satisfactory attendance levels
> - Prognosis is long term
> - Where there is no foreseeable return to work
> - Where Occupational Health state your employee is not fit to work
> - No further reasonable adjustments available
>
> The following should be considered prior to a Capability Hearing being arranged where appropriate
>
> - Frequency and duration of absences
> - Any reasonable adjustments considered
> - Up-to-date medical information
> - Impact on service
> - Periods of Special Leave taken".

Reference was made under the heading Capability Hearing to a link to a Capability Hearing Guide. There was a section for redeployment in respect of which there was a link to a Redeployment Procedure.

19. The Disability Leave Scheme gave the respondent a discretion to grant leave to those who were disabled persons, which could be up to 10 days paid leave in any year, or other arrangements. It did not apply to an employee in receipt of occupational sick pay.

20. Strathdon Primary School ("the School") is a small rural school. It has two composite classes, one for Primaries 1 - 3 and another for Primaries 4 - 7 but when class sizes required it the classes were reconfigured to Primaries 1 - 4 and 5 – 7, which was the position in 2019 - 2020. The roll

in the whole school varied but was generally around 25 - 30. It is part of the respondent's group of schools known as the Alford cluster.

21. The School has its own policies including on Anti-Bullying, Behaviour and Discipline, and Positive Behaviour and Discipline.

22. As a Principal Teacher the claimant primarily acted as the class teacher for her class, but also had on one day per fortnight more of a managerial role, in which she was the effective deputy for the Head Teacher. The claimant had a wide range of duties and responsibilities.

23. The claimant generally taught the earlier years composite class. Another teacher, Ms Fowlie, generally taught the later years composite class. The claimant also taught the other composite class from time to time, or had other contact with pupils in that class. The Head Teacher Mrs Lilian Field did not generally carry out teaching but did do so from time to time, such as to cover absences.

24. Mrs Field also performed the Head Teacher role at Crathie Primary School. The schools are approximately 17 miles apart. A timetable was published at each school fortnightly to state where Mrs Field would be. Mrs Field also had responsibilities to UNICEF and as a GTCS Committee Member.

25. Other staff members in Strathdon Primary School in addition to the claimant, Ms Fowlie and Mrs Field were: three part time pupil support assistants, a part time Administrator, a part time school cook, a part time cleaner, and a part time Janitor. During the period August – November 2019 there was no Office Administrator which added to the burdens on other staff.

26. Some of the pupils at the School had special educational needs. They varied from child to child. The pupils identified as H, J, L, M, Q, R, S, T, U, V, W, X and Y were taught directly by the claimant during the period 2018 - 2020.

27. Within the School during the period 2018 – 2020 there were seven children in the School with a variety of recorded additional support

needs, four of whom also had emotional and behavioural issues, with three requiring behavioural risk assessments, (pupils J, I and H) one who had a co-ordinated support plan (pupil J) and two with individualised education plans (pupils H and S). Pupils J, S and H were taught by the claimant, amongst others.

28. Behaviour risk assessments are documents created to minimise any risk factors for individual children and those around them in the school community by putting in place agreed strategies and supports. These are put in place following consultations with the educational psychologist, parents and the children themselves. An Individualised Education Plan (IEP) uses the Getting it Right for Every Child (GIRFEC) approach to set targets for pupils' learning and to provide support for any barriers to learning they may face.

29. In all Schools there are children who require support due to a variety of barriers to learning. There is an expectation that teachers will have, or be willing to acquire, a varied skillset to enable them to provide universal support to address a wide range of needs and to further their professional expertise. This is part of the requirements of being on the General Teaching Council for Scotland ("GTCS") Register of Teachers. Within all classes in schools across Scotland there will be children with a mixture of academic abilities, language disorders, physical disabilities, social and emotional difficulties and other potential barriers to their learning. It is part of the role of teachers to provide a wide range of universal support which can be enhanced through partnerships with a range of partners such as speech and language therapists, social workers, pupil support workers, and educational psychologists.

30. Mrs Field generally held weekly staff briefings for 15 minutes at 9:00-9:15am before class started. If she was not available then the claimant as the Principal Teacher would lead them on her behalf. The meeting discussed a range of agenda items, including pupil behaviour and support. In addition to these meetings impromptu discussions were held between the Head Teacher, class teachers and pupil support assistants usually at the end of the day to address issues if they arose. The weekly

staff briefings and informal discussions were further supported by regular visits from an additional support needs teacher and an intervention and prevention teacher. The aim of all of these different types of meetings is to share experience, and to provide information and support to all staff. Other specialists, including an Educational Psychologist and the Children's Rights Officer for the North East of Scotland, attended a series of meetings with parents and staff to support understanding of the restorative approaches used within Strathdon School to support pupil behaviour.

31. For pupils who had regular issues that required to be recorded Mrs Field prepared individual record books, which she instructed the claimant and the other teacher Ms Fowlie to complete with the date of an event, what happened, and a signature. Records were also maintained in respect of any first aid given.

32. The claimant considered that her levels of stress were increasing during 2018, that her workload was increasing, and that issues such as changes in staff and behaviour by some pupils added to her stress.

33. The School had had four probationary teachers for each of the last four sessions as at the session after the summer holidays in 2018. The claimant's role included assisting the probationary teacher.

34. Pupil J started in the claimant's class, in Primary 1, in August 2018 and was a 'looked after child' which means that the local authority took on some legal responsibility for the care and wellbeing of the child. Pupil J had moved to Strathdon from a city in England, with a Carer. The pupil remained under the supervision of Social Services in England with three older siblings. Pupil J was born dependent on heroin and ingested cocaine when very young. In the first year at the School the pupil was often cared for and looked after by older siblings until they were all taken into care. Pupil J had attachment difficulties but had built up a strong relationship with the Carer. Pupil J found it challenging to build positive relationships with others, including the class teacher, the claimant. Pupil J also found it very difficult to self-regulate behaviour, often displaying

aggressive tendencies. As Pupil J had not attended the local Nursery class during the pre-school year, the respondent allowed a few weeks in class for pupil J to try to settle and for an initial assessment to be made by the claimant as class teacher. This was completed and an informal referral to Educational Psychology, which is the first step in the referral process, was made in October 2018. The Educational Psychologist met with the claimant and Mrs Field to discuss strategies to support the child.

35. Following this meeting an email was sent to Mrs Field by the Educational Psychologist on 30 October 2018. It contained 14 attachments with information on a range of games and strategies to use to support children in both the claimant's class and the upper stages class. One of the strategies was to create 'a circle of friends' which is an approach to help socially isolated children develop relationships. Mrs Field forwarded the email with attachments on 1 November 2018 to both Strathdon class teachers, one being the claimant. A formal referral for pupil J was made to the Educational Psychologist on 19 October 2018 with a meeting arranged in school on 27 November 2018. A referral was also made to the Intervention and Prevention Teacher (IPT) on 4 December 2018. The newly appointed IPT was timetabled to support pupil J on a weekly basis from January 2019. Regular review meetings were held in school throughout the session, March, April, June and September 2019. At each of these meetings and many times in between, strategies for managing the challenging behaviours of pupil J were discussed and expected to be implemented by the claimant and the other members of the school staff. A comprehensive list of recommended strategies was appended to the educational psychologist's report which was provided to the claimant on 14 January 2019.

36. Some of the early episodes of behaviour displayed by pupil J in the classroom which she considered to be aggressive meant that, for the safety of the other children and herself, the claimant decided to evacuate the children from the room on a number of occasions. On many occasions throughout the pupil J's Primary 1 and Primary 2 years, Mrs Field was called to the classroom by the claimant to support Pupil J or she sent Pupil J directly to Mrs Field to continue his school work in her

office. On some occasions, Pupil J was also looked after in the upper stages class by their teacher Miss Fowlie. At times, Pupil J left the claimant's classroom without her permission and went to other areas within the school. At other times he was aggressive towards other pupils or teachers. The claimant became concerned that Pupil J may cause injury to one of the other pupils or staff. She became increasingly anxious as to his behaviour, and was concerned that strategies to manage it were not successful. She recorded regularly incidents involving Pupil J in the record book for him, which was not before the Tribunal.

37. On 9 November 2018 two children, pupils B and C, started at the School. They resided with their mother and her partner.

38. Between November 2018 and 24 January 2019, Mrs Field recorded 19 significant events involving accusations made by the mother of those children B and C ("the mother"), and noted the results of the school's investigations in the children's chronologies and the school's incident book. At the same time, the mother had started to contact some parents out of school and make accusations against their children.

39. On 11 January 2019 the mother made a formal complaint against the school via the Council's formal complaints procedure. This was investigated by a senior member of Aberdeenshire Council through the Council's internal complaints procedure and the school was found to be not responsible for the accusations made. A response to the complaint was sent to the parent on 17 January 2019 by the Council's Feedback Team.

40. On 16 January 2019 Pupil J bit the claimant on her finger. Mrs Field spoke to the Pupil and returned him to her classroom ensuring that the Pupil made an apology to the claimant. Mrs Field advised the claimant to contact her GP which she did. It was noted that the skin had not been broken. She was reassured that the risk of infection was low, and the issue was to be reviewed.

41. On 23 January 2019 the mother sent an email to Mrs Field complaining of bullying of her children pupils B and C. That day was a Sunday and Mrs Field did not reply to it then.

42. On 24 January 2019 the mother entered through the pupil's entrance, not the main door entrance, at the School with her children in the morning. Mrs Field was at Crathie School that day due to a Fire Safety inspection. The claimant was present as Principal Teacher and was the most senior member of staff in the building. The mother insisted that she see Mrs Field in connection with an incident involving Pupil B that she reported had happened the day before. The claimant and the upper stages class teacher Ms Fowlie were in the corridor at the time and let the parent know that Mrs Field would be at Strathdon School that afternoon. The mother then became very aggressive in her tone and started to shout at the claimant, the upper stages class teacher and some of the children, using abusive and offensive language. The mother refused to leave when requested to do so by the claimant. The Administrator telephoned Mrs Field when she noticed that, who called the police and asked them to attend Strathdon School as soon as possible. She then went to the School herself. By the time she arrived the mother had left.

43. When the Police arrived later Mrs Field explained what had happened and the Police interviewed the claimant and the other staff who were present at the time of the incident and took statements. The claimant was substantially distressed by the events that day. The mother was given a fixed penalty notice by the police but she refused to accept the same. The mother was as a result charged with a Breach of the Peace.

44. The Police contacted Mrs Field on 25 January 2019 to inform her that after being charged, the mother made an allegation against the claimant alleging that the claimant had pulled one of the children down the corridor that morning to get the child into class against her will. She was advised that this allegation was to be investigated and was asked to inform the claimant of this. She informed the claimant of the accusation on 25 January 2019 and the claimant was subsequently interviewed by

police officers later that day. On the same day the mother made the same complaint against the claimant to Councillor Gibb of the respondent, which the claimant was not informed about at the time. Mr Eric Clark the Principal Teacher at Crathie School attended Strathdon School that day towards the end of the school day and said that Mrs Field had instructed that all staff and pupils leave together at the end of the school day, He also said that he was sent to check on the claimant's wellbeing. The claimant was also substantially distressed by the events that day and had several conversations with Mrs Field over the course of the weekend of 26 and 27 January 2019.

45. On 27 January 2019, a police officer called Mrs Field and informed her that the mother had withdrawn the complaint against the claimant and that they would be pursuing the charge of Breach of the Peace against the mother. The police officer also said that the members of staff who had witnessed the incident would be cited as witnesses when the case was in Court. She immediately telephoned the claimant to let her know that. The claimant did not receive formal notification of the position directly from the police.

46. Vincent Docherty of the respondent wrote a letter to the mother on 25 January 2019 to alert her to the fact that her behaviour at school that day was unacceptable. Mrs Field reviewed the incident and made sure that the entrance doors at school were locked from that point onwards and that any unexpected visitors would have no option but to access the school via the main office block which has security doors. All staff were informed of this change verbally at a staff meeting.

47. The mother raised a complaint to the next stage of the Council's internal complaints process in mid-January 2019 as she had been unhappy with the previous Council response issued to her via the Council's Feedback Team. A further response was then issued from them but as she still remained unhappy, she then referred it to the Scottish Public Services Ombudsman (SPSO). The SPSO Decision Notice was issued in November 2019. The outcome of the investigation was that the respondent had failed to take action in response to reports of bullying.

The respondent put in place a new electronic incident reporting system to be used by staff across the local authority to report allegations of bullying in July 2019. A second complaint that the respondent's communication with the mother during the complaints process was unreasonable was not upheld.

