IN THE EMPLOYMENT TRIBUNAL (SCOTLAND)

5 **Judgment of the Employment Tribunal in Case No: 4106913/2019 Issued Following Final Hearing heard on the Cloud Based Video Platform on 6, 7, 8, 9 and 10 and 20 December 2021, and 11 January 2022 with Deliberation on the 1st and 21st February 2022**

10 **Employment Judge J G d'Inverno**
Tribunal Member Mrs L Brown
Tribunal Member Mr S Larkin

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Mrs J Kerr	**Claimant** **Represented by:** **Mr R Russell, Solicitor**

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Fife Council	**Respondents** **Represented by:** **Ms K Sutherland, Solicitor** **instructed by** **Ms Kirsty McElroy**

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JUDGMENT OF THE TRIBUNAL

The unanimous Judgment of the Employment Tribunal is:

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(First) That the claimant's complaints of Discrimination, in terms of section 21(2) of the Equality Act 2010 ("EqA"), are dismissed on their merits;

(Second) That the Tribunal lacks Jurisdiction, in terms of section 123(1)(a) and or (b) of the EqA, to Consider the claimant's complaints of section 21(2) EqA Discrimination.

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Employment Judge:	**J G d'Inverno**
Date of Judgment:	**27 May 2022**
Date sent to parties:	**30 May 2022**

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I confirm that this is my Judgment in the case of Kerr v Fife Council and that I have signed the Judgment by electronic signature.

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REASONS

1. This case called before a full Tribunal on the Cloud Based Video Platform, on 6, 7, 8, 9 and 10th December 21. That allocation of 5 days proved insufficient due to a combination of factors including the underestimation of the time required for the examination of witnesses, technical difficulties, the taking of necessary breaks to allow for rest and recovery and a contraction of Covid. In the event the hearing extended over an additional two days on 20 December 2021 and 11th January 22 with the Tribunal unable to meet to deliberate until the following month. The Tribunal records at the outset its appreciation of the efforts made by, and conduct of, parties, their representatives and their witnesses in seeking to conduct the hearing expeditiously and proportionately.

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Merits only and Reserved Preliminary Issue of Jurisdiction

2. The Hearing was:-

(a) one fixed to determine the merits of the claims only, with remedy to be dealt with at a subsequent Hearing in the event that one or other of the claims were to succeed; and,

(b) was a Hearing to which the Preliminary Issue of Jurisdiction (by reason of asserted Time Bar) was reserved for determination, on a Proof Before Answer basis.

3. Each party enjoyed the benefit of professional representation; for the claimant Mr Russell, Solicitor and for the respondent Council, Ms Sutherland, Solicitor.

4. At the outset of the Hearing, and of consent of parties' representatives the Tribunal:-

   (a) Allowed additional documents for both claimant and respondent to be received and form part of the Joint Hearing Bundle;

   (b) Allowed an updated "Agreed List of Issues requiring investigation and Determination at the Final Hearing", and which incorporated a number of sub issues of disputed fact together with the reserved Preliminary Issue of Jurisdiction, to be received;

   (c) Allowed an updated Schedule of Loss to be received;

   (d) Of consent of parties, adjusted sitting times across the then allocated 5 days of Hearing, to accommodate the availability of parties and their witnesses.

Sources of Documentary and Oral Evidence

5. In compliance with the Tribunal's Direction, parties lodged a Joint Bundle extending to some 407 pages, including additional documents lodged by each party at the commencement of the Hearing, and to some of which reference was made in the course of evidence and submissions.

6. The claimant gave evidence on her own behalf, on affirmation.

For the respondent the Tribunal heard evidence from:

- Ms Shelagh McLean the decision taker in relation to the request for reclassification (extension) of contractual sick pay allowance, who gave her evidence on oath and

- Ms Heidi Reid Head Teacher and the claimant's Line Manager who gave her evidence on oath

- Ms Sarah Else Education Manager who succeeded Heidi Reid, during a period of Mrs Reid's absence, in managing the claimant's absence, and who gave her evidence on oath

"Working Pattern" and "Shift Pattern"

7. The claimant's first complaint of discrimination in terms of section 21(2) of the Equality Act 2010 ("EqA"), by reason of asserted failure in a duty to make "adjustments" and said to arise in terms of section 20 of the Act, focused upon:-

   (a) the timing of the respondents making permanent her reduced working hours; and,

   (b) upon the circumstances of their facilitating the claimant's working of a specific shift pattern desired by her, and including its subsequent temporary substitution by another shift pattern.

8. From its understanding of the evidence led before it, the term "working pattern", used in the technical sense which is reflected in the respondent's formal policies, is a reference to the number of hours worked by an employee teacher being a reference to the 35 hours per week worked by a normal full time employee of the respondents, or to some lesser variation thereof. The term "shift pattern" on the other hand, is the term which properly describes the particular hours and days which are worked, on a recurring basis, by a particular employee within an individual work pattern; that is, by an employee who is working either a full time 35 hour week or some part time variation of those full time hours.

9. In the course of oral evidence, and variously in the pleadings and in parts of the Agreed List of Issues, the term "working pattern" was used on occasions to describe both of the above.

10. With a view to avoiding confusion, the Tribunal, in this Note of Reasons, endeavours to use the terms "working pattern" and "shift pattern" according to them the meanings set out at paragraph 8 above.

11. The following Agreed List of Issues and sub issues of fact was lodged by parties' representatives in the course of Case Management Discussion conducted at the commencement of the Hearing and confirmed by them, at the Tribunal's request, to be the Issues requiring determination at the Hearing; and as further specifying the PCP and substantial disadvantage, given notice of as relied upon by the claimant, for the purposes of both of her complaints of section 20(3) EqA.

12. At the outset of the Hearing parties jointly tendered and the Tribunal allowed to be received the following:

"Agreed List of Issues Requiring Determination at Final Hearing
Failure to make reasonable adjustments – section 20 of the Equality Act 2010

1-4 below is in respect of each of the two reasonable adjustments sought.

1 Was the Claimant subject to the following provision, criterion or practice (PCP): "*the requirement to work the specific shift pattern expected of the Claimant/a teacher*" for any period? If she was, what was this period?

2 If the Claimant was subject to the PCP as defined for any period, did that PCP place her at a substantial disadvantage, that disadvantage being defined as the increased risk of her being unable to perform her contractual duties of employment on account of ill health arising from the PCP, and by extension the increased risk of her being dismissed or otherwise having her employment terminated on grounds of non-performance/capability, as compared with persons who do not share the Claimant's disability of Parkinson's Disease?

3 In the event the Respondent had the requisite knowledge, did it take such steps as it was reasonable to have taken to avoid the disadvantage? Namely was it a reasonable step to put in place the working pattern sought by the Claimant in August 2017 (articulated in paragraph 8(i) of the Claimant's further and better particulars on page 92 of the joint bundle) and/or to re-classify her sick pay in November 2018 with the result that she continued to receive full pay throughout her absence?

3.1 Was there a point in time when nothing could be done to support the Claimant's return to work? If there was such a point in time, when was it?

Working Pattern

3.2 Was there a reasonable basis for Ms Reid to change the working pattern in August 2017?

3.3 Was the working pattern in place for the period August 2016 to June 2017 having a detrimental impact on the pupils?

3.4 Would changing the shift pattern have a potentially positive impact on the behavioural issues with the pupils?

3.5 Was it reasonable to change the shift pattern in August 2017 when the Claimant was teaching a different class with different issues from the class taught in the previous year?

3.6 Did Ms Reid consider the Claimant's disability when making the decision to change the working pattern in August 2017?

3.7 Was the decision and rationale of Ms Reid in relation to removing the shift pattern contradicted by the subsequent trials she agreed to in relation to
5 the shift pattern contended for?

3.8 Was the working pattern put in place in August 2017 designed in part to alleviate any disadvantage the Claimant might experience because of her disability?

3.9 It is agreed that for the period February 2018 up to and including June
10 2018 the working pattern that the Claimant contends is a reasonable adjustment was in place and that it was in place for the period that the Claimant's temporary reduction in hours was in place (until 29 June 2018).

3.9.1 Does the fact that the working pattern requested had not been made permanent at this time mean that such steps as it is reasonable to have
15 taken to avoid the disadvantage had not been taken?

3.9.2 In particular, for this period was the Claimant subject to the substantial disadvantage as defined above in paragraph 2?

3.10 What is the relevance, if any, of Ms Reid writing to parents and pupils in June 2018 regarding the next academic year with the Claimant not
20 allocated to any class?

3.11 Was the Claimant's flexible working request made on 9 May 2018 for her hours to be reduced permanently and for her working pattern to be made permanent accepted for a trial period from August 2018 until October 2018?

25 3.11.1 Again, does the fact that the working pattern would be on a trial basis until October 2018 mean that such steps as it is reasonable to have taken to avoid the disadvantage had not been taken?

3.11.2 Had the working pattern in place since February 2018 had a detrimental impact on the pupils in the class?

3.11.3 Was the proposed change in job share partner for the period August 2018 until October 2018 a potentially material change to the way in which the working pattern would work for the children in the class?

3.11.4 What was the Respondent planning on doing with the teachers allocated to classes for the academic year commencing August 2018?

3.11.5 Would the disadvantage as defined in paragraph 2 above have been alleviated for the period August 2018 to October 2018?

3.12 Was this period of one term and four working weeks a reasonable period for a trial?

3.13 Having regard to the circumstances, was the adjustment made based on the evidence available?

3.14 From 4 September 2018 did the Respondent put in place the reasonable adjustment contended for by the Claimant on a permanent basis, subject to the Claimant's own health needs?