48. Mrs Field had considered prior to the incident with the mother that it was important to have staff trained in CALM measures. CALM training is not a mandatory course that the respondent provides to teaching staff, but rather staff can either request to attend; or if circumstances warrant it such as it being identified as an aid to staff via a Behaviour Risk Assessment, or a Head Teacher can recommend staff enrol on the course. It is an external course delivered by providers and is undertaken in two parts. The first part focusses on the theory of managing behaviour, gives practitioners a deeper understanding of the reasons for children presenting with challenging behaviours and provides support for developing positive strategies to de-escalate behaviours. This should lead to a positive impact on the person being supported, lowering their anxieties and making a positive impact on their behaviour. The second part of the course provides more practical training to staff on how to safely support a child physically when they need to de-escalate their pupil's behaviour.

49. Mrs Field contacted Marian Youngson to request places for the claimant and a PSA to attend part one of a CALM course in Aberdeenshire which was scheduled to take place in February 2019. Mrs Youngson emailed the claimant on 24 January 2019 to say that she was addressing the claimant's CALM training. She referred to training days on 12 and 13 February 2019. On 28 January 2019 the claimant confirmed that she wished to undertake training on those days by email to Ms Youngson.

50. Ms Youngson made an error in not updating records for that course on a system called ALDO. She sought to remedy that by email on 4 February 2019 to the person responsible for it but that did not succeed, and she informed the claimant of her error, and apologised for it, on 6 February 2019. She said that she would look at other options for the claimant, to

which the claimant replied the same day to state that she would discuss it with Mrs Field. Mrs Field responded that day to state that a bespoke course at the School would be really helpful for staff as soon as possible.

51. On 11 February 2019 the claimant consulted her GP about the increasing stress and anxiety she felt as a result of the incident with the mother and the allegation against her. Her GP recommended that she speak to her head teacher. The claimant emailed Mrs Field on 12 February 2019 and said that she wanted to discuss the recommendations made by her GP. The claimant emailed her again on 13 February 2019 to thank her for the support given earlier that day and also to comment on the wider discussions held with school staff on Restorative Practices.

52. The claimant self-certified a period of absence on 14 February 201 for a period of seven days. On 21 February 2019 her GP issued a fit note stating that she was unfit for work due to stress at work.

53. Mrs Field kept in touch with her to check how she was and keep her updated as to how her class were getting on. Mrs Field taught her class during that period. Mrs Field was diagnosed on 26 February 2019 with a severe chest infection. She considered that the School desperately needed the stability of a full-time class teacher in both classes to enable her to give the level of support required for both of the Schools she had responsibility for.

54. A CALM training session did take place at the School in March 2019 but the claimant did not attend as she was off work at the time. Staff could register for training under CALM on the ALDO system. Dates for the theory training were available on 14 and 15 May 2019. The claimant did not register for those dates as Mrs Field expressed concern as to securing supply teacher cover for those dates.

55. The claimant returned to work on the day before the start of the School Easter holidays. After those holidays she returned on a phased basis, as recommended by her GP.

56. The claimant emailed Mrs Field on 12 March 219 advising that she had been given a fit note by her GP from 7 March until 25 March and that her Doctor had said it would be helpful if she could meet with the claimant prior to her return to school. She arranged to meet the claimant on 22 March 2019 at a café in Ballater to discuss her return to school, and talk about the stress questionnaire she had been given, and the claimant's phased return to work. At that meeting they agreed that the claimant would begin a phased return after the Easter holidays in April 2019. The claimant did not wish to reduce her hours although that was also discussed as a possibility.

57. The claimant sent a partly completed questionnaire to HR on her return to work in April 2019. The claimant did not complete the first two or last pages of it, but provided a lengthy narrative setting out her concerns in relation to the management of certain pupils. It was not then signed either by the claimant or Mrs Field.

58. On 24 May 2019 the claimant, together with the two other staff members, were given citations to appear as witnesses at Court in connection with the Breach of the Peace charge against the mother, initially by text then post. A court visit was arranged for familiarisation.

59. A few days after the Court visit, the claimant and the other staff members received notification that the Court case was being postponed until January 2020.

60. Prior to schools returning after the summer holidays in August 2019 new dates for CALM theory training were uploaded to ALDO, being for 26 and 27 August, 7 and 8 October and 18 and 19 November 2019. The claimant did not enrol for them.

61. In August 2019, a new entrant Primary 1 pupil started in the claimant's class, Pupil H. Pupil H was extremely active and displayed some challenging behaviours. The pupil also had language difficulties. Mrs Field suspected that Pupil H was on the autistic spectrum and possibly had attention deficit hyperactivity disorder. The claimant and Mrs Field identified that pupil H required a behaviour risk assessment to

try to address potential dangers to her safety and the safety of others. Mrs Field and the claimant completed a risk assessment for pupil H with input from pupil H's parents and the additional support needs teacher who visited once every week.

62. Pupil H could, at times, be aggressive towards other children and members of staff. The claimant had the support of a Pupil Support Assistant to watch Pupil H to try to pre-empt aggressive behaviours, flight from the classroom or unsafe play. Pupil H was discussed by Mrs Field with the Educational Psychologist on 17 September 2019 and they generated a report. The report gave advice to school staff about the most effective ways of managing behaviours pupil H was presenting with. Mrs Field shared the report with the claimant. Methods recommended within by the Educational Psychologist included identifying a 'safe space' that Pupil H could retreat to if the pupil felt things were becoming overwhelming. It also recommended that the claimant should prepare a 'now/next' visual timetable of Pupil H's activities which would include a choose time where Pupil H could access a range of special items that she was very keen to play with. Strategies were also provided to adopt if Pupil H should leave the classroom area whilst the claimant was teaching and no pupil support assistant was available.

63. On 20 September 2019 Ms Youngson sent a message to Mrs Field about staff attending training as she had noted that the claimant had not registered for the CALM training.

64. The claimant contacted Pupil H's parent on 23 September 2019 to advise them of the report. Mrs Field met with Pupil H's parent the following week following a request from the parent. She discussed the report and suggested to the parent that it would be helpful for her to contact her GP to ask for Pupil H to be formally assessed at Aberdeen Children's Hospital for Attention Deficit Hyperactivity Disorder/Autism. Pupil H was formally referred to the Educational Psychology Service on 30 October 2019. In April 2021 following a formal assessment, Dr Taylor at Aberdeen Children's Hospital confirmed a diagnosis of ADHD and

Autistic Spectrum Disorder for pupil H. Pupil H was prescribed medication by Dr Taylor.

65. Over time it became apparent to Mrs Field that the claimant was finding it difficult to cope with both pupils J and H in her classroom. Mrs Field was concerned about the number of times that pupil J and pupil H were sent to her or taken out of the classroom. She therefore arranged for the Pupil Support Assistant (PSA) to be in the claimant's class every day to provide additional support for her class. The PSA was to focus on assisting pupils J and H to engage with their learning activities. At times, the PSA would be advised by the claimant to do this out with the classroom in the general purposes room at the other end of the school. There were also pupils, with identified additional support needs in the upper stages class, but the teacher in that class, although recently qualified, was able to cope with their needs the majority of the time.

66. Mrs Field and Ms Youngson discussed the claimant at a meeting on 30 September 2019 when Ms Youngson suggested that the claimant's style of teaching was traditional and that it may assist if Ms Youngson observe classes on her next visit. Mrs Field stated that she thought that the impending court case was affecting the claimant rather than that she was underperforming as a teacher.

67. On 3 October 2019 the claimant consulted her GP in relation to her level of stress, which she felt was being increased by managing pupils H and J. The GP noted that the claimant had felt "terribly vulnerable", that vulnerability was still there but more manageable. The claimant was not signed off as unfit for work.

68. On 13 November 2019 Ms Youngson visited the School but did not speak to staff as her time was limited.

69. On 18 and 19 November 2019 the claimant, the other class teacher and a PSA attended part 1 of the CALM training.

70. On 5 December 2019 there was a practice session held in the General Purposes room of the School, to practice the end of term Christmas play.

The class teachers for both classes were involved, and around 30 pupils were taking part in the practice. The claimant was responsible for leading it. Pupil H was not involved in the practice until towards the end. Pupil H was not where she was intended to be. An incident with Pupil H then occurred, which led to allegations against the claimant.

71. The claimant was alleged to have taken hold of Pupil H by one of her arms and dragged her across the floor to where she should have been. Doing so was alleged to have led to bruising on the Pupil's hip area, and scuffing of her shoes. Pupil H was alleged to have been upset by this and crying which was said to have been heard and seen by some of the other children. Ms Fowlie sent an email that evening to Mrs Field briefly to describe the incident and give her a "heads up" that complaints from the parents of Pupil H or other pupils who allegedly had seen the incident may be received.

72. On 6 December 2019 the upper stages class had been invited to attend an event at The International School in Aberdeen connected to a project they had been involved in. Ms Fowlie and Mrs Field were scheduled to accompany them. Following the claimant and Ms Fowlie's attendance at CALM training, Mrs Field had come across a policy produced by Highland Council which was related to behaviour management. At around 3:00pm, after the school day, she met briefly with them both to give them that. During the meeting, the claimant said that she was travelling to Edinburgh straight after the meeting to see her elder daughter who was anxious about her forthcoming university exams. Mrs Field decided that she would not question the claimant about the alleged incident then, although that had been her initial intention, as she did not want to compromise her safety and wellbeing whilst driving long distance given the likelihood of her becoming very upset.

73. On 6 December 2019 Ms Youngson emailed Tara Kennedy to request further CALM training for the claimant and Ms Fowlie in January 2020.

74. On 7 December 2019 Mrs Field received an email from Pupil H's mother advising that she had been made aware of an incident that had occurred

at school between the claimant and her child and stating that she was deeply concerned about it. Mrs Field responded to arrange a meeting with the parent on 9 December 2019 to discuss it. She also emailed her line manager Marian Youngson to inform her of the incident, provided her with a summary of the events and seek her advice as to how to proceed.

75. On the claimant's arrival at school on 9 December 2019 Mrs Field asked her what had happened at the concert practice. The claimant denied dragging Pupil H and said she took the child by the hand and the child had dropped to the floor. The claimant said she had felt that Pupil H was in danger of hurting herself or other children by climbing on the portable screens in the room. The claimant also said that she was fed up trying to cope with it as she didn't feel there was enough support from outwith the school to help her manage the children. Mrs Field told her that there had been a formal complaint from pupil H's parent. The claimant was very upset to hear this. She was very distressed. Mrs Field suggested that she go home and rest and that she, Mrs Field, would teach her class. She suggested that the claimant remain at school until fit to drive. The claimant remained at school for a period to compose herself and then left.

76. Mrs Field reported matters to Ms Youngson that morning. Ms Youngson emailed her managers Mr Wood and Mr Docherty at 13.26 asking whether to investigate the allegations formally and to suspend the claimant. Mr Docherty replied at 13.31 that day to state "Yes… Definitely." Ms Youngson passed that email on to Ms Wallace the HR Advisor.

77. When the claimant arrived at her home later that morning she telephoned her GP surgery, and an appointment was made for 12 December 2019 being the first available date.

78. During that day Mrs Field met with the mother of Pupil H during which she explained that Pupil H and her sibling (Pupil M) told her that during the Christmas play practice her child had been physically assaulted by

the claimant. She mentioned that some other children who had witnessed the alleged incident had told their parents and they had also informed her. Mrs Field said that the incident had been reported to her line manager Marion Youngson and that an investigation would be made into the allegation.

79. After school on 9 December 2019 Mrs Field spoke separately to Ms Fowlie and Ms Humphries, the PSA who said that she had been present at the time of the incident. She asked them both to give their accounts of the events leading up to, during and after the incident. They each separately alleged that the claimant dragged Pupil H across the floor by her arm. She spoke again with Marian Youngson, who said that she would contact Vincent Docherty, Head of Service, to discuss the potential for the claimant to be suspended under the Council's Disciplinary Policy.

80. The claimant emailed Mrs Field on 9 December 2019 at 6.26pm to inform her that she was to see her GP and that she was self-certifying her absence for a week. At that stage the claimant was substantially distressed by what had happened, particularly the allegation made against her. She was anxious, withdrawn, and had suicidal ideation.

81. On 10 December 2019 Mr Docherty decided that the claimant should be suspended pending an investigation. Ms Youngson told Mrs Field who phoned the claimant to let her know. The claimant was upset at hearing that. The decision to suspend was confirmed by letter from Mr Docherty dated

82. Ms Youngson was informed of the decision to suspend the claimant and commence an investigation. On 10 December 2019 she emailed Ms Julie Rogers, the Head Teacher at Tarland Primary School, to ask if she could act as the investigating officer, to which Ms Rogers agreed by email that day. Ms Rogers checked the terms of the respondent's Disciplinary Policy. Ms Rogers spoke to Ms Doreen Wallace HR Advisor of the respondent who informed her of the nature of the allegation against the claimant, which was that she had dragged a Primary 1 pupil

across the floor of the school by the arm on 5 December 2019, and that it had been witnessed by Ms Fowlie the Upper Stages teacher, Ms Joanne Humphries the Pupil Support Assistant, and three pupils, who were identified.