3.15 For the period 4 September 2018 until 26 June 2019 did the Respondent take reasonable steps to support the Claimant to return to work on the working pattern she wanted?

3.16 For the period August 2017 to 26 June 2019 what reasonable adjustments, if any, were in place for the Claimant?

3.17 Why did the Claimant not return to work for the period 4 September 2018 until 26 June 2019?

3.18 What was the cause of the Claimant's absence between 4th September 2018 and 26th June 2019?

3.19 Between 4th September 2018 and 26th June 2019 what specific schools were identified for the Claimant on the shift pattern contended for?

3.20 Between 4 September 2018 and 26 June 2019 were there any schools at which the Claimant could have been placed on a permanent basis with the working pattern identified?

3.21 Was the Respondent still looking at options to make the reasonable adjustment contended for regarding the shift pattern up to 26th June 2019?

3.22 Was the Respondent's actions from September 2018 until June 26th 2019 enough to comply with any duty to make a reasonable adjustment regarding the shift pattern, if so required?

Re-classification of sick pay

3.23 Would paying the Claimant full sick pay for the period of her absence have alleviated the disadvantage as defined at paragraph 2 above?

3.24 Was the decision originally made to not re-classify the Claimant's pay in September 2018?

3.25 Did the Claimant's Trade Union representative have a further discussion with Ms McLean in November 2018 regarding the Claimant's sick pay?

3.26 Was the Respondent's decision to not exercise its discretion under the SNCT Handbook Conditions of Service to extend the Claimant's sick pay reasonable?

3.26.1 In particular, was this decision made in order to focus on facilitating the Claimant's return to work?

3.26.2 If it was, was it reasonable for the Respondent to consider that this should be the primary aim and that continuing to pay the Claimant full sick pay did not contribute to that aim?

3.26.3 Could the Respondent have focussed on facilitating the return to work and exercised its discretion regarding sick pay at the same time?

3.27 Why did the Claimant not return to work from November 2018?

Reserved Preliminary Issue: Time Bar – section 123 of the Equality Act 2010

4 If there was a failure to make the reasonable adjustments contended for, when did the Respondent positively decide to not make each of these adjustments (s.123 (3)(b))?

5 In the absence of evidence about such a decision, did the Respondent do an act inconsistent with putting in place the working pattern or re-classifying the Claimant's pay and if it did, when, alternatively, when did the period expire within which the Respondent might reasonably have been expected to make the reasonable adjustments (s. 123(4))?

5.1 In so far as the working pattern, the issues of fact determined with regards to the substantive claim of a failure to make a reasonable adjustment are relevant to the issue of time bar.

5.2 Was the decision regarding the decision made about the Claimant's sick pay communicated to the Claimant and if it was, when was it so communicated?

6 Was the Claimant's claim submitted within three months (less one day) of the date(s) which have been determined by considering the response to questions at 5&6 above and taking into account any operation of early ACAS conciliation (s.123(1)(a))?

7 If not, would it be just and equitable to extend time for the Claimant to submit her claim (s.123(1)(b))?

7.1 The length of and reason for any delay.

7.2 What is the relative prejudice that will be caused to the Claimant by not extending time and to the Respondent if time was extended?

Summary of Submissions for the Claimant

In the course of his submissions, the claimant's representative made reference to and relied upon the following statutory provisions and case authorities

Statutory Provisions

The Equality Act 2010 sections;- 20, 21, 123 (including sections 123(3) and (4))
The Limitation Act 1980 section 33
The Judgment of the Employment Appeal Tribunal in the instant case (J-65-74 No 2 ***Royal Bank of Scotland v Ashton*** [2011] ICR 632 EAT
5 ***Environment Agency v Rowan*** [2008] ICR 218
Fareham College Corporation v Walters [2009] IRLR 991, EAT
Archibald v Fife Council [2004] UKHL paragraph 32
Abertawe Health Board v Morgan [2018] ICR 1194 CA
British Coal Corporation v Keeble [1997] IRLR 336
10 ***DPP v Marshall*** [1998] IRLR 494
Robertson v Bexley Heath Community Centre [2003] IRLR 434 CA

Credibility and Reliability of Witnesses

15 13. The claimant's representative urged the Tribunal to regard the claimant as a wholly credible and reliable witness who had given her evidence against the difficulty of contending with her medical condition. He submitted that any issues upon which her evidence may have appeared to be lacking in reliability, consistency or credibility should be accounted for as being due to 20 misunderstanding and he invited the Tribunal to prefer the claimant's evidence in all instances where it was at odds with that of the respondent's witnesses on any material matter.

14. Turning to the respondent's witnesses, the claimant's representative invited 25 the Tribunal to disregard all of the evidence of Shelagh McLean, in relation to the meeting at which she asserts she communicated her positive decision not to reclassify the claimant's sick pay allowance, either as lacking in credibility or as being unreliable. She had stated that she made that communication to the claimant's Trade Union representative, Pamela Stewart, at their routine 30 September meeting but could only confirm that that meeting took place some time in the latter part of September, she could not confirm the precise date. Given that Shelagh McLean had remained firm in cross examination that she had communicated her refusal of the request at the September meeting, he

invited the Tribunal to regard her as being deliberately untruthful on that point and, on that basis, to reject her evidence on all matters.

15. In relation to the evidence of Sarah Else the claimant's representative submitted that Mrs Else could be seen to have made certain concessions both in the course of her examination in chief and in cross examination. On that basis he invited the Tribunal to reject her evidence which was to the effect that although she had intended to discuss particular potential work placements with the claimant at the absence management meeting with her about which the claimant has complained, she had not done so because at the outset of the meeting the claimant had stated that she was not yet fit to return to work.

16. In relation to the respondent's principal witness Mrs Heidi Reid, the claimant's representative, invited the Tribunal to regard her as a witness who was neither credible nor reliable, and in particular, to reject her position that from her perspective her professional relationship with the claimant had not deteriorated despite the difficulties which she perceived were arising in the claimant's classroom. On that basis he invited the Tribunal to reject her evidence insofar as it might conflict, on any material matter, with that of the claimant.

17. The claimant's representative reminded the Tribunal:-

    (a) That it was a matter of concession by the respondent in their amended response at page 109 of the Bundle (J-109) that the claimant was a person possessing the protected characteristic of Disability, and further that the respondent had had knowledge of the same as of the 16th of August 2017.

    (b) That the claimant's complaints related only to the period from 16th August 2017 forward; that date being the date upon which in the claimant's assertion the PCP identified and complained of was first applied to her with the effect of placing her at a

substantial disadvantage in comparison with persons not suffering from Parkinson's Disease;

(c) Drew the Tribunal's attention to the terms and mechanisms of section 20 of the EqA reminding it that the section imposed a positive duty upon employers to make "reasonable adjustments in the face of substantial disadvantage suffered by disabled persons which arose from an applied PCP.

(d) That the duty arises when the disabled person is placed at a substantial disadvantage by the application, of in this case, a provision, criterion or practice;

(e) That a failure to comply with the duty constitutes discrimination in terms of section 21(2) of the EqA and, under reference to the terms of section 20(3) that the duty requires an employer to take "*such steps as is reasonable to avoid the disadvantage …*" where the PCP puts the disabled person at a comparative substantial disadvantage.

18. Under reference to the case of **Environment Agency v Rowan** [2008] ICR 218, the claimant's representative invited the Tribunal to take a sequential approach to the issue of reasonable adjustments bearing in mind the words of the statute. He confirmed that the PCP relied upon, was that set out at paragraph 8 of the recast pleadings (J-91) namely, the requirement, applied to amongst others the claimant, "*to work the specific shift pattern expected of the "claimant/a teacher*"; and that the substantial disadvantage was again as set out in that section of the pleadings namely "*the substantial disadvantage is the increased risk of being unable to perform her contractual duties of employment on account of ill health arising from the PCP, and the increased risk of being dismissed on the grounds of capability.*"

19. Under reference to **Fareham College Corporation v Walters** [2009] IRLR 991, EAT, the claimant's representative submitted that in reasonable

adjustment claims involving non-disabled comparators it is not necessary to identify a class or group of non-disabled comparators as in some cases the facts will speak for themselves and thus, in the instant case, the relevant group for comparison purposes in the instant case were teacher employees of the respondent who were not disabled or suffering from the claimant's disability and who were able to attend work on a full time shift pattern.

20. As was reflected in the Agreed List of Issues, he accepted the respondent's representative's contention that the requirement identified and the PCP articulated by the claimant was for a teacher to work a weekly 35 hour shift pattern on a full time basis. He submitted that the duty incumbent upon the respondent engaged:-

    (a) a requirement not only to reduce the claimant's hours to 50% Full Time Equivalent, which he accepted had been done with effect from 14th August 2016 albeit not at that time on a permanent basis, but also,

    (b) a requirement to allow the claimant to work only on the shift pattern which she came to regard and define as her preferred shift pattern, with effect from the date upon which she communicated to her Head Teacher that she did not wish that particular shift pattern, upon which she had been working since the reduction in her hours to 50% FTE, to be changed to any other shift pattern.

21. It was on the above date, submitted the claimant's representative, namely on 16 August 2017, that the duty which the claimant asserts was encumbent upon the respondent and in which they had failed, arose for the purposes of her complaint. It was on that date also, having advised the claimant of her intention to implement changes to the shift pattern and having understood the claimant to have clearly communicated that she did not want any changes to the pattern to be made, that the Head Teacher took the positive decision not to leave the claimant's preferred shift pattern unaltered and thus fell to be

regarded, for the purposes of section 123(b) and in relation to shift pattern, as having first failed in the section 20(3) duty. That failure had subsisted, in his primary submission, until 26 June 2019, on which date the duty fell away, which failing and in the alternative, until 13 February 2018 when the preferred shift pattern was restored, albeit not "*without any qualification in time or trial*", i.e. not on what was declared, at that time, to be on a permanent basis.

22. Under reference to **Archibald v Fife Council** [2004] UKHL 32 he submitted that complying with the duty may entail a measure of positive discrimination, in the sense that employers are required to take steps to help disabled people which they are not required to take for others.

23. Under reference to the EHRC Code of Practice at paragraph 6.3, he submitted that "*what is a reasonable step for an employer to take"* will depend on all the circumstances of each individual case; and, at 6.28, that the following factors should be taken into account:-

    (a) Whether taking any particular steps would be effective in preventing the substantial disadvantage

    (b) The financial and other costs of making the adjustment and the extent of any disruption caused,

    (c) The extent of the employer's financial or other resource

    (d) The availability to the employer of financial or other assistance to help make an adjustment and the type and size of the employer

    (e) The extent of any disruption associated with the steps.

24. The claimant's representative went on to invite the Tribunal to hold that the evidence presented, including in particular the evidence of the claimant, supported Findings in Fact that;

(a) agreeing not to change the claimant's shift pattern from, and or having changed it restoring to the claimant her preferred shift pattern, would have been effective in avoiding the specified substantial disadvantage.

(b) That the fact that the adjustment which had been in place for over a year, had thereafter been reintroduced subject to a trial period, and, had ultimately been put in place without qualification as to time of trial, effectively equated to a Finding in Fact that, as at 16 August 2017, that it had been, and should have continued throughout the period complained of to be, not only possible but also practicable to make the adjustment in the claimant's own school; and, after she had indicated that she would not return to work at that school because of her lack of trust and confidence in the Head Teacher,

(c) that it was or should have been both possible and practicable to make the adjustment in another school; that is to say, to find another school, the location of which was acceptable to the claimant which could not only accommodate her 50% FTE hours but could also accommodate her preferred shift pattern.

(d) In relation to financial and other costs he submitted that no evidence putting that matter in issue by the respondents had been put before the Tribunal and further, that the respondent being a large public sector employer should be regarded as having access to sufficient financial resource for that not to be a matter which prevented the putting in place of the adjustment.

25. In relation to the factor of "the extent of any disruption caused" the claimant's representative submitted that the Tribunal should reject the evidence of the

Head Teacher Heidi Reid, as to the adverse impact upon the pupils in the claimant's class, which she said she had observed and which, in her professional opinion, she had consistently asserted, was associated with the claimant's preferred shift pattern. He submitted that the Head Teacher's asserted professional opinion should not be viewed as sufficient evidence in that regard and should be rejected; and, on those grounds, that the claimant's expressed view that there were no such adverse impacts occurring, be accepted.

26. He further submitted that the fact that the respondent's Head Teacher had, despite her expressed concerns, agreed to reinstate and had reinstated the claimant's preferred shift pattern evidenced the fact that her expressed concerns were not genuine and were not founded in fact.

27. The claimant's representative confirmed his acceptance that the period prior to 16th August 2017 was not founded upon by the claimant as one in which any breach of duty had occurred. Further, his acceptance that prior to that date the respondents had made adjustment to the PCP both in respect of reducing the claimant's hours to those requested by her and in respect of allowing her to work the particular shift pattern which, as at the 16th of August 2017, she subsequently identified as her preferred shift pattern, and had done so through the mechanism of granting the claimant's flexible working request. He reminded the Tribunal, however, that the duty under section 20(3) fell to be regarded as arising independently of any flexible working request.

28. The claimant's representative submitted that in the instant case the starting point should be the extent to which the substantial disadvantage relied upon and at which the claimant was placed, could have been avoided by the contended for adjustment. He submitted that in the claimant's perspective, explained by her in the course of her evidence, the onset of the disadvantage coincided with the first alteration to the shift pattern made by the respondent's Head Teacher. He invited the Tribunal to accept that evidence and infer from the coincidence that the former was caused by the latter, to further infer that

the putting back in place of the preferred shift pattern would therefore avoid that disadvantage, and to conclude and to find in fact, on that basis, that requiring the claimant to work any shift pattern other than her preferred shift pattern, constituted a breach of the section 20(3) EqA duty.

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29. The claimant's representative went on to submit that the question for the Tribunal was accordingly:-

(a) whether or not taking the step of making available to the claimant, of new, her preferred shift pattern and requiring her to work only that shift pattern and no other, either in St Leonard's Primary School which failing and in the alternative after the claimant had stated that she would not return to St Leonard's for the separate reason of no longer having confidence in the Head Teacher, at another school within the geographic location specified by her and which was otherwise acceptable to her, was a step,

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(b) "*as it is* [sic was] *reasonable to have to take to avoid the disadvantage.*"

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30. He further invited the Tribunal to infer and thus find:-

(a) That the change in shift pattern introduced by the respondent in August of 2017 directly and principally caused the claimant's absence which commenced in September 2017 and further, that its non reinstatement in the period between September 2017 and the date on which it was reinstated, 13th February 2018, was the principal cause of the claimant's absence in that period;

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(b) that the failure to declare the restored preferred shift pattern to be permanent, directly and principally caused of the claimant's

subsequent absence in the period 13 August 2018 to the date of her ill health retirement.

(c) He invited the Tribunal to reject, as untruthful, the evidence of the Head Teacher, Heidi Reid, that in her professional opinion the claimant's preferred shift pattern was having an adverse impact on the pupils in the class, which she Heidi Reid had observed, and, on that basis, to dismiss the respondent's contention, and Heidi Reid's evidence, that in proposing and in deciding to change and in changing the shift pattern in August 2017, Heidi Reid had sought to substitute an alternative shift pattern which in respect of the matters identified by the claimant and associated with her disability, was a shift pattern which also had the potential to avoid the disadvantage founded upon, while simultaneously having the potential to lessen the adverse impact upon the pupils which, in her perception and professional opinion the preferred shift pattern was having.

(d) Read short, the proposition contended for by the claimant's representative, was that in the particular circumstances it was only the claimant's preferred shift pattern and no other shift pattern which had or could have the potential to avoid the disadvantage;

(e) That the respondents, per their Head Teacher, were not entitled when seeking to take a step as was reasonable to have to take to avoid the disadvantage, to consider whether, and to conclude that that, it could also be achieved through a varied shift pattern which simultaneously had the potential to lessen the perceived adverse impact on pupils; and

(f) In their so doing, the claimant's representative submitted, the respondent should be seen as prioritising the interests of the

business over those of the claimant such as to result in the step failing to discharge the section 20(3) duty.

31. Following the claimant's Trade Union representative's intimation, on 19th October 2018 (J-284) that the claimant would not return to St Leonard's, and notwithstanding the same, the respondent's Manager, Sarah Else, had continued to meet with the claimant and her Trade Union representative, on the 1st November 2018, and the respondents began to address the question of whether there could be identified another school, at which the claimant when fit, would be prepared to return to work and which could accommodate not only her 50% FTE working pattern but also the now identified "preferred shift pattern", which had been restored to her on 13th February 2018 at St Leonard's and which had been made permanent on 4th September 2018.

32. The above, submitted the claimant's representative, constituted recognition and acceptance by the respondents that they continued to be under a section 20(3) duty, albeit to be given effect to in a school other than St Leonard's to which the claimant was no longer prepared to return even when fit (J284). He submitted that as at the 26th of June 2019, (the date of the claimant's decision to opt for ill health retirement), the respondent had been unable to identify and positively confirm to the claimant a specific school, within the geographic area specified by her and which otherwise met the claimant's stipulated requirements such that it was a school to which she was prepared to return when fit, and which could also accommodate both her 50% FTE working pattern and, on a permanent basis guaranteed never to be changed, her specific preferred shift pattern. That failure to identify a specific school which met all of the claimant's stipulated requirements, constituted in his submission, a failure of the section 20(3) duty on the part of the respondents, as at the 26th of June 2019, and did so notwithstanding the fact that the claimant was never fit to return to work.

33. Under reference to **Abertawe Health Board v Morgan** [2018] ICR 1194 per Leggatt LJ at paragraph 14 and the analysis of section 123(3) and (4)(b) of EqA 2010 set out therein, he submitted:-

(a) that the respondent's failure in relation to shift pattern, was an omission of the respondents which constituted conduct extending over a period, and which fell to be treated as done at the end of that period, in terms of section 123(3)(a) of the Act,

(b) that in terms of section 123(b) the respondent's failure in the duty was to be treated as occurring when the person in question decided on it, on the respondent's behalf,

(c) that in terms of section 123(4)(b) that there was insufficient evidence of when the respondents had decided on the matter and that therefore

(d) the end of the period fell to be seen as occurring on the expiry of the period in which the respondent might reasonably have been expected to put the adjustment in place;

(e) that date which in the claimant's representative's submission fell to be assessed from the claimant's point of view having regard to what was known or what ought reasonably to have been known by the claimant, he invited the Tribunal to hold was on the 26th of June 2019 (the date of the claimant's deciding to opt for ill health retirement).