83. On 12 December 2019 the claimant met her GP. The GP made a diagnosis of stress at work, and provided a fit note for absence for two weeks from that date.

84. Ms Rogers wrote to the claimant by letter dated 12 December 2019 to confirm that she had been appointed investigator, setting out the allegation being investigated as "Your alleged involvement in an incident on Thursday 5 December 2019 involving [Pupil H]". It stated that there would be a meeting with her as part of the investigation. It referred to the respondent's Employee Assistance Programme. The claimant did not respond to that letter. Ms Rogers contacted the witnesses she had been informed about by the respondent on 13 December 2019 to arrange to meet them.

85. The claimant emailed Mrs Field on 13 December 2019 to inform her that she had been to the GP and was signed off work until 28 December 2019. She had self-certified for the five days prior to the start of the Fit Note on the 19 December 2019, as well as being suspended from duties at school since 10 December 2019. Arrangements were made between them to ensure that correspondence about the claimant was kept in confidence.

86. On 19 December 2019 the claimant met her GP again. The GP noted that she was "really quite shocked by how distressed Gillian appears". Citalopram, an anti-depressant, was prescribed, and diazepam. The claimant was informed that she was depressed. A fit note was issued for the period to 9 January 2020.

87. On 19 December 2019 Ms Rogers met Pupil H and her mother. Ms Rogers was accompanied by Ms Kareen Webster as a note-taker. Pupil H described the incident to Ms Rogers, assisted by her mother on occasion. On 20 December 2019 Ms Rogers interviewed Pupil [CD] on a

similar basis, and then Pupil [RM]. Pupil RM was not accompanied by its mother.

88. Ms Rogers thereafter met Ms Fowlie, and took a statement from her, and finally Ms Humphries.

89. All the statements taken were sent to the witnesses for checking and if necessary amended, and were returned signed and amended by each of them.

90. On 19 December 2019 Ms Rogers wrote a letter to the claimant requiring her to attend an investigation meeting on 7 January 2020. To avoid that letter being received prior to Christmas Ms Rogers delayed sending it, and did so on 30 December 2019. The claimant saw that letter on return to her home after being away over the Christmas period on 3 January 2020.

91. On 6 January 2020 the claimant wrote to Ms Rogers stating that she would not attend the meeting due to illness, and referred to her fit note. The claimant visited her GP that day, who noted that the claimant "certainly sounds very anxious and despairing." The claimant also submitted a Fit Note from her GP dated 6 January 2020 which stated she would be off work until 3 February 2020 due to work related stress. Ms Rogers took advice from Ms Wallace on receipt of the email to her.

92. On 9 January 2020 the respondent wrote to the claimant to state that her suspension had ceased on 12 December 2019 as the claimant had submitted a fit note from that date, and she was accordingly on sick leave from 12 December 2019. It stated that the other aspects of the conditions from the suspension in relation to not attending work or contacting members of staff save through Mrs Field remained in effect.

93. Ms Rogers wrote to the claimant on 17 January 2020 with a list of questions she wished to ask and inviting her to submit written responses. She explained that on receipt of the same she would send a report to Mr Docherty, Head of Education.

94. On 20 January 2020 the claimant emailed Ms Rogers to state that she was still signed off work, and that she found processing information difficult such that she did not feel well enough to answer the questions until she had recovered. On 21 January 2020 Ms Rogers replied and stated that she looked forward to hearing from the claimant. Ms Rogers conferred with Ms Wallace, who later informed her that the claimant had submitted a fit note stating that she was unfit for work for the period to 12 March 2020, and that a referral to Occupational Health would be made.

95. Mrs Field covered the claimant's teaching due to difficulties finding supply teachers. That affected the ability of Mrs Field to manage two schools, and she was also concerned about the continuity of education for the children in the claimant's class.

96. Mrs Field and the claimant had a phone conversation in early January 2020 in which the claimant asked that in future, prior to trying to phone her, that Mrs Field should email her so that she could decide whether she was able to speak or not. The claimant sent Mrs Field a Fit Note dated 30 January 2020 by email which advised that she would be off until 12 March 2020 due to work related stress. The GP noted on 30 January 2020 that the claimant was slowly feeling better and was less actively suicidal.

97. As the claimant had been off work for two months Mrs Field sought advice from HR and was referred to Nicola Robertson, HR Advisor. Mrs Field was concerned at the constant changes of teacher which meant that some of the boundaries regarding behaviour management were unsustainable. Ms Robertson recommended that I make a referral to the Occupational Health (OH) Provider Iqarus. Doing so was to establish if the claimant was fit to participate in the disciplinary process and also to find out when the claimant might be fit to return to work. Mrs Field emailed the claimant on 3 February 2020 to let her know and then submitted that referral on 4 February 2020.

98. On 13 February 2020 the claimant consulted her GP who prescribed an increased dosage of citalopram. The GP made a referral for psychological therapies, which included Cognitive Behaviour Treatment.

99. The claimant attended a consultation with an OH Nurse via a telephone on 20 February 2020. Mrs Field received a copy of the report on 24 February 2020. The OH nurse suggested that the claimant would be unlikely to be fit enough to return to work in the near future. The claimant did not see that report at that time

100. The claimant attended her GP on 5 March 2020 who noted that she was beginning to feel a little better on the increased dosage of citalopram, but that she was likely to be off work for several months.

101. On 16 March 2020 Ms Wallace informed Ms Rogers that the claimant was not able to participate in the investigation at that stage. Ms Wallace was then to commence a career break, and was to be replaced to support Ms Rogers by Nicola Robertson, HR Advisor. The claimant did not return to work, and did not meet Ms Rogers or respond to the written questions. Ms Rogers did not complete her investigation report accordingly.

102. On 16 March 2020 Mrs Field emailed Nicola McDonald, QIO, who had taken over from Marian Youngson, at the end of January 2020 as her line manager to convey the ongoing impact the continuity of supply cover was having on the school as well as her concerns for the claimant's health. She asked whether the disciplinary process could be amended. She received an acknowledgement but no substantive reply to that suggestion.

103. All school buildings closed on 23 March 2020 as a result of the Covid-19 pandemic and there was only one school that opened in the Alford cluster for children of key workers to attend. The School provided some remote learning.

104. On 25 April 2020 the claimant's pay was reduced to half pay, and for a period of two months thereafter she also received Statutory Sick Pay.

105. The claimant sent another fit note on 4 May 2020 which signed her off work until 1 July 2020. After emailing beforehand Mrs Field called her on 22 May 2020 to ask how she was and update her on events at the school. Mrs Field asked whether she wanted her to make another referral to OH. She said that she didn't feel up to it and preferred to wait until she returned to her own Doctor at the end of her current fit note. She mentioned that she didn't have a copy of her last OH report and Mrs Field forwarded her a copy by email that day.

106. Mrs Field emailed Nicola Robertson on 22 May 2020 to seek further guidance on how best to proceed, and on 26 May 2020 she replied to advise that she had two options which were either proceed with fixing a Capability meeting under the Council's Attendance Management Policy or give the claimant a further five weeks to allow her to speak to her GP. Mrs Field considered the continued impact on the lack of continuity on the children's education being taught by her and several supply teachers over a lengthy period of time that it was appropriate to proceed with inviting her to a capability meeting.

107. On 2 June 2020 the claimant consulted her GP. The claimant had by then received the OH report prepared in February 2020.

108. Mrs Field telephoned the claimant to inform her of her decision to arrange a Capability hearing and confirmed that in writing with an invitation to a meeting sent on 4 June 2020. The meeting was fixed for 16 June 2020 and was to be held virtually due to the ongoing pandemic.

109. Mrs Field also emailed the staff resourcing Officer of the respondent, Margaret McKay, to find out if they could offer a solution to cover the claimant's class on 29 May 2020.

110. On 12 June 2020 the claimant sent an email to Mrs Field with a letter from her doctor attached which stated that the claimant was not well enough to participate in the capability meeting and had not yet received talking therapy due to the ongoing pandemic. Mrs Field consulted with Nicola Robertson and agreed to postpone the meeting. Nicola Robertson took a call from David Smith, the claimant's Educational

Institute for Scotland Trade Union representative, who had encouraged the claimant to be seen again by OH. Mrs Field submitted a further referral to OH on 15 June 2020.

111. The claimant had an OH consultation appointment with an occupational health nurse on 17 June 2020 and Mrs Field received a copy of the report that same day. The report stated that the claimant was reluctant to engage in a skype meeting as she felt it is intrusive to her home. It also stated that although she had been offered on-line talking therapies she was not keen to engage with them or self-help resources that had been recommended. She had preferred to wait until face-to-face therapy became available. It also confirmed that she remained unfit for work, and to attend disciplinary meetings.

112. From June 2020 the claimant's pay was half pay only.

113. The claimant is a disabled person under the Equality Act 2010, and was so at least from 17 June 2020. The respondent knew or ought reasonably to have known that she was a disabled person from 17 June 2020.

114. The claimant sent a further fit note on 19 June 2020 signing her off work from 25 June 2020 to 1 September 2020. The reason given was work related stress and it stated that she awaited psychological intervention, which was a form of talking therapy. Mrs Field decided to wait until the end of the summer holidays to see if the claimant did attend talking therapies in that period.

115. Mrs Field was advised by the Staff Resourcing Officer on 23 June 2020 that the School was being allocated a newly qualified teacher Ms Gemma Ellis on a temporary basis to cover the claimant's on-going absence and she sent the claimant an email that same day, a few days before the schools broke up, to let her know.

116. On 29 June 2020 the claimant emailed Mrs Field asking if she could let her into school to collect some of her personal school things that she needed. She agreed to the claimant's request. She met the claimant and

her husband at the school on 2 July 2020 and gave them access to pick up the items that the claimant wished to.

117. On 7 July 2020 the claimant consulted her GP to ask about the therapy that had been recommended. The GP contacted the psychological service who stated that the claimant was on the waiting list.

118. Ms Gemma Ellis started work at the School at the beginning of term in August 2020 and taught the claimant's Primary 1 - 4 class. She was classed as 'newly qualified' which meant that she had completed a probationary teaching year in another school where she had been an upper stages class teacher. She taught at the School for that academic year.

119. On 26 August 2020 Mrs Field wrote to the claimant to seek the return of her keys and fob for the School as they were required by the temporary teacher. The claimant did so on 2 September 2020.

120. On 2 September 2020 the claimant sent another further Fit note signing her off with 'work related stress awaiting psychology' until 2 November 2020. Mrs Field responded to the claimant to ask how she was and give her an update on the things that her class had been doing since returning from the holidays. She forwarded the fit note to Ms Robertson, who replied asking how the claimant was. On 10 September 2020 Mrs Field replied to state that she was "quite shocked at how frail she was……she was still very unwell….[and] really wasn't in a position to discuss things." They arranged to discuss the claimant's situation.

121. At this point the claimant had been off work for almost 12 months. Mrs Field considered that the school needed the continuity of a permanent Principal Teacher or class teacher. There did not seem to her to be any likelihood of the claimant receiving the therapies that had been recommended for her in the near future. It was not clear to her for how long the therapy would be required or if the claimant would make a recovery that enabled her to return to work. On 10 September 2020 Mrs Field received an email from Nicola Robertson as to the claimant's

circumstances, and her advice was that inviting the claimant to a Capability meeting could be a possible way forward.

122. Mrs Field telephoned the claimant on 15 September 2020 to discuss her on-going absence and to try to suggest possible ways forward. The claimant said during the call that she had not made any progress with her recovery and she had not had any talking therapy, either in person or on-line. Mrs Field tried to discuss with her that the possibility of resolving her workplace situation might enable her to recover more quickly and that there were options for her future when she did become well again. The claimant was not receptive to this and suggested that she was not able to talk about it at this time.

123. On 15 September 2020 Mrs Field emailed Nicola Robertson in HR and Nicola McDonald, QIO, following her call with the claimant. She expressed concern for the claimant's health and that the pending court case combined with potential disciplinary action by the respondent may be detrimental to her mental health. She said that she felt it "advisable to wait before any further action is taken to resolve the current situation" as the claimant was very unwell and there was to be a court appearance for the breach of the peace charge on 9 October 2020. She added that she feared that adding a Capability or Disciplinary Hearing to matters "might well tip her over the edge". Ms Robertson replied and stated that the Attendance Management and Disciplinary processes could not be put on hold indefinitely, and that her professional advice was to proceed with a Capability hearing. Mrs Field decided that it was appropriate to proceed with that Capability Hearing in light of that advice.