Jurisdiction (Time Bar)

34. In relation to the question of jurisdiction, he invited the Tribunal to hold that the statutory prescriptive period in respect of the right to complain of the section 20(3) Breach of Duty, in respect of failure to adjust shift pattern, only began to run on the 26th of June 2019 and that thus, the claimant's claim, first presented on the 14th of May 2019 was timeously presented and that the Tribunal had jurisdiction to consider it.

Failure to Reclassify the Claimant's Contractual Sick Pay Allowance

35. Under reference to a Judgment of the EAT in this case, per the Honourable Lord Fairley at paragraphs 3.2 and 3.3 of the Judgment, (J-82 J-83), the claimant's representative reminded the Tribunal that it was necessary that the Tribunal make Findings in Fact not only about when the duty arose and when the breach of duty first occurred but also, in the case of conduct extending over a period, that it make Findings in Fact about when that period ended and thus when the statutory limitation period began to run.

36. The claimant's representative invited the Tribunal to accept as truthful and reliable the claimant's evidence that she herself was unaware of any decision having been taken by the respondent in relation to the request, made on her behalf by her Trade Union representative on 3 September 2018, for reclassification (extension) of her sick pay allowance.

37. He invited the Tribunal to reject as untruthful the evidence of Shelagh McLean which had been to the effect that she had positively decided not to make the adjustment and had communicated that decision to the claimant's Trade Union representative, in relation to the claimant and others, in the course of her scheduled routine meeting between her and Pamela Stewart which took place in the latter part of September 2020.

38. Ms McLean had remained adamant in cross examination that she had not only considered and taken a decision to refuse the request communicated to her by Pamela Stewart in her email of 3rd September 2018 (J-266), but having considered it, had decided to refuse it and had communicated that refusal, to Pamela Stewart orally at her meeting with her in the latter part of September 2018. Ms McLean however had stated that she had not recorded that communication in writing that not being her normal practice, nor could she confirm the precise date of meeting. The claimant's representative invited the Tribunal to hold that Shelagh McLean was being knowingly

untruthful in giving that unsatisfactory evidence and he invited the Tribunal to reject it on that ground.

39. In what he submitted would, in consequence, be the absence of any direct evidence as to whether or not the respondent had decided not to make adjustment to the classification of the claimant's sick pay allowance, and of any direct evidence, let it be assumed, they had so decided, as to whether they had communicated that decision to the claimant's representative;

(a) he invited the Tribunal to infer from the fact that Pauline Stewart had sent an email with the heading "Awaiting a Decision" to Shelagh McLean on 5th November 2018 (at about or after the time the claimant moved to half pay) and making reference to the request of "4th September", that a positive decision had neither been taken nor communicated by the respondent to the claimant's representative.

(b) He submitted, in that circumstance, that the statutory prescriptive period fell to be assessed, in terms of section 123(4), and as posited in the EAT Judgment at paragraph 3, as probably occurring, in terms of section 123(4)(a), at the point of reduction of the claimant's pay to nil by the respondents on a date occurring in the first half of February 2019 and thus,

(c) that that complaint of breach of section 20(3) duty, in relation to that failure, and first presented in the initiating Application ET1 on 15th May 2019 was presented within the initial prescriptive period and that thus the Tribunal had jurisdiction to consider it.

40. Although recognising that an obligation to make relevant and reasonable adjustments in furtherance of the section 20(3) EqA duty arose independently

of the respondent's sick pay policy, the claimant's representative argued specifically that the Tribunal

(a) should infer and thereafter find in fact that the claimant's continuing absence from work from 13th August 2018 until her deciding to seek ill health retirement, was expressly caused by the respondent failing to make permanent (i.e. with a guarantee of no future variation), the restoration of her preferred shift pattern, which had been restored to her with effect from 13th February 2018 and, let it be assumed that the Tribunal so found in fact,

(b) that it followed in terms of paragraph 6.20 of the respondent's own policy (J-115) that the claimant's absence should be regarded as being due to sickness or disablement as a result of a work related injury or illness and, accordingly,

(c) that the respondents should, in terms of their own policy, have allocated to the claimant an entirely separate and additional sick pay allowance, something which they had omitted to do at any point during her employment.

41. The claimant's representative further submitted that in terms of paragraph 6.36 of their own policy (J-116) "Long Term Medical Conditions" the respondents were under an obligation, in light of the claimant's diagnosed condition of Parkinson's Disease, to give careful consideration to extending the period of sickness allowance particularly when the prognosis is that the claimant will be able to return to work, or where the illness will bring the employee under the terms of the Equality Act 2010.

42. it was not in dispute between the parties that since August of 2017 the respondent had accepted that the claimant was a disabled person in terms of section 6 of the Act, by reason of her Parkinson's Disease.

43. In those circumstances and in terms of paragraph 6.36 of the Policy, the respondent's Manager Shelagh McLean, let it be assumed that she did consider, and decide to refuse, the claimant's representative's application of 3rd September 2018 for reclassification of the claimant's contractual sick pay, should have obtained evidence from the employee's "medical advisor" to help the Council in making its decision. In the claimant's representative's submission reliance upon the claimant's Fit Notes fell short of what was meant by obtaining evidence from the employee's medical advisor, and would not amount to a discharge of the respondent's obligations under their own policy.

44. By extension he submitted reaching a decision to refuse such an application for reclassification (effectively an extension of the period of sickness allowance) without first obtaining such additional medical evidence from the claimant's GP was insufficient to discharge the section 20(3) duty.

45. The claimant's representative returned to the Preliminary Issue of Time Bar reiterating his earlier made submissions regarding the nature of the respondent's failure in both instances. He submitted that in each instance these were omissions, in the context of which the provisions of sections 123(3) and or 123(4) of the Equality Act 2010 fell to be applied in accordance with the explanation of the same set out by the Honourable Lord Fairlie in the Discussion and Disposal section of the EAT Judgment.

46. He submitted, let it be assumed that to discharge their section 20(3) duty they required not only to confirm the adjustments restoring the claimant's preferred shift pattern but also to make it permanent, that the Tribunal should reject the respondent's contention, that that date of compliance occurred, at the latest, on the 4th of September 2018 when the claimant was unequivocally informed by the respondent's Sarah Else that the adjustment already put in place and confirmed would continue unaltered and unvaried going forward.

47. In the above regard he submitted that "words are not enough", that is to say that an undertaking about the future could not and or did not in the circumstances, constitute compliance with the duty.

48. After the claimant had advised the respondents that she would not return to work at St Leonard's, even when fit to, because of the separate issue of lack of trust in the Head Teacher, the respondents had then sought to identify another school which met with the claimant's stipulated requirements, which was within the geographic area that she had identified, and which could accommodate not only her 50% FTE hours but also could accommodate her preferred shift pattern. He submitted that the fact that the respondents had continued to act in that way should lead the Tribunal to the conclusion that they had not, and further that they accepted that they had not yet, complied with the section 20(3) duty. In the period intervening between the 4th of September 18 and the claimant's ill health retirement they had continued in their attempts to find an appropriate alternative school to which the claimant might return but had failed to confirm to the claimant, at any point in that period, that they had identified a specific school which met all of her requirements and to which, if and when she became fit to, she could return to work. Their failure in that regard, he submitted, constituted a continuing failure of their section 20 (duty) which did not cease until (26 June 2019).

49. On the above basis he invited the Tribunal to conclude that the claimant's complaint of section 20(3) Breach of Duty in relation to adjusting the claimant's shift pattern and, on similar grounds in relation to their failure to reclassify her contractual sick pay, had been timeously presented on the 15th of May 2019.

50. In the alternative and, let it be assumed that the Tribunal were to hold that it lacked jurisdiction in terms of section 123(1)(a) of the 2010 Act to consider the complaints he submitted that the Tribunal should extend the relevant limitation period on the basis of holding that the period within which the claim was submitted fell to be regarded as "*such other period as the Tribunal thought was just and equitable in terms of section 123(1)(b) of the Act*".

51. Under reference to the cases of **British Coal Corporation v Keeble** [1997] IRLR 336 and **DPP v Marshall** [1998] IRLR 494 he submitted that the Tribunal had a wide discretion to extend time and that the approach of the Courts in England and Wales to section 33 of the English Limitation Act 1980, although not binding upon Tribunals, was one that might usefully be adopted by them.

52. Section 33 of the 1980 Act required Courts to consider factors relevant to the prejudice that each party would suffer if the extension were to be allowed and which included:-

- The length of any delay

- The extent to which the cogency of evidence was likely to be impacted

- The extent to which the party sued had cooperated with the requests for information

- The promptness of which the claimant had acted once they knew of the possibility of taking action; and the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action

53. He submitted that if the Tribunal found the claims to be time barred but otherwise established on their merits;

(a) the claimant would be denied a finding of discrimination whereby she was treated extremely poorly over a sustained period.

(b) Despite the passage of time (including the EAT appeal) there had been no obvious or apparent impact upon the preparation

for or the conduct of the Hearing and or the cogency of evidence [in the Discussion section refer to the criticisms advanced by the claimant's representative of the reliability (cogency) of evidence given by the respondent's witnesses or some of the evidence given by the respondent's witnesses.]

(c) While accepting that the Tribunal would be concerned to know why the claims had been submitted late, the two key issues in that regard were the claimant's ill health and her belief that the discrimination was ongoing. In relation to the claimant's health he relied upon the various documents (elements of medical evidence/reports contained within the Bundle).

(d) He invited the Tribunal, if necessary, to exercise what he described as its wide ranging discretion in favour of the claimant due to her significant ill health over a sustained period and that it would be just and equitable to do so in the circumstances.