124. The claimant was not informed by the respondent at any stage that the investigation into the allegation of conduct in relation to Pupil H was not proceeding. As the claimant was not fit to attend an investigation hearing or provide written answers no investigation report was ever concluded, nor was any step taken to progress the issue as a disciplinary matter.

125. Mrs Field wrote to the claimant requesting her attendance at a Capability meeting under the respondent's Policy which was to take place on

30 September 2020. She attached a copy of the 2014 policy which by that stage had been superseded by the 2019 policy. She received a reply from the claimant on 29 September 2020 stating that she was unable to attend a capability hearing on medical grounds following a consultation with her Doctor. She referred to a letter from her doctor, dated 29 September 2020, which would confirm that she would be unable to attend any meetings or reviews until further notice.

126. Mrs Field emailed Ms Robertson to ask for advice who responded by email on 1 October 2020. She recommended that Mrs Field proceed with the capability process, the next step being to fix a Capability hearing. At that stage the hearing would be chaired by Mr Peter Wood, Quality Improvement Manager. Mrs Field emailed Mr Wood on 2 October 2020 to inform him of the background leading up to the parental incident that took place in January 2019 and also the alleged incident that took place involving a child during a Christmas play rehearsal in December 2019.

127. On 9 October 2020 Mr Wood had a discussion with Mrs Field about the effect of the absence of the claimant, who at that stage had been absent for a continuous period of approximately nine months. Mrs Field said that it was proving very difficult for her to manage due to difficulty in getting supply cover. Changes in staff affected continuity of teaching and the ability to establish pupil/teacher relationships. Mrs Field was finding it difficult to cover the teaching of the class and her role as Head Teacher. Mr Wood spoke with Nicola McDonald to see if longer term supply cover could be given.

128. It was not necessary for the claimant to be dismissed by the respondent to enable the respondent to appoint someone to a role to teach the lower stages class that the claimant had taught. It was practicable for the respondent to have appointed someone to a long-term temporary contract or to a permanent contract pending resolution of the claimant's unfitness to work or attend hearings.

129. Mrs Field, Mr Wood and Ms Robertson did not consider whether the claimant might have been a disabled person under the Equality Act 2010 at any time.

130. Mr Wood decided that a capability meeting was appropriate as he believed that the claimant's continued absence was having a significant effect on the class she taught, with no foreseeable date for return.

131. On 9 October 2020 Mr Andrew Bannister, the claimant's husband, emailed Mrs Field, expressing his dissatisfaction at how the claimant's ongoing absence was being considered, in particular with regard to sick pay. He expressed that she would be under considerable financial hardship going forward if the sick pay were not to be extended under what he felt constituted exceptional circumstances. Mrs Field replied the same day to state that she had passed on his email to the relevant parties within the respondent.

132. On 25 October 2020 the claimant ceased to receive half pay under the contractual sick pay scheme, which had latterly been £1,479.95 per month net, having been informed in advance of the same by the respondent's HR department.

133. The application for extended sick pay was considered by Mr Wood, who discussed it with Mr Docherty, and they decided to reject it. The respondent's unions had argued earlier that sick pay should be extended generally during the Covid-19 pandemic, which the respondent had decided to reject. Ms Robertson prepared a substantive reply to reject the application for extended sick pay which Mrs Field emailed to Mr Bannister on 29 October 2020. In the email she said that all Council processes were still being managed despite the Covid-19 pandemic and so that would not be a reason to delay. It also confirmed that the respondent had already provided an extension to the pursuit of an attendance management procedure due to the disruption of the pandemic. It stated that the extension to sick pay would not be provided but gave no reason for that decision.

134. Mr Wood emailed the claimant inviting her to a Capability Hearing under the respondent's Attendance Management Policy to be held at Midmill School, Kintore, on 12 November 2020. He also provided the option of a remote hearing on Microsoft Teams if she preferred. The letter stated that the purpose of the meeting was to consider whether termination of her employment due to capability was appropriate or not. The right to be accompanied by a trade union representative or work colleague was referred to, as was the Employee Assistance Programme. It was stated that Mrs Field was to present the respondent's case.

135. On 11 November 2020 the claimant emailed Mr Wood to state that she was unable to attend the hearing as she was awaiting the advanced psychological support referred to in her GPs letter dated 29 September 2020. Mr Wood replied that the next step would be to offer another meeting, which he hoped she would attend but if not may continue in her absence.

136. On 16 November 2020 Mr Wood wrote to the claimant stating "I hope you are keeping well" and asking her to attend a rescheduled capability meeting on 27 November 2020, and set out the same basis as previously. That comment as to keeping well distressed the claimant, as she was not keeping well. The claimant replied that day to state that she was not keeping well, and not able to attend for the same reason as earlier, adding that she did not agree with the assertions in an email from Mrs Field which she attached, and that she was taking legal advice. The Capability Hearing was re-scheduled to 1 December 2020 by email on 26 November 2020. That change was as Mr Wood had other commitments on 27 November 2020. By email of that date Mr Wood stated that if the claimant decided not to attend she had the option of submitting a written statement, and asked for clarification of whether the claimant would attend in person or virtually, or wished to submit a written statement.

137. On 27 November 2020 at 3.39pm the claimant emailed Mr Wood to inform him that she was not capable of attending that meeting, but would attempt to prepare a written submission. She provided comment as to

her illness stating that recalling events was very distressing for her especially without the advanced psychological support she had been prescribed but not received. She stated that her condition had worsened from the capability process that had been instigated. She stated that opportunities were missed to prevent, manage and mitigate the unsafe conditions for staff, and disagreed with the respondent's view that the conditions and events were unavoidable. She stated that the result was that trust and confidence in her employer had been irrevocably harmed.

138. Mr Wood replied on 27 November 2020 at 3.52pm by referring again to the Employee Assistance Programme, appreciating how difficult a time the claimant had had, and stating that he looked forward to receiving her statement. He also emailed Ms Robertson to pass on the claimant's email. She replied at 4.07pm that day to state that she was happy to discuss it but that she was off work on the following working day, a Monday being 30 November 2020.

139. The claimant attempted to prepare a written statement but found that she could not do so. When she made the attempt she had flashbacks of earlier incidents at the School, and a panic attack. That distressed her.

140. On the morning of 29 November 2020, being a Sunday, the claimant decided to resign. She thought that the process was making her condition worse. She felt that the respondent was not supporting her recovery. She felt that she was to be dismissed for being unwell, and that she was not being listened to in her comments with regard to the School.

141. The claimant sent an email to Mrs Field on 29 November 2020 informing her, Nicola Robertson and Peter Wood that she was resigning from her Principal Teacher position at Strathdon school with immediate effect "as trust and confidence in my employer had been irrevocably harmed".

142. Mrs Field responded on 30 November 2020 by email, thanking her for letting her know that she was tendering her resignation, and adding that she was very sad to be losing a valued member of teaching staff. The claimant replied to the email on 1 December 2020 stating she did not

feel like a valued member of staff and that she was resigning on the grounds of constructive dismissal.

143. On 2 December 2020 Mrs Field sent an exit questionnaire to the claimant. The claimant sent a copy of her completed exit questionnaire on 4 December 2020. She received an email from Mr Wood that day, in which he sought to explain the respondent's position, which she replied the same day stating that she did not agree with his assertions.

144. On 4 December 2020 the claimant provided HR, Mr Wood and others with her exit questionnaire and made comments as to why she felt that she had been constructively dismissed and that trust and confidence with the respondent had been irrevocably harmed. Mr Wood replied that day to acknowledge it, expressing his regret that she felt that trust and confidence had broken down. The claimant responded that day to state that a capability hearing would not explore the conditions and events at the School which she alleged were responsible for causing her illness. Mr Wood passed that email to Ms Robertson but indicated that he was not going to reply to it.

145. When employed by the respondent the claimant was latterly paid a net weekly wage of £541.92 prior to her absence. The claimant was a member of the respondent's pension scheme and had employee and employer contributions of £78.74 and £186.69 per week respectively.

146. The claimant has not worked since her employment ended.

147. The claimant has received State Benefits in the form of Employment and Support Allowance.

148. The claimant commenced advanced psychological therapy on 16 March 2021. It consisted of two initial meetings for an assessment, and then cognitive behavioural therapy sessions on a weekly basis. It lasted for about three months. The claimant's condition improved as a result, but she remained at that stage, and remains, assessed by her GP as unfit for work.

149. During 2021, on a date not given in evidence, the claimant's registration with the GTCS lapsed. Unless she applies for re-registration, she is not able to work as a teacher in Scotland.

150. The claimant is to commence a further period of therapy in about January 2022. It is likely to be about nine months thereafter before she will be fit to return to full-time work.

151. The claimant commenced early conciliation on 25 February 2021 and received the Certificate for the same on 10 March 2021. The Claim Form in this claim was presented to the Tribunal on 10 April 2021.

The respondent's submission

152. Ms Stein helpfully provided a written submission and the following is a very basic summary of it although all of the submissions were considered. She argued that the claim should be dismissed, that there had been no dismissal, that the respondent had acted reasonably in managing matters as it had, and had followed proper procedures when doing so. She argued that there was reasonable and proper cause for their actions, given the circumstance of a lengthy period of absence and no clear end date for that. She further argued that there had been no breach of the 2010 Act, as what had happened was a proportionate means of achieving a legitimate aim, and that the steps proposed were not unreasonable as no difference was made by not deferring the meeting. It was argued that the claimant had resigned, but that there had been no dismissal as there was no repudiatory breach by the respondent. On remedy it was argued that the claimant had contributed to dismissal and that she had not pursued a grievance such that if there was an award it should be reduced on that account.

The claimant's submission

153. Mr Bannister spoke to his submission orally and helpfully sent that in written form after the hearing concluded. The following again is a basic summary of it although all of the submissions were considered. This was a case where the respondent was determined to follow its procedures

come what may, contrary to the claimant's position, GP reports or occupational health advice. The respondent wanted closure of the issue and did so under the cloak of a capability hearing. There were a series of matters that were linked and led to the claimant being entitled to resign. The respondent did not admit that the claimant was a disabled person until 30 August 2021. He set out reasons why there was a constructive dismissal, which was unfair. That included the unfair application of the attendance management policy, which he set out. He argued that there were a series of matters that were the responsibility of the respondent which included the working conditions and circumstances and an unfair application of the disciplinary policy and procedure, including how the suspension was handled, and an unfair investigation. The last straw was the respondent's insistence on the claimant attending the capability hearing despite her severe illness which was entirely attributable to unsafe working conditions and that the treatment she needed was not available due to the pandemic. The respondent's behaviour towards her was unreasonable. The dismissal was procedurally and substantively unfair. He set out a series of steps he argued it was reasonable for the respondent to have taken as adjustments for the provisions, criteria and practices applied. He argued that the dismissal arose from the disability and could not be objectively justified. He asked the Tribunal to prefer the evidence of the claimant.

The law

(i) Unfair dismissal

154. Section 95 of the 1996 Act provides, so far as material for this case, as follows:

> "**95 Circumstances in which an employee is dismissed**
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—
>
> ……..
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which

he is entitled to terminate it without notice by reason of the employer's conduct."

155. Section 98 of the Act provides, so far as material for this case, as follows:

> **"98 General**
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> ……
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."……..

156. The onus of proving such a dismissal where that is denied by the respondent falls on the claimant. From the case of ***Western Excavating Ltd v Sharp [1978] IRLR 27*** followed in subsequent authorities, in order for an employee to be able to claim constructive dismissal, four conditions must be met:

(1) There must be a breach of contract by the employer, actual or anticipatory.

(2) That breach must be significant, going to the root of the contract, such that it is repudiatory

(3) The employee must leave in response to the breach and not for some other, unconnected reason.

(4) She must not delay too long in terminating the contract in response to the employer's breach, otherwise she may have acquiesced in the breach.