(e) He submitted that the Tribunal should do so even if it found that the primary statutory limitation period expired in September of 2018 that is on the 4th and not later than 30th of September 2018, respectively in relation to the failure to adjust the claimant's shift pattern and the failure to reclassify (extend) the claimant's contractual sick pay entitlement.

(f) On a balancing of injustice test there would be greater prejudice to the claimant than to the respondent.

54. The claimant's representative made no reference in submission on this point to the fact that the claimant had had the benefit of both Trade Union and professional legal advice in the periods both prior to and after the expiry of the time limits (let it be assumed that they expired in September 2018) including clear advice that time limits were expiring and that the instructed

solicitors did not intend to raise proceedings, or as to the account, if any, to be taken of that factor.

55. Under reference to **Robertson v Bexley Heath Community Centre** [2003] IRLR 434 CA he accepted that while it was generally recognised that a Tribunal had a wide discretion to extend time,

- time limits were to be strictly exercised in employment cases,

- that there was no presumption in favour of an extension, and that the onus of proving facts and circumstances which justify the Tribunal's exercising its discretion in favour of extension sitting with the claimant he invited the Tribunal to hold that the claimant had satisfied that requirement on the evidence presented.

56. Returning to the issue of failure to reclassify the claimant's contractual pay entitlement, the claimant's representative invited the Tribunal to hold that that omission, (failure), fell to be regarded as continuing as at the date of first presentation of the claim on 15th May 2019, he so submitted on the basis that the Tribunal should reject as untruthful the evidence of Shelagh McLean that she had made and had communicated the decision refusing the adjustment to the claimant's appointed representative in the latter part of September 2018; but, if the Tribunal was against him in that regard to exercise its discretion on the same grounds as that prayed in aid of the shift pattern adjustment.

57. He concluded by inviting the Tribunal to hold that it had jurisdiction to consider and to uphold the 2 complaints of section 20(3) Failure in Duty.

Summary of Submissions for the Respondent

58. The respondent's representative invited the Tribunal to regard the respondent's witnesses as having given clear cogent evidence and in relation to relevant matters where it was in conflict with the evidence given by the claimant to prefer that of the respondent's witnesses.

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(a) She invited the Tribunal to reject the claimant's representative's contention that Mrs MacLean had been stuttering when giving her evidence and directing the Tribunal to the witness's explanation that she was suffering from COVID together with the fact that the events she was speaking to had taken place some 3 years earlier. She invited the Tribunal to regard Mrs MacLean as having been honest in her responses about that which she could remember.

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(b) She submitted that Sarah Else should be regarded as having honestly answered the questions put to her and pointed out that she had not stated that she had discussed any of the particular school options which she referred to with the claimant but rather that she had definitely considered them. Her approach was led by the claimant's communicated assessment of her own health and, at the particular absence review meeting referred to, the claimant had commenced by stating that she was not yet fit to return to work. Mrs Else's explanation in evidence, which she invited the Tribunal to accept as genuine, had been that in those circumstances no practical purpose would be served by mentioning the particular schools which at that point in time presented possible opportunities since there was no mechanism whereby those particular opportunities could be preserved as available until such indeterminate time in the future when the claimant may be fit to return to work.

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(c) She invited the Tribunal to reject the claimant's representative's assertion that Heidi Reid had given her evidence in a "robotic" manner. It was not incredible that she considered that she still had a reasonable professional relationship with the claimant, notwithstanding the fact that the claimant's position in evidence was that for her part she, the claimant, did not consider that to be the position.

(d) Heidi Reid did try to meet with the claimant regarding her second flexible working request in order to discuss it. She had stated expressly in her evidence "*I was still going to arrange a meeting with them to discuss their flexible working requests*".

(e) Regarding when in particular and on how many occasions she had visited the classroom of the job sharing teachers she had explained, that having left the school some time earlier to take up another post she had returned when asked to with a view to trying to find her records of those visits, which she was clear she had made, but despite her best efforts had been unable to find those records amongst other papers which she had left in the school at the time of her departure. She had nevertheless given clear evidence, from which she did not depart under cross examination, that she had made visits, sufficient in type and in number to inform her clearly stated professional judgment and opinion that the claimant's shift pattern of preference was having an adverse impact upon the pupils and was a contributing factor to the subsisting behaviour issues being experienced in the class.

59. Turning to the claimant's evidence the respondent's representative submitted that throughout it there was a recurring reluctance on the part of the claimant

to answer particular questions and the impression given was of someone who was being evasive particularly, in the course of cross examination during which there had also been a number of occasions upon which the claimant had contradicted her own earlier evidence:-

(a) At the meeting in January of 2017 the claimant had said firstly that Heidi Reid did not make any mention of the working patterns and subsequently, in cross examination, had proactively stated that she had made mention of them.

(b) She had initially asserted that she had communicated to Heidi Reid at a much earlier stage that difficulties which she, the claimant, was experiencing in the discharge of her duties were related to or because of the particular shift patterns in question, whereas she had subsequently accepted in the course of cross examination when confronted with her own email to Heidi Reid, that that was not the case and it was only at a much later stage, after she had undertaken cognitive behavioural therapy, that she had begun to consider that there might be a connection between the two issues, and had also accepted that it was in the email to which she was referred that for the first time she communicated to Heidi Reid that there may be a connection between the two.

(c) In the respondent's representative's assertion, the claimant had adopted a wholly subjective and unsustainable position in stating that the Head Teacher's (Mrs Reid) expectations in relation to planning were unreasonable. Those expectations were no different from those which she had always had in respect of all teaching staff in the school.

60. In the course of her submissions the respondent's representative made reference to and relied upon the following statutory and provisions and case authorities:-

Statutory Provisions

1 Section 20 of the Equality Act 2010

2 Section 21 of the Equality Act 2010

3 Section 123 of the Equality Act 2010

4 Section 140 of the Equality Act 2010

5 Section 212 of the Equality Act 2010

6 Schedule 8, Part 3 of the Equality Act 2010

Case Authorities

7 ***Secretary of State for Justice v Prospere*** EAT 0412/14 (paragraphs 23-25)

8 ***Smith v Churchills Stairlifts plc*** 2006 ICR 524, CA (paragraphs 43 & 58)

9 ***Garrett v Lidl Ltd*** [2010] All ER (D) 07 (Feb) (paragraph 19)

10 ***Tameside Hospital NHS Foundation Trust v Mylott*** EAT 0352/09 (paragraph 50)

11 ***North Lancashire Teaching Primary Care NHS Trust v Howorth*** EAT 0294/13 (paragraphs 32-33 and 37)

12 ***Lincolnshire Police v Weaver*** [2008] All ER (D) 291 (Mar) (paragraphs 49 & 51)

13 ***HM Prison Service v Johnson*** [2007] IRLR 951, EAT (paragraph 96, 115 and 124(4))

14 ***Conway v Community Options Ltd*** UKEAT/0034/12, [2012] EqLR 871 (paragraphs 17 and 19)

15 ***O'Hanlon v Comrs for HM Revenue & Customs*** [2007] EWCA Civ 283 , [2007] IRLR 404, [2007] ICR 1359 (paragraphs 67, 69 & 74)

16 ***Meikle v Nottingham County Council*** [2004] EWCA Civ 859, [2004] IRLR 703, [2005] ICR 1 (paragraphs 66 & 67)

17 ***HM Revenue and Customs v Garau*** 2017 ICR 1121 (paragraph 30)

18 ***Robertson v Bexley Community Centre t/a Leisure Link*** 2003 IRLR 434, CA (paragraph 25)

19 ***British Coal Corporation v Keeble and ors*** 1997 IRLR 336, EAT

Other Authorities

20 Paragraphs 6.10, 6.15 and 6.28 of the EHRC's Statutory Code of Practice

21 Paragraph 6.29 of the EHRC's Technical Guidance for Schools in Scotland

61. Under reference to the above statutory provisions and authorities, the respondent's representative reminded the Tribunal:-

(a) that the claim before it for determination comprised of two instances of alleged discrimination in terms of section 21 of the EqA, by reason of an asserted breach of duty on the part of the respondents to make adjustments, said to arise in terms of section 20 of the Act.

(b) The burden of proof under those sections sat with the claimant to establish that firstly the duty was engaged and thereafter was breached.

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(c) That in turn focused the question of what steps ("adjustments") could have been reasonably taken which would have had the effect of avoiding the substantial disadvantage to which the claimant asserts she was put to,

10 because,

(d) Only steps which it is reasonable to take are embraced by the duty.

15 **The PCP relied upon as giving rise to the duty**

62. While the term provision, criterion and practice is to be construed widely, a claimant's complaint must be assessed against the PCP which they identify and rely upon. In this case the PCP averred and relied upon by the claimant,

20 and accepted by the respondent and thus not a matter in dispute before the Tribunal, was that set out at paragraph 8 of the claimant's Further and Better Particulars, copied and produced at page 91 of the Joint Bundle (J-91), where it is averred:- "*The PCP is the requirement to work the specific shift pattern expected of the claimant/teacher. The claimant will rely upon a hypothetical*

25 *comparator.*" It was further a matter of agreement between the parties, and not in dispute before the Tribunal, that the requirement expected of a full time teacher and thus that referred to in that PCP as relied upon was the requirement for a teacher to work a full time shift of 35 hours per week.

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The Substantial Disadvantage Relied Upon

63. The substantial disadvantage, given notice of by the claimant as relied upon, is also set out and particularised at paragraph 8 of the Further Particulars in terms of the following averment "*The substantial disadvantage is the increased risk of her being unable to perform her contractual duties of employment on account of ill health arising from the PCP and by extension the increased risk of her being dismissed or otherwise having her employment terminated on the grounds of non-performance/capability.*"

The First Adjustment Contended For

64. At paragraph 8(i) of the Further Particulars and at paragraph (9)(ii) the claimant gives notice of the first and at 9(ii) the second particular adjustment contended for and which she offers to prove the failure to make constituted the breach of duty upon which she relies, and being respectively,

(a) (at 8(i)) a specific shift pattern of:- "*work Wednesday, Thursday, Friday, off Saturday and Sunday, work Monday and Tuesday, then off Wednesday, Thursday, Friday, Saturday, Sunday, Monday and Tuesday. This afforded the claimant a 7 day rest period with a weekend also in between her working days allowing for further recuperation.*"; and,

(i) At paragraph 9 of the Further Particulars the claimant offers to prove that the duty to comply with the requirement to make adjustments began, in relation to the specific shift pattern requested, on the 16th of August 2017 that being the date upon which that shift pattern which, as a matter of fact, the claimant had been working was allegedly unnecessarily changed by the respondent with the substitution of a shift pattern which was unsuitable, thus constituting the alleged breach of duty which in the claimant's assertion continued up to and including the 26th

of June 2019.[Mr d'Inverno I'm not sure of the amendments to follow in this para – have attached a post it to the manuscript] at which date the claimant's employment terminated by reason of ill health retirement.

(b) At paragraph 9(ii) of the Further Particulars the second contended for adjustment given notice of as relied upon is the "*reclassification of the claimant's pay*" an application for which is said to have been submitted in November 2018;

(i) with the duty said to arise as at that date and the breach said to be ongoing, in terms of the claimant's representative's submissions, as at 26th June 2019.

65. The respondent accepted that prior to the 15th of August 2016 (the date of granting of the claimant's first flexible working request) the respondent did apply the identified and relied upon PCP to, amongst others, the claimant. That was a period in respect of which it was neither contended that any duty arose in terms of section 20 of the 2010 Act, nor that any breach of duty had occurred in terms of section 21.

66. On the 15th of August 2016 the claimant's first flexible working request, dated 14th April 2016 being a request to move from being a full time employee to working 0.5 full time equivalent ("FTE") hours and which was granted on that same date was granted was given effect to. By letter dated 25th May 2016 (page 179 of the bundle) the claimant had been formally notified that her flexible working request had been approved and that her requested working pattern would begin on 15th August 2016. The working pattern being referred to was the number of hours the claimant was required to work. It was not a reference to any particular shift pattern which the claimant might work or might be required to work going forward.

67. It was the respondent's contention that there was no specific shift pattern which part time teachers were expected to work. In the respondent's contention, thereafter, that is after the 15th of August 2016 and throughout the remaining period of her employment, the claimant was never required to adopt the working pattern required, or for that matter the shift pattern required of a full time teacher.

68. In the respondent's representative's contention the PCP as pled and relied upon by the claimant was no longer applied to the claimant after 15th of August 2016 and thus, no question arose of the claimant being placed at a substantial disadvantage by it, nor of any duty to make adjustments in the face of it in consequence of its application arising as at the 16th of August 2017.

69. On the Findings in Fact which she invited the Tribunal to make in relation to those matters, and upon that principal submission, the respondent's representative invited the Tribunal to dismiss the complaint of section 21 EqA 2010 Discrimination.

70. In so doing, the respondent's representative invited the Tribunal to reject the contention which, although not expressly pled, had emerged in the course of the claimant's evidence and in her representative's submissions, that the PCP relied upon fell to be regarded as continuing to be applied to the claimant after the 15th of August 2016, on which date she became part time (50% FTE), and up to and including a date of termination of her employment, by reason of the fact that the reduction in the hours to be worked by her (to 50% FTE) which was put in place and remained in place from that date to the Effective Date of Termination, was not said, as at the 15th of August 2016, to be a permanent change but rather linked as it was to the 23 month period after which she would require to renew her flexible working request, fell to be regarded as temporary and by reason of the temporary nature, although suspended, fell to be regarded as still being applied to the claimant.

71. In the respondent's representative's submission there was no basis in law or, in logic, advanced for that proposition. Although the possibility existed that the claimant herself, as she initially indicated she hoped might be the case, would ask that she be returned to full time working hours, or that at the 23 month point an application to make the reduced hours a permanent change might have been refused by the respondents, as a matter of fact neither of those things had occurred. It was not in dispute between the parties, and in any event the evidence of all witnesses supported the Finding in Fact, that after 15th of August 2016 the claimant never worked, nor was she ever required by the respondents to adopt the working pattern or shift pattern expected of "a teacher" namely to work a full time shift of 35 hours per week.

In the Alternative

72. In the alternative and standing the same facts relied upon above, the respondent's representative submitted, let it be assumed that the Tribunal were persuaded by the temporary versus permanent point, that the PCP notionally fell to be regarded as being applied to the claimant beyond 15th August 2016, the adjustment to the claimant's working pattern which was contemporaneously put in place and thereafter never removed, either, resulted in the claimant not being put at the substantial disadvantage relied upon or, in the alternative, amounted to an adjustment which had the effect of removing the substantial disadvantage in comparison with the hypothetical comparator throughout any period during which it was in place that being, in her submission, the whole period of her employment after 15th August 2016. The fact that the claimant subsequently expressed a preference for the particular shift pattern that she had been working post the change in her working pattern, not to be substituted with a different shift pattern, did not of itself mean that the adjustment of her working pattern to 50% FTE, which was put in place in August 2016, no longer fell to be regarded as an adjustment, which was reasonable for the purposes of fulfilling a section 20(3) EqA duty.

73. Under reference to ***Garrett v Lidl Limited*** [2010] all ER(D)07 (Feb) (paragraph 19) she submitted a respondent, objectively viewed, can be seen

to have satisfied the requirement even if what was done was not to the satisfaction of an employee from their subjective standpoint. It was, in her submission reasonable that in addition to giving consideration to the claimant's expressed preference, the claimant's Head Teacher (the respondent) should also take account of the need to maintain standards of behaviour in the classroom, the interests of the pupils and what, in her professional assessment, was an adverse impact upon the pupils associated with aspects of the shift pattern for which the claimant had preferred a preference. It was reasonable in those circumstances for the respondent, for a trial period, to alter the shift pattern in a way which in its assessment would continue to sufficiently support the claimant in terms of section 20(3) on the one hand, but also had potential to reduce the adverse impact upon pupils.

74. Under reference to ***Lincolnshire Police v Weaver*** [2008] all ER(D)291 (paragraphs 49 and 51), she submitted that it was reasonable to take into account wider considerations such as operational objectives.

75. In the period 15th August 16 to 16th August 2017, no breach of duty was alleged or relied upon nor had any occurred, the respondents having immediately delivered the change of working pattern i.e. the reduction to 50% FTE hours and which was the only step which the claimant had requested be made.

76. The respondent's representative reminded the Tribunal that even had the claimant, in August 2016, asked for and even had the respondents made the change in working pattern permanent, that would have related only to the number of hours worked by the claimant.

77. Regarding Heidi Reid's concerns about the adverse impact on pupils, she had given clear evidence about the emergence of additional support needs in the class being taught by the claimant and her job share partner under the claimant's preferred shift pattern, of issues of lack of consistency and of parental complaints. She submitted that there was no evidential basis upon which the Tribunal could properly hold that the professional opinion formed

and expressed by Heidi Reid, in her capacity as Head Teacher, was unfounded.

78. In January of 2017 Heidi Reid did speak to the claimant and her job share partner about her concerns and, in light of their indication that they wished to try to make the particular shift pattern work and in order to ensure that they had a real opportunity of potentially doing so, Heidi Reid had agreed not to change the pattern at that point in time. The fact that she had so agreed did not mean that her concerns had disappeared. She continued to have them and they had increased in the period January to August 2017. In August of 2017 she had again focused with the claimant the view that she had reached that some change to the shift pattern, as opposed to the working pattern, would be appropriate. The two matters which the claimant had focused with Heidi Reid at that time as reasons for she, the claimant, not wanting the shift pattern to change were firstly that she, the claimant, wished to continue to teach across the whole curriculum, that being a preference which was not related to her protected characteristic and secondly that the proposed substitute shift pattern would not give her sufficient recovery time.

79. The respondent's representative invited the Tribunal to find in fact on the evidence presented that the proposed substitute shift pattern delivered more recovery time not less than the claimant's preferred pattern. [Mr d'Inverno – I'm not sure I've amended this para correctly]

80. In all the circumstances Heidi Reid had advised the claimant that it was her intention to introduce the revised shift pattern in the period 17th June to 17th August that is for the remainder of the summer term but on a trial basis to see both how it worked out for the claimant but also for the pupils.

81. Heidi Reid had not told the claimant that the substitute shift pattern being trialled was or would at the end of the trial be made a permanent change.

82. In the period 16th August to 21st September 2017 the claimant had not told the respondent at any point that the shift pattern *per se* was an issue which

was in any way related to her protected characteristic of disability and condition of Parkinson's Disease. On the claimant's own evidence she did not raise it at all until the 5th of December 2017 email in which she indicated that she herself had not formed a view at any point prior to the start of the trial of the substitute shift pattern, that it was or would be detrimental to her.