157. In every contract of employment there is an implied term derived from ***Malik v BCCI SA (in liquidation) [1998] AC 20***, which was slightly amended subsequently. The term was held in ***Malik*** to be as follows:

> "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

158. In ***Baldwin v Brighton and Hove City Council [2007] IRLR 232*** the EAT held that the use of the word "and" following "calculated" in the passage quoted above was an error of transcription of the previous authorities, and that the relevant test is satisfied if either of the requirements is met such that the test should be "calculated or likely". That was reaffirmed by the EAT in ***Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT:***

> "The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

159. The law relating to constructive dismissals was reviewed in ***Wright v North Lanarkshire Council [2014] ICR 77***, which in turn referred to ***Meikle v Nottinghamshire Council [2004] IRLR 703*** on the issue of causation. The reasonableness or otherwise of the employer's actions may be evidence as to whether there has been a constructive dismissal, although the test is contractual: ***Courtaulds Northern Spinning Ltd v Sibson and Transport and General Workers' Union [1988] IRLR 305***, ***Prestwick Circuits Ltd v McAndrew [1990] IRLR 191***. There is in general no *contractual* right to observance of statutory rights, especially where the statute itself provides a remedy: ***Doherty v British Midland Airways [2006] IRLR 90,*** where an employee left because of alleged victimisation on trade union grounds which was held not to be a constructive dismissal. In ***Green v Barnsley Metropolitan Borough Council [2006] IRLR 98*** it was held that a failure to make reasonable adjustments for disability over a period of time was a constructive dismissal because it constituted a breach of trust and respect. Where, however, the alleged breach of trust and confidence consists solely of an exercise of a discretion granted to the employer by the contract of employment, an employee who is disadvantaged by it can only challenge it by showing that no reasonable employer would have done so ***IBM UK Holdings Ltd [2018] IRLR 4*** (applying ***Braganza v BP Shipping Ltd [2015] UKSC 17, [2015] IRLR 487***).

160. Where it is argued that there was a final straw, being a last act in a series of acts that cumulatively lead to repudiation, that last straw must not be entirely trivial – ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833.***

161. If there is held to be a dismissal, there must then be consideration of what the reason, or principal reason, for that dismissal was, and if it was a potentially fair reason under section 98(2) whether or not it was fair under section 98(4) of the Employment Rights Act 1996 ***Savoia v Chiltern Herb Farms Ltd [1982] IRLR 166*.** It is possible, if somewhat unusual, for a dismissal under section 95(1)(c) to be fair.

(ii) Discrimination

162. The law relating to discrimination is complex. It is found in statute and case law, and account is taken of guidance in a statutory code.

(i) Statute

163. Section 4 of the Equality Act 2010 ("the Act") provides that disability is a protected characteristic. The Act re-enacts large parts of the predecessor statute, the Disability Discrimination Act 1995, but there are some changes.

164. Section 15 of the Act provides as follows:

> "**15 Discrimination arising from disability**
> (1) A person (A) discriminates against a disabled person (B) if—
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

165. Section 20 of the Act provides as follows:

> **"20 Duty to make adjustments**
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

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

166. Section 21 of the Act provides:

"21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person…."

167. Section 39 of the Act provides:

"**39 Employees and applicants**

…….

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

(a) as to B's terms of employment;

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

(c) by dismissing B;

(d) by subjecting B to any other detriment.

……

(7) In sub-sections (2)(c) and (4)(c) the reference to dismissing B includes a reference to the termination of B's employment-

……

(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice."

168. Section 136 of the Act provides:

"**136 Burden of proof**

If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

169. Section 212 of the Act states:

"**212 General Interpretation**

In this Act - …….

'substantial' means more than minor or trivial"

170. Schedule 8, at paragraph 20 states:

"**Part 3**

Limitations on the Duty

Lack of knowledge of disability, etc

20

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) [in any case referred to in Part 2 of this Schedule], that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

171. The provisions of the Act are construed against the terms of the ***Equal Treatment Framework Directive 2000/78/EC***. Its terms include Article 5 as to the taking of "appropriate measures, where needed in a particular case", for a disabled person, "unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing

within the framework of the disability policy of the Member State concerned."

172. The Directives referred to are retained law under the European Union Withdrawal Act 2018.

(ii) Case law

(a) Discrimination arising from disability

173. Dismissal is provided for in section 39 of the Act. It includes dismissal where the employee resigns in circumstances where entitled to do so by repudiatory conduct by the employer under section 39(7) which provides that "In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment…..(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice." The case law on dismissal under section 95(1((c) is relevant in this context.

174. The process applicable under a section 15 claim was explained by the EAT in ***Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305***:

> "The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words 'because of something', and therefore has to identify 'something' – and second upon the fact that that 'something' must be 'something arising in consequence of B's disability', which constitutes a second causative (consequential) link. These are two separate stages."

175. In ***City of York Council v Grosset [2018] IRLR 746****, Lord Justice Sales held that*

> "it is not possible to spell out of section 15(1)(a) a … requirement, that A must be shown to have been aware when choosing to

subject B to the unfavourable treatment in question that the relevant 'something' arose in consequence of B's disability".

176. The EAT held in ***Sheikholeslami v University of Edinburgh [2018] IRLR 1090*** *that:*

> "the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the 'something' was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."

Unfavourable treatment

177. In ***Williams v Trustees of Swansea University Pension and Assurance Scheme [2017] IRLR 882*** the Court of Appeal did not disturb the EAT's analysis, in that case, that the word "unfavourable" was to be contrasted with less favourable, the former implying no comparison, the latter requiring it. The Equality and Human Right's Commission Code of Practice on Employment states at paragraph 5.7 that the phrase means that the disabled person "must have been put at a disadvantage."

178. That analysis was supported by the Supreme Court decision, reported at ***[2019] IRLR 306.***

Justification

179. There is a potential defence of objective justification under section 15(1)(b) of the Act. In ***Hardys & Hansons plc v Lax [2005] IRLR 726****,* heard in the Court of Appeal, it was held that the test of justification

under the statutory provisions then in force requires the employer to show that a provision, criterion or practice is justified objectively notwithstanding its discriminatory effect. The EAT in ***Hensman v Ministry of Defence UKEAT/0067/14/*** applied the test set out in that case to a claim of discrimination under section 15 of the 2010 Act. It held that when assessing proportionality, while an employment tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. As stated expressly in the EAT judgment in ***City of York Council v* Grosset *UKEAT/0015/16*** the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the tribunal was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the tribunal. The Court of Appeal in ***Grosset [2018] IRLR 746*** upheld this reasoning. In ***Buchanan v Commissioner of Police of the Metropolis [2016] IRLR 918*** the claimant was dismissed for unsatisfactory performance after eight months of absence. He had been in a serious motorcycle accident whilst responding to an emergency call, and developed post-traumatic stress disorder which had prevented a return to work. The respondent accepted that the officer had been treated unfavourably because of something arising from his disability – namely his absence – but relied on the application of the Police Performance Regulations by way of justification. The EAT held that the Tribunal had erred in accepting justification on the basis that the police force's general procedure had been justified. The EAT drew a distinction between cases where A's treatment of B is the direct result of applying a general rule or policy, to cases where a policy permits a number of responses to an individual's circumstances. In the former the issue will be whether the general rule or policy is justified. In the latter, it is the particular treatment which must be examined to consider whether it is a proportionate means of achieving a legitimate aim. That may be contrasted with the case of ***Browne v Commissioner of Police of the Metropolis UKEAT/0278/17***

in which the EAT held that the employment tribunal were entitled to find that the individual treatment of the claimant was justified because the employer had given the claimant an opportunity to make representations asking for an extension of sick pay.

180. The case law in relation to the test of objective justification for a claim of indirect discrimination under section 19 of the 2010 Act is relevant in this context. In ***MacCulloch v ICI [2008] IRLR 846,*** the EAT set out four legal principles with regard to justification, which have since been approved by the Court of Appeal in ***Lockwood v DWP*** **,** ***[2013] IRLR 941***.

> "(1) The burden of proof is on the respondent to establish justification: see ***Starmer v British Airways [2005] IRLR 862*** .
>
> (2) The classic test was set out in ***Bilka-Kaufhaus GmbH v Weber Von Hartz*** **(case 170/84)** ***[1984] IRLR 317*** in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must 'correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end' (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to 'necessary' means 'reasonably necessary': see **Rainey v Greater Glasgow Health Board** ***(HL)*** ***[1987] IRLR 26*** per Lord Keith of Kinkel at pp.30–31.
>
> (3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: ***Hardy & Hansons plc v Lax [2005] IRLR 726*** per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60].
>
> (4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether

the former outweigh the latter. There is no 'range of reasonable response' test in this context: ***Hardy & Hansons plc v Lax [2005] IRLR 726,*** *CA*."

(b) Reasonable adjustments

181. Guidance on a claim as to reasonable adjustments was provided by the EAT in ***Royal Bank of Scotland v Ashton [2011] ICR 632***, in ***Newham Sixth Form College v Sanders [2014] EWCA Civ 734,*** and ***Smith v Churchill's Stair Lifts plc [2005] EWCA Civ 1220*** both at the Court of Appeal. The reasonableness of a step for these purposes is assessed objectively, as confirmed in ***Smith v Churchill***. The need to focus on the practical result of the step proposed was referred to in Ashton. These cases were in relation to the predecessor provision in the Disability Act 1995. Their application to the 2010 Act was confirmed by the EAT in ***Muzi-Mabaso v HMRC UKEAT/0353/14.*** The guidance given in ***Environment Agency v Rowan [2008] IRLR 20*** remains valid, being that in order to make a finding of failure to make reasonable adjustments there must be identification of, relevant for the present case:

(a) the provision, criteria or practice applied by or on behalf of an employer; and
(b) the nature and extent of the substantial disadvantage suffered by the claimant.

182. Mr Justice Laws in ***Saunders*** added:

"the nature and extent of the disadvantage, the employer's knowledge of it and the reasonableness of the proposed adjustment necessarily run together. An employer cannot … make an objective assessment of the reasonableness of proposed adjustments unless he appreciates the nature and extent of the substantial disadvantage imposed upon the employee by the PCP."

183. The nature of the duty under sections 20 and 21 was explained by the EAT in ***Carranza v General Dynamics Information Technology Ltd [2015] IRLR 43*** as follows:

> "The Equality Act 2010 now defines two forms of prohibited conduct which are unique to the protected characteristic of disability. The first is discrimination arising out of disability: section 15 of the Act. The second is the duty to make adjustments: sections 20–21 of the Act. The focus of these provisions is different…… Sections 20–21 are focused on affirmative action: if it is reasonable for the employer to have to do so, it will be required to take a step or steps to avoid substantial disadvantage."

184. In ***O'Hanlon v Commissioners for HM Revenue & Customs [2007] IRLR 404*** and ***Meikle v Nottingham County Council [2004] IRLR 703*** it was held that, while extending sick pay for a disabled employee was not precluded, it would be a rare and exceptional case that it would amount to a reasonable adjustment. The financial cost of making an adjustment will go to reasonableness – ***Cordell v Foreign and Commonwealth Office [2012] ICR 280***.

Burden of proof

185. There is a two-stage process in applying the burden of proof provisions in discrimination cases, which may be relevant to the issue of whether the respondent applied a PCP to the claimant, as explained in the authorities of ***Igen v Wong [2005] IRLR*** 258, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If she does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached.

186. The application of the burden of proof is not as clear as in a claim of direct discrimination. In ***Project Management Institute v Latif [2007] IRLR 579***, Mr Justice Elias, as he then was, said this:

> "53
>
> ……It seems to us that by the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made. It would be an impossible burden to place on a respondent to prove a negative; that is what would be required if a respondent had to show that there is no adjustment that could reasonably be made. Mr Epstein is right to say that the respondent is in the best position to say whether any apparently reasonable adjustment is in fact reasonable given his own particular circumstances. That is why the burden is reversed once a potentially reasonable adjustment has been identified.
>
> 54
>
> In our opinion the paragraph in the code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made.
>
> 55
>
> We do not suggest that in every case the claimant would have had to provide the detailed adjustment that would need to be made before the burden would shift. However, we do think that it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not."

187. ***Jennings v Barts and the London NHS Trust UKEAT/0056/12*** held that ***Latif*** did not require the application of the concept of shifting

burdens of proof, which 'in this context' added 'unnecessary complication in what is essentially a straightforward factual analysis of the evidence provided' as to whether the adjustment contended for would have been a reasonable one.

188. The EAT emphasised the importance of Tribunals confining themselves to findings about proposed adjustments which are identified as being in issue in the case before them in ***Newcastle City Council v Spires UKEAT/0034/10.*** The importance of identifying the step that the respondent is said not to have taken which amounts to the reasonable adjustment required in law of it was stressed in ***HM Prison Service v Johnson [2007] IRLR 951.*** Setting out what the step or steps that comprise the reasonable adjustments are, before the evidence is heard, was however referred to in ***Secretary of State v Prospere EAT 0412/14. General Dynamics Information Technology Ltd v Carranza [2015] IRLR 43*** highlighted the importance of identifying precisely what constituted the step which could remove the substantial disadvantage complained of.

189. The adjustment proposed can nevertheless be one contended for, for the first time, before the ET, as was the case in ***The Home Office (UK Visas and Immigration) v Kuranchie UKEAT/0202/16.*** Information of which the employer was unaware at the time of a decision might be taken into account by a tribunal, even if it emerges for the first time at a hearing – ***HM Land Registry v Wakefield [2009] All ER (D) 205.***

(iii) EHRC Code

190. The Tribunal also considered the terms of the Equality and Human Rights Commission Code of Practice on Employment, the following provisions in particular:

> **"Substantial disadvantage**
>
> 6.15
>
> The Act says that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a

particular case is a question of fact, and is assessed on an objective basis.

Reasonable steps

6.28

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

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

6.29

Ultimately the test of the 'reasonableness' of any step an employer may have to take is an objective one and will depend on the circumstances of the case.

6.33

[Provides a list of examples of steps it might be reasonable for an employer to take, including….

Allowing a disabled worker to take a period of disability leave

Example: A worker who has cancer needs to undergo treatment and rehabilitation. His employer allows a period of disability leave and permits him to return to his job at the end of this period."

(iv) Remedy

191. In the event of a finding of unfair dismissal, the tribunal requires to consider firstly whether to make an order for re-instatement under section 113 of the Employment Rights Act 1996. The matter is further considered under section 116 as follows:

"(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—

(a) whether the complainant wishes to be reinstated,

(b) whether it is practicable for the employer to comply with an order for reinstatement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement."

192. The tribunal requires also to consider a basic and compensatory award if no order of re-instatement or re-engagement is made, which may be made under sections 119 and 122 of the Employment Rights Act 1996, the latter reflecting the losses sustained by the claimant as a result of the dismissal. The amount of the compensatory award is determined under section 123 and is "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer". The Tribunal may increase the award in the event of any failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. Awards are calculated initially on the basis of net earnings, but if the award exceeds £30,000 may require to be grossed up to account for the incidence of tax. The Tribunal may separately reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant.

193. Guidance on the amount of compensation was given in ***Norton Tool Co Ltd v Tewson [1972] IRLR 86.*** In ***Nelson v BBC (No. 2) [1979] IRLR 346*** it was held that in order for there to be contribution the conduct required to be culpable or blameworthy and included "perverse, foolish or if I may use a colloquialism, bloody minded as well as some, but not all, sorts of unreasonable conduct." Guidance on the assessment of contribution was also given by the Court of Appeal in ***Hollier v Plysu Ltd [1983] IRLR 260***, which referred to taking a broad, common sense view of the situation, in deciding what part the claimant's conduct played in

the dismissal. At the EAT level the Tribunal proposed contribution levels of 100%, 75%, 50% and 25%. That was not however specifically endorsed by the Court of Appeal. Guidance on the process to follow was given in ***Steen v ASP Packaging Ltd UKEAT/023/13.*** In respect of the assessment of the compensatory award it may be appropriate to make a deduction under the principle derived from the case of ***Polkey,*** if it is held that the dismissal was procedurally unfair but that a fair dismissal would have taken place had the procedure followed been fair. That was considered in ***Silifant v Powell 1983 IRLR 91***, and in ***Software 2000 Ltd v Andrews 2007 IRLR 568,*** although the latter case was decided on the statutory dismissal procedures that were later repealed. A Tribunal should consider whether there is an overlap between the ***Polkey*** principle and the issue of contribution (***Lenlyn UK Ltd v Kular UKEAT/0108/16).*** There are limits to the compensatory award under section 124, which are applied after any appropriate adjustments and grossing up of an award in relation to tax – ***Hardie Grant London Ltd v Aspden UKEAT/0242/11.***

194. In the event of an unreasonable failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures, the Tribunal may adjust the level of compensation upwards or downwards by up to 25%. It has a discretion on whether or not to do so.

195. In the event of a breach of the 2010 Act compensation is considered under section 124, which refers in turn to section 119. That section includes provision for injured feelings under sub-section (4). The first issue to address therefore is injury to feelings. Three bands were set out for injury to feelings in ***Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102*** in which the Court of Appeal gave guidance on the level of award that may be made. The three bands were referred to in that authority as being lower, middle and upper, with the following explanation:

> "i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign

> of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.
>
> ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.
>
> iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings."

196. In ***Da'Bell v NSPCC [2010] IRLR 19,*** the EAT held that the levels of award for injury to feelings needed to be increased to reflect inflation. The top of the lower band would go up to £6,000; of the middle to £18,000; and of the upper band to £30,000.

197. In ***De Souza v Vinci Construction (UK) Ltd [2017] IRLR 844***, the Court of Appeal suggested that it might be helpful for guidance to be provided by the President of Employment Tribunals (England and Wales) and/or the President of the Employment Appeal Tribunal as to how any inflationary uplift should be calculated in future cases. The Presidents of the Employment Tribunals in England and Wales and in Scotland thereafter issued joint Presidential Guidance updating the Vento bands for awards for injury to feelings, which is regularly updated. In respect of claims presented on or after 6 April 2020, the Vento bands include a lower band of £900 to £9,000, a middle band of £9,000 to £27,000 and a higher band of £27,000 to £45,000.

198. Consideration may also be given to an award in respect of financial losses sustained as a result of the discrimination. This is addressed in ***Abbey National plc and another v Chagger [2010] ICR 397***. The question is "what would have occurred if there had been no discriminatory dismissal ……. If there were a chance that dismissal

would have occurred in any event, even if there had been no discrimination, then in the normal way that must be factored into the calculation of loss."

199. It was stated in ***Chief Constable of Northumbria Police v Erichsen 2015 WL 5202327*** that what was required was an assessment of realistic changes, not every imaginable possibility however remote and doing so "taking into account any material and plausible evidence it has from any source".

200. There is a duty of mitigation, being to take reasonable steps to keep losses sustained by the dismissal to a reasonable minimum. That is a question of fact and degree. It is for the respondent to discharge the burden of proof – ***Ministry of Defence v Hunt and others [1996] ICR 554***.

201. Interest can be awarded in discrimination cases under the Industrial Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Different provisions apply to different aspects of the award. The awards made can include for injury to feelings, and for past financial losses. No interest is due on future losses.

Observations on the evidence

202. The **claimant** was, the Tribunal concluded, a person who had material mental health issues. There was no detailed up to date medical report, and the last one from Occupational Health was from June 2020. Adjustments were made as noted above, which meant that her evidence was given in periods of around 30 minutes in general. The claimant had a tendency to give lengthy answers to many questions, but we considered that that was as a result of her mental health conditions, and was not an attempt to mislead the Tribunal. She had clearly been very distressed by the circumstances involving the mother of a child in January 2019. She had returned to work after a period of about two months off work. After her return there was a further incident involving Pupil H on 5 December 2019, which led to suspension and an investigation. Those events also caused her substantial distress. She

was suspended for one day before being signed off work by her GP, a process that continued until her resignation. The levels of her stress were significant. The respondent has accepted that she was a disabled person under the 2010 Act. There are reports from her GP and her medical records which refer to the extent of the symptoms she exhibited, and the medication she was prescribed. In addition, the GP prescribed advanced psychological support, but that could not take place when prescribed because of the Covid-19 pandemic which commenced on 23 March 2020 with "lockdown" and the closure of schools and many in person medical services. We were satisfied that the claimant was seeking to give honest evidence. There were however certain points of her evidence where we were not able to conclude that her recollection was reliable. Points of detail were omitted. Her perception of the seriousness of matters was, in our judgment, greater than was warranted by the facts, although her perception of them was entirely genuine. She used language that indicated the extent of her distress, but objectively was we considered not always warranted, such as referring to incidents with Pupil J as "violent" when the example given included throwing pencils around the classroom, and climbing on tables. That Pupil did however bite her finger, and there were incidents of disruption and difficulty on a regular basis. The claimant sought to argue that all her stress was caused by an unsafe working environment, but we did not consider that that was accurate. Behavioural issues with pupils is part of the role of a teacher. There may be pupils with particular difficulties causing material problems in management, but that is not new, nor unique to the School. There were other issues causing stress which was not in any sense the fault of the respondent, or their responsibility, in our assessment. That included the security at the School which we considered reasonable, the attendance and behaviour of the mother of Pupils B and C not having been reasonably foreseeable, and the incident on 5 December 2019 leading to stress but where the claimant was alleged to have acted in a manner that was, if true, substantially wrong. Suspension was an appropriate reaction, as was an investigation. These are factors, amongst others, on which we did not accept the arguments for the claimant.

203. **Ms Rogers** was we considered an obviously credible and reliable witness. She conducted the investigation she was asked to in a fair and appropriate manner so far as she could, but did not complete her task as the claimant was not fit to meet her, or provide a written answer to her written questions.

204. **Mrs Field** we considered to be a credible and generally reliable witness. She gave evidence in a straightforward and candid manner. Whilst it is true that there were some inaccuracies in her statement that were corrected in cross examination they were not we considered especially significant. She did support the claimant, and did not actively seek the commencement of the capability procedure. On the contrary, she argued against it in her email of 15 September 2020. That was to her credit, and indicated that she was taking account of the circumstances of the claimant. We considered that her evidence was to be preferred to that of the claimant in relation to the number of pupils who required behaviour risk assessments. We considered that her assessments on that and related matters was more likely to be reliable. That claimant had suffered stress at work on her own evidence, and that we considered heightened the claimant's own perception of the seriousness of the position beyond that which was accurate.

205. **Ms Youngson** we considered to be a credible and generally reliable witness. She considered that the security arrangements at the School were appropriate, and we accepted that evidence.

206. **Mr Wood** was a witness whose reliability in some respects we had a concern over. He did not consider at the time whether the claimant may be a disabled person, when the indicators for that were clear from the 17 June 2020 report, and from emails passed to him thereafter. His answers to some questions were more limited than candour would normally suggest was appropriate. When asked, for example, in cross examination about an email on 4 December 2020 what he had meant by "the route we discussed earlier" he said that he could not recall, but that was we considered clearly a reference to a claim to the Tribunal by the claimant. Mr Wood said that he could not recall other details, such as

why the extension to sick pay was refused. He argued that the attendance management procedure was being followed in the management of the claimant's case, but he later accepted that the procedure did not provide for a situation such as that for the claimant. He referred to a Capability Hearing Guide, which was not before the Tribunal at that point, which he said entitled the hearing to proceed in absence, but that did not appear to be correct when the Guide was later produced by the respondent, and in any event takes no account of the terms of the 2010 Act, although we did not consider that that was an issue that was his responsibility. His answers had a tendency to be restricted to the process rather than to address the circumstances of the claimant. He also suggested that decisions were taken by him jointly with HR, which was not Mrs Shiels' evidence which was that she gave advice but that decisions were taken by the managers. We accepted her evidence on that, and did not accept the evidence of Mr Wood that he was not the sole decision-maker. He did however candidly accept that there was no necessity to terminate the claimant's employment to employ someone to provide longer term cover for her class, which was to his credit. We also appreciated that the circumstances involving the claimant were novel ones, with the difficulty of unresolved serious allegations of conduct towards a young child in her care, and that these matters were all being addressed against the background of the Covid-19 pandemic.

207. **Mrs Shiels** was a candid and credible witness. She accepted that with hindsight she did not recognise that the claimant was a disabled person at the time, and should have done so. She also recognised that some language she had used, such as stating in an email that the claimant had refused to attend the capability meeting, was not accurate as she was unable to attend, and that seeking occupational health advice on both whether the claimant was disabled, and if so what adjustments might be considered for her, would have assisted. We were not clear that she was fully aware of the test for who was disabled, and how matters may then need to be handled. She argued that the respondent followed its attendance management policy, but whether it did so was open to doubt

at the least, and it did not provide for what happens if an employee could not because of illness attend a capability hearing or contribute to one in her absence. She also accepted that Mr Wood telling the claimant that after she did not attend the first such meeting that the second was likely to be held in her absence had come after a discussion with her, and that there was no specific reference to such a matter in the policy.

Discussion

208. It is necessary to state firstly that there was a considerable body of evidence presented by both parties that was not relevant to the issues before the Tribunal. Some of the evidence which was gone into in substantial detail was at best for background, or tangential to the issues. The findings in fact set out above are those that the Tribunal considered potentially relevant to the issues before it. Some material within the witness statements or evidence otherwise given was omitted from the findings in fact if not potentially relevant.

209. The claimant also argued that the respondent was responsible for her stress. That was her perception, but it was not one we accepted in full. There were matters where we concluded that the respondent had not handled matters appropriately, and doing so may have exacerbated the stress the claimant felt, but she had feelings of stress for issues for which the respondent did not have responsibility and other aspects of the claimant's reaction to events which affected the reliability of the evidence in that regard.