83. Thus submitted the respondent's representative, if, contrary to her primary submission, the Tribunal considered that the PCP, (that the claimant work as a full time teacher on a 35 hour per week shift) was being applied to the claimant, which the respondent denied, a reasonable adjustment had been made and was in place throughout the period complained of it being reasonable to take into consideration the need to minimise any adverse impact upon pupils while at the same time taking reasonable steps to remove the substantial disadvantage founded upon; And, in doing so to take account of all of the circumstances including the fact that the claimant herself did not know until she began to undertake cognitive behavioural therapy and did not advise the respondent at any point prior to the 5th of December 2017, of her perceived adverse impact of the substitute shift pattern.

84. On that separate, *esto*, basis, the respondent's representative invited the Tribunal to hold that no breach of duty had occurred in the period 16th August to 21st September 2017 on which latter date the claimant commenced a period of sickness absence.

85. The respondent's representative acknowledged that in the period 22nd September 2017 to 13th February 2018, Mrs Reid's communicated position was that when the claimant was fit to return to work the return would initially be on the substitute shift pattern while at the same time confirming that an Occupational Health referral would be sought and consideration would be given to any recommended adjustments which emerged from it. On the claimant indicating that she felt that she would soon be fit to return to work Mrs Reid had made an Occupational Health referral, on the 21st of December 2017, and had done so against the background of the claimant

indicating that she thought she would be fit to return from around 15th of January 2018.

86. In the fit note submitted by the claimant on the 22nd of December there had occurred for the first time ever any reference to a disagreement between the claimant and the respondents as to a particular shift pattern to be preferred.

87. The Occupational Health report when received did not contain any expression of medical opinion by the Occupational Health practitioner as to whether the claimant's preferred shift pattern, as opposed to the substitute shift pattern would better support the claimant's return to work. Rather the report presented only what was said to be the claimant's view on that matter.

88. The claimant's consultant's letter of 9th January 2018 in which he indicated that it might be preferable if the claimant was given her previous preferred working pattern when she returned to work had never been shown by the claimant to Mrs Reid.

89. In the respondent's representative's submission there was no evidence that went to support a Finding in Fact that had the claimant been referred to Occupational Health at an earlier date she would have returned to work sooner or at all.

90. Notwithstanding her continuing concerns about the adverse impact upon the children but, in circumstances where the Occupational Health report appeared to reiterate the claimant's preference, and in light of the different information against the background of what the claimant said in her email of 5 December 2017, Heidi Reid decided, on balance, that it would be reasonable upon the claimant's return to work to reinstate the previous shift pattern preferred by her. She did so because she wished to support the claimant in a hoped for return to work. There was no evidence to suggest that she did so because the claimant had raised a grievance against her on the 18th of May earlier that year.

91. On 21 February 2018 the claimant returned to work on her preferred shift pattern she did so notwithstanding the fact that it was subject to a trial period. She remained at work discharging her duties as a teacher throughout the remainder of the academic year and end of the summer term, with no sickness absence.

92. On the 29th of March 2018 the claimant was reminded that what had been a temporary change to her working pattern was due to come to an end and that if she wished the change in working pattern to become permanent she should request the same in a second application.

93. In making that second application the claimant specified not only the fact that she wished to make to her made permanent her change in working pattern to 50% FTE hours, but also specified a particular shift pattern, which was her preferred shift pattern.

94. In her initial flexible working request submitted and granted some 23 months earlier the only change to her working pattern which the claimant had requested had been a reduction from full time to 50% FTE hours.

95. The claimant submitted her further request on the 9th of May 2018. Heidi Reid had intended to and sought to meet with the claimant in order to discuss her application with her, including what she had indicated as a preferred shift pattern, prior to taking a decision on the application. For the reasons which the respondent's representative invited the Tribunal to find established in fact, that had not proved possible and requiring to respond to the application within a specified time period, Heidi Reid did so on the 26th of June 2018 indicating in the section set out for completion by the relevant Manager, that she did need a discussion or meeting to get more information in order to make a decision, that having been unable to meet as initially intended a letter had been sent to the claimant on the 22nd of May 2018, and further that she needed more time to consider the request.

96. Under the decision part of the form, where some 4 options are set out, Heidi Reid had indicated that she agreed a modified or alternative arrangement which she specified as being a trial period of the requested shift pattern but with each of the claimant and her then job sharer job sharing with one of the new principal teachers as opposed to with each other. Each of the principal teachers being able to deliver increased support and input to seeking to address the adverse impact which the preferred shift pattern continued to have on pupils.

97. As was clear from the terms of the decision template at page 223 of the bundle the respondent's flexible working request had not been refused.

98. At the absence review meeting held between the claimant and Heidi Reid on 13th February 2018 the claimant had been advised that Heidi Reid agreed to make available to her her preferred work pattern for the remainder of the academic session that is from February 2018 up to and including summer 2018 and that in that period she would monitor how the work pattern was working for the claimant, for the pupils and for the school.

99. On the 26th of June 2018 a meeting between Heidi Reid and the claimant took place at which it was confirmed that the claimant's request for a specific shift pattern would be accommodated for the coming academic year that is the year August 2018 to July 2019, a position confirmed in Heidi's Reid's email to the claimant of 14th August 2018 (page 264 of the bundle). It was reasonable that the claimant's preferred shift pattern, although available to her in the intervening period on her return to work would be on a trial basis to allow assessment of its impact, both upon the claimant's requirements and the children. It was reasonable to make such a trial assessment given the material change in job share partner namely that the claimant would be job sharing with one of the principal teachers and Heidi Reid's introduction of a behavioural management programme.

100. On 15th June 2018 the claimant submitted a transfer request both on her own behalf and on behalf of her job share partner. In the request she did not state

that the request was because of any change or apprehended change to a preferred shift pattern. Rather because she considered that her relationship with the Head Teacher Heidi Reid had broken down.

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101. As of 26th June 2018 the respondent had put in place at St Leonard's the claimant's preferred shift pattern for her to return to work to at the end of the summer vacation. The claimant's position, however, was that she did not wish to return to work at St Leonard's but wished to be transferred to another school.

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102. Under reference to ***Smith v Churchill Stairlifts Plc*** [2006] ICR 524, CA (paragraphs 43 and 58), the respondent's representative submitted that the fact that the adjustment, if it fell to be regarded as such, was subject to a trial did not make it unreasonable. That is to say putting the adjustment in place but also monitoring it did not constitute a breach of duty. Heidi Reid's professional concerns, which gave rise to her desire to monitor the arrangement for a period were genuine. Although the claimant had challenged Heidi Reid's professional opinion in evidence stating that she didn't agree with it as she had provided no other reason that might go to explain why Heidi Reid would articulate such concerns.

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103. The adjustment, if it was to be so regarded, although at first not said to be "permanent" did allow the claimant to fulfil her contractual obligations and perform her duties as a teacher and her absence from 13th August 18 onwards absences were due to her Parkinson's.

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104. The work pattern and shift pattern of Sharon Milton, her previous job share partner, were to change but the preferred arrangements were always left in place for the claimant, the difference being the claimant's protected characteristic of disability.

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105. In addition in the period 4th September 2018 to June 2019 no actual breach of duty, let it be assumed that a duty was in place, had occurred, for the separate reason that the claimant was never fit to return to work and did not

return to work in that period. Such medical evidence as was before the Tribunal supported the finding that the claimant's health was deteriorating due to her Parkinson's in that period and that it had done so to the extent that it supported ill health retirement. Notwithstanding that deterioration and the fact, let it be assumed a duty had been in place, that if it would have fallen away at the point where no adjustments could be put in place which would facilitate the claimant's return to work, the respondent still continued to support the claimant and continued to search for suitable schools, alternative to St Leonard's to which she had indicated she would not return, in which the claimant's preferred shift pattern could be put in place without adverse impact on the pupils. Nevertheless Kevin Funnel, Team Manage, and relevant heads of service was engaged by the respondent immediately upon the transfer request being received and an alternative school which could accommodate the claimant's request identified in Kirkcaldy. On 20 June 2018 the respondent identified an opportunity to, and offered to, transfer the claimant and her job share partner, who had asked to transfer with her, to Pathhead Primary School. The claimant had declined that offer on the basis that it would not suit her job share partner travel arrangements. Such a position was not readily available nor easy to identify. Nevertheless the respondent's Mr Funnel had been engaged and had identified alternative possibilities, these being;

(a) that the claimant could be put on permanent supply,

(b) that the claimant could be made supernumerary and

(c) move to a permanent post ("a true vacancy"), when a suitable vacancy for which the respondents continued to look, arose.

106. Of the above options the only one not discussed with the claimant was the possibility of permanent supply because the respondent knew that the claimant would not want to be in a position of having to attend at one school on one day and another school on another, varying according to where the supply need arose.

107. The claimant knew and or with the benefit of her continuous Trade Union support, ought reasonably to have known in relation to supernumerary and a true vacancy options that those could be positively identified and confirmed only at the point at which they can also be implemented, which point could not arise until the claimant confirmed that she was fit to return to work and would do so by a specified date.

108. The claimant knew or ought reasonably to have known that it was not possible to identify and confirm any such specific option until the claimant had identified he return to work date because such options reflected real requirements in particular schools and could not be preserved or held open for the claimant for unspecified periods of time because. Rather, they required to be filled they would, in the interim, be filled by Head Teachers and thus not be available as an option for the claimant.

109. The supernumerary option was always available and could have been put in place immediately upon the claimant's return to work, with her requiring to do no more than identify the school which she wished to work at and identify a return to work date. While the claimant had originally responded enthusiastically to the possibility of returning to work on a supernumerary basis, she subsequently stated, at her attendance review meeting on 02 November 18, that she did not want to consider that option.