210. The claimant was not dismissed as a result of the incident on 5 December 2019, and the Tribunal did not hear from the witnesses who attended that incident, save for the claimant who was (entirely properly) not cross-examined on it. It was clear to the Tribunal firstly that the allegations made were serious ones, and secondly that they were entirely properly investigated by the respondent. The Tribunal was also clear that the decision to suspend the claimant was made on the morning of 9 December 2019, before the claimant emailed Mrs Field to say that she was self-certificating. Although the confirmation of the

suspension was not issued until 11 December 2019 by which time that email from the claimant had been received, the Tribunal did not consider that there was anything wrong with taking the decision to suspend, and although there was some delay in rescinding a number of parties were involved, and the delay was explained by holidays taken over the Christmas and New Year period. The investigation into the allegations was not concluded in light of the claimant's absence, nor was it then referred to the GTCS. It may well be that the allegations are not investigated or resolved by that body as the claimant is not currently registered as a teacher, but in any event we were not able to conclude whether the claimant did act as alleged, or if so what the outcome of any disciplinary process is likely to have been. It did appear to us that there was a considerable body of evidence that contradicted the claimant's explanation for the event given in her witness statement, but there was also credible evidence that the claimant had a stressful position, which continued up to the point of the incident, and she had not inconsiderable support from Mrs Field in her email of 15 September 2020. No evidence was given from either Ms Fowlie for example who was present, or Mr Docherty who Mr Wood said would have heard any disciplinary hearing.

211. We gave the claimant and her husband who is representing her latitude in how they presented their case as they were not legally experienced or qualified. The claimant has reserved the right to proceed with a separate personal injury claim. Some of the matters that the claimant sought to raise were potentially relevant to that claim, but that is not the claim before us.

212. Some of the matters of background were not those which could be said to be the fault of the respondent, but contributed to the claimant's stress. An example is the criminal investigation in relation to the mother who attended the school, who later made an accusation against the claimant, which was withdrawn, and in respect of whom a breach of the peace charge was laid. We did not accept that the security arrangements were inadequate and led to that incident, as the claimant alleged. The claimant was cited to attend the trial of that matter, which was delayed.

That all caused the claimant stress. That process was under the control of the police and the Procurator Fiscal, and implemented by police officers. It was outwith the control of the respondent.

213. Ms Stein did not have an easy task in cross-examining the claimant given her state of health, and the need for regular breaks. She showed consideration for the claimant in the questions she did, or did not, ask, and the manner in which she did so. We were grateful to both representatives for the manner in which they conducted the hearing, and for ensuring that despite losing the first day of the hearing it was concluded within the time allocated for it.

214. There is a need to consider the evidence that we heard against the law bearing on the issues before us. The Tribunal is not a forum for a wider enquiry into the resources available at a school, methods of teaching or the management of pupils with particular needs, or related matters. The Tribunal has attempted to consider the evidence it heard solely in relation to the issues before it. There were arguments that both parties could make. The Tribunal reached a unanimous decision.

215. The Tribunal answered the issues before it as follows:

Did the respondent dismiss the claimant in terms of section 95(1)(c) of the Employment Rights Act 1996 ("the 1996 Act") and in that regard has the respondent, without reasonable and proper cause, conducted itself in a manner calculated or likely seriously to damage or to destroy the relationship of trust and confidence between the respondent and claimant?

216. The Tribunal concluded that the respondent was in breach of the implied term as to trust and confidence quoted in the issue. Whilst the respondent had a complex and unique set of circumstances it required to address, there were matters that it did not handle adequately, which collectively amounted we considered to a dismissal under section 95(1)(c). The particular matters that led to that conclusion are –

(a) The claimant's GP expressed a view that the investigation process should be deferred because the treatment prescribed had not been delivered, and without that the claimant would not be fit for work or to attend hearings. Occupational health reports were commissioned in February and June 2020 which stated that the claimant was not fit for work or to attend formal meetings, initially for the investigation and thereafter regarding the attendance management procedure, and would not be fit until that therapy had taken place.

(b) Mrs Field supported a deferral of the capability hearing under that procedure in her email of 15 September 2020, where she warned that proceeding may tip the claimant over the edge, which was prescient of her as that is what in due course happened. Her view was contradicted by Mrs Shiels, whose advice was to proceed, and Mrs Field acquiesced in that, but the advice from Mrs Shiels took no account of the claimant's status as a disabled person, it appeared to consider a binary position of either a capability hearing or a disciplinary hearing, and did not consider fully the alternatives that there were, including that suggested by Mrs Field herself.

(c) The GP report given in September 2019 maintained that general position.

(d) These were clear indicators that, at that stage, proceeding with a capability hearing was not the step that a reasonable employer could take. The respondent however decided to proceed with a capability hearing in the knowledge that the claimant was not fit to attend it.

(e) Mr Wood was involved in the process. Neither he nor Mrs Shiels the HR Adviser (then Ms Robertson) appreciated that the claimant was a disabled person. They did not therefore consider whether any adjustments to arranging a capability hearing at all were appropriate. They should have done so, both initially and when the claimant confirmed that she could not attend a hearing.

(f) Mrs Shiel referred to the claimant in an email "refusing" to attend the capability hearing, which was not correct. It was not a refusal but an

inability to attend, and that contributed we concluded to the respondent deciding to proceed regardless of the claimant's health.

(g) By 25 October 2020 the claimant was not on pay. Whilst having an employee still employed is not without cost, both administratively and for issues such as any accruing holiday pay, the cost was modest. Against that there was an ill employee, and we considered that some of those at the respondent did not properly appreciate how ill the claimant was, although Mrs Field had remarked on that in emails.

(h) The claimant did not wish to be dismissed, and did not agree to leave on that basis. She continued to state that she was not fit to attend hearings, but the respondent continued to arrange them despite that. Their doing so contributed to an increasing level of stress for the claimant, making her condition worse.

(i) The attendance management policy did not have provisions to cover the circumstance of an employee unable through illness to attend a hearing or, as it later transpired, to provide a written submission. In all the circumstances all reasonable employers would have deferred the hearing for a period to allow time for the treatment required to be given.

(j) The respondent argues in this connection that the claimant had been absent for a long period "without prospect of returning". We did not accept that. The evidence from the various reports was that there was such a prospect, at the least, on receipt of therapy. What was not known was when that therapy would take place, and what it would lead to.

(k) Mr Wood's language in writing to the claimant expressing a hope that she was well was not badly intentioned, but not considerate for her. She was obviously and known to be unwell and it is not surprising that that caused the claimant a measure of distress.

(l) The correspondence from Mr Wood arranged hearings on a number of occasions on dates not that many days from the letter giving the notice of that. Doing so was not taking account of the claimant's circumstances. There was pressure applied to her either to attend in

person or remotely, or provide a written submission, when none of that was appropriate. The respondent did not update its own occupational health advice. It did not ask about the claimant's status as a disabled person or the adjustments that might be considered. It did not ask, or know, whether the claimant could provide a written submission. As it turned out, she tried but could not. That further added to her levels of stress.

(m) It was accordingly no surprise when on 29 November 2019 the claimant felt so worn down by what was happening, particularly the continued insistence of holding a hearing which she was unable to attend, the attempt to provide a written submission as an alternative which she found she could not do, and the increases to the levels of stress that she felt as a result, that she decided to resign. She did so as trust and confidence had broken down, and that was because of the failures of the respondent to handle the circumstances of the claimant's case in the manner that a reasonable employer could have done.

(n) The respondent argues that the hearing would not have necessarily led to dismissal, as it could have been deferred further. That however ignores two points. Firstly it should not have been arranged for then at all. Secondly the claimant was not fit to participate, and did not provide for example any request for adjournment or delay as a report was being commissioned which were suggested as potential triggers for such a decision. In all likelihood the claimant would have been dismissed had the hearing taken place. Both Mr Wood and Mrs Shiels had decided to proceed with it despite the terms of the medical advice, and that indicated to us an intention to resolve matters by ending the claimant's employment to bring what they referred to as "closure", which in their view was to benefit both the respondent and the claimant. The suggestion that it might have been deferred ignores the reality of the situation.

(o) There was a breach of duty under sections 20 and 21 of the 2010 Act by the failure to make the reasonable adjustment of deferring the capability hearing. That is not conclusive, but it is a strong factor in

addressing this issue. The breach of duty is directly related to the circumstances which led to resignation. The detail of the breach of duty is set out below.

(p) The respondent did not have reasonable and proper cause for acting as it did, in the manner it did, at that time. There was no material harm to it in deferring the hearing for what turned out to be about six months to allow the treatment to take place. There was limited cost to doing so for it. No salary was being paid. It accepted that it could manage the absence of the claimant as Principal Teacher, and teacher of the lower stages class, by appointing a long-term temporary teacher, or otherwise. There was in fact a new teacher for that class in post at that time. Dismissing the claimant was not a necessary step to operate the School effectively. The respondent also refers to the need to conclude the disciplinary process if the claimant was to return to employment. That is of course correct. But for the reasons we address below, we do not have sufficient evidence to conclude that her dismissal was likely to be the outcome of such a process.

217. In all the circumstances we considered that the test for a dismissal under section 95(1)(c) was met.

If so, what was the reason or principal reason for the dismissal?

218. We were satisfied that capability was the reason for the dismissal, being in this context the events that led to the resignation.

If that reason was potentially a fair one under section 98 of the 1996 Act was it fair or unfair under section 98(4) of that Act?

219. It is potentially a fair reason, but was not a fair dismissal. No reasonable employer would have acted as the respondent did, given the circumstances we have outlined above. It is unfair to proceed with a capability hearing when the employee is not fit to participate in it, and when the harm being caused to the employer is of such a limited nature. We accept that employees cannot be left in employment indefinitely, and

that there does come a time when a fair dismissal can be achieved, as we discuss further below, but the respondent had not reached that point. There was no need to dismiss the claimant to free up a place to employ someone as a replacement either permanently or for sufficiently long a time as to provide stability to the pupils. That was accepted by the respondent in evidence. It was also accepted that the entitlements to sick pay had ceased, such that the financial cost of waiting for the therapy that had been recommended but delayed because of the pandemic could take place. There was also a complete failure to consider the terms of the 2010 Act and the duties flowing from that, as addressed below. Proceeding with arrangements for a capability hearing in the face of such facts was not within the band of reasonable responses.

Was the dismissal of the claimant something arising in consequence of the claimant's disability under section 15(1)(a) of the Equality Act 2010 ("the 2010 Act")?

220. Yes. It matters not for these purposes what the cause of disability was. It is the fact that it was because of the claimant's disability that she was absent from work from 9 December 2019 onwards, that led to what we have held to be a dismissal. The test for a dismissal under the 1996 Act is not exactly replicated in section 39(7)(b) of the 2010 Act, but the effect is the same and we consider that the same considerations apply to the 2010 Act given the use of the same term.

If so has the respondent shown that the dismissal was a proportionate means of achieving a legitimate aim under section 15(1)(b) of that Act?

221. No. For the reasons given above it was not proportionate to act as the respondent did by arranging repeated capability hearings for an employee unable through ill health to attend or participate in them. They did so on a number of occasions. They did not have updated or indeed adequate occupational health advice. They did not have a reliable prognosis, as the reports received were from a nurse rather than an OH physician or equivalent. It was entirely practicable to have deferred the

decision, as Mrs Field suggested, until the therapy referred to had taken place. Whilst the precise timing of that was not known, a deferral for a period of, for example, three or up to six months initially to await such developments was we considered proportionate.

Did the respondent apply any of the provisions, criteria or practices on which the claimant founds to her?

222. The respondent applied the provision, criterion or practice (PCP) of the attendance management policy to the claimant, being the 2019 policy. That was not seriously disputed. It also applied the contract of employment which had provisions as to sick pay. There was no particular provision for extending it, but we consider that the decision not to do so was in effect applying the terms of the contract. The Tribunal considered that the other matters on which the claimant sought to rely were not PCPs (for example a complaint about not replying to correspondence sufficiently quickly) or otherwise not established in the evidence. That included an allegation of requiring the claimant to teach pupils when not suitably supported, trained or experienced to do so. That is because we did not accept the latter part of the proposition. The claimant was suitably supported, trained and experienced to teach the pupils in her class. CALM training was not a necessary element of that, although it clearly could have been of substantial assistance. Similarly we did not accept that there was an unsafe working environment, and preferred Mrs Field's evidence on that issue.

If so, did doing so put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

223. Yes. Application of the 2019 policy led to the claimant resigning, which we held to be a dismissal. It placed the claimant at a substantial disadvantage in comparison with those not disabled. Someone not disabled is not likely to have had the length of absence that the claimant did or her material difficulties in engaging with the process. Someone not disabled would not have suffered from the additional stress from the

process that was followed, or the terms of Mr Wood's emails for example, as the claimant did. That did cause the claimant substantial disadvantage, noting that the word substantial is defined in the 2010 Act. The claimant had been absent for a period of over 10 months and was still absent when there was an application for extended sick leave beyond the contractual scheme, and someone not disabled is not likely to have had such a lengthy and continuing absence. That also caused the claimant a substantial disadvantage.

If so, did the respondent take such steps as it was reasonable for them to have taken to avoid that disadvantage under section 20 of the 2010 Act and if not is the respondent in breach of duty under section 21?

224. The claimant sought a large number of steps in this connection, but the Tribunal considered that the only one that was established on the evidence, and was one that it was reasonable to take, was to have deferred proceeding with a capability hearing until the therapy referred to had taken place. That is so for the reasons set out above. It had regard to the terms of the Code of Practice: Employment in this regard. The cost was limited. The respondent is a local authority. There was no material difficulty for the respondent in doing so, as the School could appoint someone in the claimant's role as referred to above. It had the support initially of the Head Teacher of that school for that, but did not do so.

225. The Tribunal did not regard it as a reasonable step to extend sick pay. Whilst Mr Wood did not give evidence either in his witness statement or orally as to the reason, nor did the letter giving the decision do so, the Tribunal accepted Mrs Shiels evidence that the trade unions had sought an extension which had been refused, and that part of her consideration was not to set a precedent. That was also in the context that, at that time, the end point of such an extension was at best unclear. The authorities referred to above make clear that such an adjustment is exceptional. The claimant had had a total of 12 months of sick pay. In all the circumstances extending that further was not, we considered, a reasonable adjustment required of the respondent. We did further consider the terms of the Disability Leave Scheme but accepted the

evidence of Mrs Shiels that it was not apt to cover the circumstances of someone on sick leave, but was intended to provide support to someone working who was then seeking to have time off, for example for medical treatment.

In the event that any claim succeeds to what remedy is the claimant entitled having regard to (i) losses sustained, (ii) mitigation, (iii) contribution, (iv) whether there could have been a fair dismissal from a different process, and (v) any failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

226. There was no suggestion that the remedy should include re-instatement or re-engagement, and not only is the claimant not presently fit for work but her registration as a teacher has lapsed. Neither remedy was accordingly practicable. The claimant sought an award of compensation. We considered firstly that the claimant was entitled to a basic award, and that sought in the Schedule of Loss was £4,842.00. It was calculated on the basis of the maximum week's pay at the time of the dismissal, where the pay was higher than that maximum at the time. It is correctly calculated. The respondent invited the Tribunal to reduce it because of contribution. We did not consider that it was just and equitable to do so, as we address further below. It was not clear to us what the contribution was said to be. The dismissal was based on the events set out above, to which we did not consider that the claimant contributed. It is not an easy argument to allege that a claimant contributed to a capability dismissal. We award the full basic award.

227. We then considered a compensatory award. That addresses losses suffered because of the dismissal. We concluded that there were none. The therapy started in March 2021. It lasted about three months. The claimant was not then fit for work. She is not fit for work currently, in December 2021. It will be at least about nine months before she is, and whether she will be depends on therapy still to be undertaken in circumstances where the therapy she received in the earlier months of the year did not lead to a fitness to work. Against that background we assessed what is likely to have happened if the respondent did await the

therapy referred to and deferred a capability hearing until it had taken place. By June 2021 it would have been clear that the therapy had not been sufficient to return the claimant to work. At that stage, we consider that it would have been open to a reasonable employer to have commenced a capability procedure on the basis of what was by that stage an absence of around 30 months, where the therapy had been attempted, had not succeeded in achieving a return to work, and where a return to work remained uncertain. A fair dismissal after such a process was we considered what would be likely to have happened. The claimant would not have been paid for that period. We concluded that the claimant did not suffer financial losses as a result of the dismissal. We did not therefore award a compensatory award.

228. We then addressed an award for injury to feelings. We considered the position in light of the amended ***Vento*** bands. Doing so was not straightforward. We considered that it was likely that the period of absence from 9 December 2019 was caused very largely if not wholly by allegations made against the claimant. She told Mrs Field that she could not deal with them that day, and sought an appointment with her GP. She reported matters to her GP. The absence then commenced. We do not consider that the respondent can be properly criticised for the suspension or investigation, despite the claimant's arguments. The allegations against her were serious. Suspension initially was decided before her being absent was known. There was then a delay in her being informed of that decision, and something of a failure of communication within the respondent, but the suspension was rescinded and we did not consider that that process made any material contribution to the stress that the claimant experienced. The investigation was conducted in an appropriate manner, and the criticisms of it we reject. It could not conclude because of the absence. It was not explained to the claimant properly that it was paused, however, and that is one factor we take into account. The claimant returned to work on a phased basis in April 2019. There is then a period to 5 December 2019 when she was at work. She did not have absences during that period. Whilst her evidence was that stress was building up there is limited independent support for that.

There were stresses from Pupils J and H, but managing those issues did not require CALM training in our view, however helpful having that was. Mrs Youngson made a mistake about booking that training, but the claimant did not appear to follow up other opportunities for the course until November 2019 when prompted by Mrs Youngson. The claimant did not raise a grievance formally about that. The circumstances changed markedly when the incident on 5 December 2019 occurred.

229. Where matters become discriminatory is when the respondent did not address the claimant's status as a disabled person properly, from 17 June 2020 when it accepts that it knew or ought reasonably to have known that. That failure of appreciation lies behind much of what followed. We consider that the respondent did not appreciate how ill the claimant was, although Mrs Field referred to it in clear terms by email. There was we consider an intention on the part of the respondent to follow a process, despite that process not covering the situation, rather than address the person involved. The policy itself was not properly applied, as there was no up to date occupational health advice, no prognosis in proper terms, and no proper consideration of the adjustment referred to by Mrs Field of deferring the hearing process. That did increase the stress of the claimant. She was being invited to attend a hearing she was not fit to attend, with the possibility of termination of employment. That is bound to add to stress. That pressure continued, if not intensified. She attempted to write a submission when that was belatedly put forward by Mr Wood (although Ms Lockhart suggested it to Mrs Shiels on 30 September 2020) but could not do so as she had flashbacks and a panic attack. That too will have increased her stress.

230. Against that background we sought to assess the award for injury to feelings as an exacerbation of an existing stress condition, which was itself material. We concluded that the award should be at the low end of the middle band, and that £10,000 was the appropriate award for that. Interest on that sum is calculated to be £933 for the period to the anticipated date of payment.

231. We then considered whether any award was appropriate under the 2010 Act for the dismissal. We considered that if there had not been a discriminatory dismissal on 29 November 2020 there would have been a non-discriminatory dismissal in or around June 2021 for the same reasons as given above as to fairness. It would not have been a reasonable step to require of the respondent to defer a hearing further as at that stage, in around June or July 2021. It would have been a proportionate means of achieving a legitimate aim, that being the proper management of teaching staff within the respondent, to have held a capability hearing at that stage, and to have dismissed the claimant then. Her absence at that point would have been for 30 months or thereby, without any reasonably foreseeable return to work within a reasonable period at that stage. It remained a possibility, but the extent of that and its timing was unknown, as it remains in December 2021. We therefore concluded that no award for financial losses under the 2010 Act was just and equitable, as no financial losses were sustained by the discriminatory dismissal. We did not consider that an award for loss of statutory rights was appropriate in the circumstances of the case as there would have been a fair dismissal as stated, and no loss was sustained during the period to that stage.

232. The total award for the breach of sections 15, 20 and 21 of the 2010 Act is therefore £10,933.

233. The total award is accordingly £15,775.

234. We did appreciate that the respondent had a very difficult set of issues to address. They included what were serious allegations involving a young child. Those allegations are disputed, but there was what appeared to be a consistent body of evidence from staff and three pupils that supported them. The claimant set out her position in her witness statement, but it is difficult to reconcile her position with the witness evidence obtained in the investigation. The criticisms of the investigation that was undertaken we did not accept. It was not appropriate to interview more pupils than there were, at least from the information that was available at the time. Such interviews of very young children in any event require to be

handled with particular care, and be restricted to those who are necessary to interview, as we consider did occur. Whilst there was limited evidence before us, including neither staff member who provided a statement, we are required to consider that evidence - ***Hovis Ltd v Louton EA-2020-00973,*** albeit that case concerned different issues to those before us. Questions of contribution are ones of fact, on the balance of probabilities, however. It appeared to us likely that the claimant had dragged Pupil H by the arm such that that caused bruising to her hip and to become upset. We also considered that that incident had arisen at a time when the claimant felt under stress, as she spoke to in her evidence, and as Mrs Field stated in emails.

235. Against that background we did not consider that it was just and equitable to reduce the basic award, which is an award related to the fairness of the dismissal and that award follows on from the decisions the respondent made on what to do. The respondent argued that we should do so, but did not set out clearly in its submission why that was, and when offered an opportunity to explain it orally did not elaborate further. Whilst it did refer to the claimant not accepting offers of assistance by online therapies and reading materials, we did not consider that that amounted to contribution for this purpose. The claimant felt that she needed in person contact to assist her recovery and we were satisfied that that was reasonable for her to believe.

236. We did also consider the potential argument that the claimant would have been dismissed for the disciplinary allegations. We have already referred to the lack of full evidence on that issue, particularly from members of staff present at it. The claimant was not cross examined on that issue. Mr Wood in his evidence said that if the matter had proceeded it would have been heard not before him, but Mr Docherty. Mr Docherty was not called to give evidence before us as to what he would have decided. Whilst we had a view as to the likelihood of what happened on 5 December 2019 we had not been presented with adequate evidence to determine what the penalty would have been, in particular whether or not the claimant would have been dismissed. She would also have had in any event a right of appeal. In light of the lack of

reliable evidence to enable us to form a view as to the likely outcome had there been such a hearing we did not consider that any award should be reduced because of the nature of the conduct on 5 December 2019.

237. We have restricted the award for injury to feelings to the exacerbation caused by the respondent, and for that reason did not consider that it was just and equitable to reduce that or any other part of the award for contribution. Finally we did not consider it just and equitable to reduce the award for the alleged failure by the claimant to lodge a grievance. She did complain about how matters had been handled. The substance of that is at least very close to a grievance, albeit that word was not used, and in any event the claimant was at that time materially unwell such that it would not be just and equitable to reduce the award on that basis.

238. The circumstances also included a long absence, where the end of that absence was not clear during it, such that a decision on what to do was not straightforward. There were both issues of discipline and capability. The respondent appeared to consider that choosing the latter was the less difficult for the employee, but it was not we considered such a binary choice. There required to be factored into the decision the fact, as the respondent accepted latterly, that the claimant was a disabled person. Even if the respondent had sought to progress the disciplinary matter rather than capability it would still have been a reasonable step to allow the therapy to take place. The fundamental issue therefore was the respondent's lack of appreciation of the claimant's disability, despite the clear and obvious signs of that.

239. It is also true that the claimant's absence led to lack of continuity of teaching in the school. That was a concern, but there were ways of managing that both in the short and then longer terms, as Mr Wood accepted. What is also clear is that had the respondent followed the position Mrs Field took on 15 September 2020, suggesting that matters be deferred and not proceed to any form of hearing, the present claim may have been avoided, however.

240. The claimant's many criticisms of Mrs Field were, we consider, not well founded. Mrs Field was someone who both showed sympathy and consideration for the claimant but also sought to support her in responding to the disciplinary investigation and the absences that took place.

241. We have made a declaration, and we considered making a recommendation. The discretion on whether or not to do so was addressed in ***Lycée Français Charles De Gaulle v Delambre UKEAT/0563/10***. That was as we were concerned that obvious indicators of disability were not noted or acted upon by the respondent. A person may be disabled who is not obviously so, for example if off work for less than 12 months as the statutory test includes someone who is expected to be suffering long term adverse effects, to paraphrase the statutory provisions, or someone who may appear on the surface to be well, as the effect of medication or treatment otherwise is discounted for that purpose. The 2019 policy did not appear to take proper account of duties under the 2010 Act. Those duties are mentioned in part, but very briefly and far from comprehensively. No account whatever was taken of someone who was not able to participate because of illness, whereas the 2014 policy referred to addressing someone who was incapacitated, albeit that term was not defined in any way.

242. We concluded that it was not appropriate to make a recommendation formally, but we would suggest that the respondent consider both the terms of its policy on attendance management, and how that policy is operated in practice, with greater care where the employee absent is, or may be, a disabled person.

Conclusion

243. We have held in favour of the claimant to the extent set out above.

244. The 2010 Act imposes statutory duties on employers, which are only possible to act on adequately in this context if it is realised that an

employee is a disabled person under its terms. The respondent failed to do so at that time, despite now acknowledging that it should have done so. That acknowledgement was properly made. There were clear indicators of it. The Tribunal expresses the hope that such a situation is not repeated.

Employment Judge **A Kemp**

Date of Judgement **5 January 2022**

Date sent to parties **5 January 2022**