110. In relation to the attendance review meeting of 17 January 2019 the respondent's representative invited the Tribunal to accept the evidence of the respondent's witness and the documentary evidence and to find:-

(a) that the claimant had understood the purpose of the meeting, that while the respondents had not contacted her directly when she was on sick leave this was to avoid causing her stress particularly so in circumstances where she had appointed a designated Trade Union representative though the convention was contact with the claimant should be made.

(b) that while Sarah Else accepted that it was possible that at the review meeting the particular schools which she had potentially identified for consideration by the claimant, in the event that the claimant had indicated at the meeting that she was fit to return to work, may or may not have been expressly mentioned by her, and to accept Sarah Else's explanation that her approach was being informed by the claimant's expressed view of her own health.

(c) The claimant, right at the outset of the meeting had stated that she was not fit to return to work at that point and couldn't say when she would be and thus there would have been no practical purpose served by discussing opportunities which were available at that time but could not be kept open to some indeterminate future date in the hope the claimant might be able to return to one or other of them.

111. Whereas the claimant had asserted in evidence that because no specific school had been discussed with her at the attendance review meeting, that fact had a detrimental impact upon her Parkinson's there was no evidential basis upon which such a Finding in Fact could properly be made. None of the medical evidence that was before the Tribunal, whether it be the GP's fit note of 22nd December 2017, her consultant's letter of 9th January 2018 which was never brought to the respondent's attention, in which he expressed a view that it would be "*preferable if she worked her previous shift pattern which allowed her longer periods to recover*", nor the Occupational Health report support, such a conclusion. Separately and in any event the comments in both the fit note and the consultant's letter appeared to be advanced on the premise that the claimant's preferred shift pattern would allow longer recovery periods between periods of working whereas in fact the reverse was the case. Separately and in any event the claimant had accepted in evidence that she made no such assertion to Sarah Else at the attendance review meeting.

112. The respondent's representative invited the Tribunal to hold:-

(a) Sarah Else ha confirmed to the claimant on 4th September 2018 that her preferred shift pattern had already been put back in place for her on her return to work, whenever she did so, and would not be changed in the future. In so confirming Sarah Else had misunderstood that the outcome of the grievance included a direction that that should be the position.

(b) the respondents had and could be seen to have done all that was reasonable to remove the asserted disadvantage, let it be assumed that such disadvantage did result from the substitute shift pattern which, in the respondent's representative assertion the claimant had not in any event proved.

(c) no presumption arose to the effect that the respondents had failed in their duty because, despite their efforts, the claimant having declined to return to St Leonard's. The claimant was never fit enough to return to work and despite their best efforts they were never able to achieve placement of the claimant by identifying a school which was acceptable to her, which could accommodate her preferred shift pattern and was available at a point in time when the claimant was fit to return to work and take up an appointment. That was not something which had occurred because the claimant had been off sick but rather because at the start of every meeting the claimant had stated categorically that she was not fit to return to work.

Ill Health Retirement

113. Regarding the question of ill health retirement the respondent's representative submitted that had been a matter raised by the claimant not by the respondents. At the time at which it was raised by the claimant and her representative at the review meeting of 17 January 2019 the respondent was of the view that it was premature to give consideration to such a matter, but at the claimant's representative's specific request, they had provided the claimant with the appropriate forms, for her information. The claimant had completed those forms before the absence review meeting of the 28th of May 2019 and she proactively handed them over at the meeting.

114. From January 2019 the claimant's health had deteriorated reaching a point at which, under reference to **HM Prison Services v Johnston** [2007] IRLR 951 paragraphs 96, 115 and 124(4), the respondent's representative submitted no steps which it was reasonable to take could be taken by the respondent to facilitate the claimant's return to work and at which point any such subsisting duty to take such steps fell away.

115. Under reference to **Conway v Community Options Limited** UKEAT/0034/12 [2012] EqLR 871 (paragraphs 17 and 19) she submitted that that point had been reached at the latest as at the date of the Occupational Health report 8th May 2019. Notwithstanding the above, the respondent had continued to try to identify potential return to work options for the claimant.

Sick Pay

116. The respondent's representative drew the Tribunal's attention to the letter at page 95 of the bundle. In that letter the claimant's representative, in a response to a request that he articulate the same in relation to the refusal to reclassify the claimant's pay, had stated "*The PCP is the same*". That being confirmation that the PCP relied upon by the claimant in respect of the failure to reclassify her sick pay was that set out at paragraph 8 of the claimant's Further Particulars (page 91 of the bundle "*The PCP is the requirement to work the specific shift pattern expected of the claimant/a teacher*", the claimant relying upon a hypothetical comparator. And that it was not in

dispute between the parties that that requirement, and thus the PCP being articulated and relied upon, was the requirement that a teacher work a 35 hour shift per week on a full time basis.

117. In regard of this second alleged breach the respondent's representative made the same primary submission namely that with effect from the 14th of August 2016 the PCP relied upon had never been applied to the claimant at any point up to the Effective Date of Termination of her employment. Thus that no question of the claimant having been placed at a substantial disadvantage by its application arose and thus no duty to make adjustments.

118. Separately, in terms of her email of 5th November 2018, (page 292 of the bundle), the claimant's Trade Union representative Pauline Stewart makes clear that the perceived disadvantage which the claimant is/it is apprehended will be, placed at is one which arises from ongoing difficulties with agreeing her work (sic *shift*) pattern and not because of her protected characteristic of disability arising from her medical condition of Parkinson's.

119. Further, let it be assumed that a relevant PCP and an applicable duty had been engaged, it would not have been a reasonable adjustment in the circumstances to reclassify the claimant's sick pay. There was no evidence placed before the Tribunal that went to show that had such a reclassification occurred it would have made it easier for the claimant to return to work or would have avoided the relied upon disadvantage which was set out at paragraph 8 of the Further Particulars and was:- "*the increased risk of her being unable to perform her contractual duties of employment on account of ill health arising from the PCP and by extension, the increased risk of her being dismissed or otherwise having her employment terminated on the grounds of non-performance/capability.*"

120. Under reference to ***O'Hanlon v Comrs for HM Revenue and Customs*** [2007] EWCA Civ 283, [2007] IRLR 404, [2007] ICR 1359 (paragraph 67, 69 and 74) she submitted that it would be a very rare case in which making such

an adjustment, "merely paying a person more" would be considered to be reasonable for the purposes of section 20(3) of the 2010 Act.

121. Under reference to ***Meikle v Nottingham County Council*** [2004] EWCA Civ 859, [2004] IRLR 703, [2005] ICR 1, (paragraphs 66 and 67), she observed that whereas the complaint before the Tribunal could have been pled as a section 13 Unauthorised Deduction from Wages, let it be assumed that the claimant could have set up some entitlement in law under the respondent's policy to have her sick pay continue, the claim was not so pled or presented. Rather, it was pled as a breach of duty to make adjustments which required to be assessed against the PCP and the substantial disadvantage identified and relied upon. There was no evidence before the Tribunal which went to support the proposition that extending the claimant's sick pay would, in the circumstances, have supported her return to work or otherwise avoided the disadvantage specified.

122. The specific provisions of the respondent's Scheme (Part 2 section 6 – Sickness Allowance and Notification Arrangements), extracted from the SNCT Handbook, upon which the claimant's representative relied for the purposes of the claim was paragraph 6.2. That paragraph was in the following terms:-

(a) "**Absence due to work related injury/illness**

6.20 Where an employee is absent due to sickness or disablement as a result of work related injury or illness, the employee shall be entitled to a separate allowance. It will be calculated on the same basis as the sickness allowance provided for in paragraph 6.6 and 6.7 above. This allowance and this sickness allowance are entirely separate. Practically all of the sick notes produced and relied upon by the claimant (fit notes) at pages 380 et seq clearly specify that the claimant was absent from work because of her condition of Parkinson's Disease.

123. The claimant's Parkinson's Disease, she submitted, was not caused by her work nor was there any medical evidence before the Tribunal that could objectively sustain a finding in fact that her Parkinson's Disease was a "work related injury or illness."

124. Separately and in any event, submitted the respondent's representative, any such duty which could be said to have arisen was one which had fallen away in the period January to May 2019.

Time Bar

125. Under reference to section 123 of the EqA and to the Judgment of the Employment Appeal Tribunal in the instant case, at paragraph 33 page 81 of the bundle, the date of the relevant section 123(4)(a) "Act" in this case, if it were necessary to rely upon that section on the evidence presented, was the respondent's act of reducing the claimant's pay to nil, in February of 2019.

126. While, on the evidence of the respondent's witness she invited the Tribunal to hold that the respondents had made a positive decision refusing the request and had communicated it to the claimant's Trade Union representative shortly after the 4th of September 2018 the claim, which was subsequently first presented on the 14th of May 2019 could be seen to have been lodged outwith the initial statutory period allowed. That was the position notwithstanding the application of the Early Conciliation Regulation. Thus, on the respondent's representative's submission the claimant required to rely upon the saving provisions contained in section 123(1)(b) of the EqA and to satisfy the Tribunal that it was just and equitable in the circumstances that time be extended.

127. Under reference to ***Robertson v Bexley Community Centre trading as Leisure Link*** [2003] IRLR 434 CA (paragraph 25) and ***British Coal Corporation v Keeble and others*** [1997] IRLR 336, EAT she reminded the Tribunal that the onus sat with the claimant in that regard and that there was

no presumption in favour of extension rather it was the exception rather than the rule.

128. The claimant's Trade Union representative (and the claimant) had been put on notice by their then legal advisors that, in their opinion and assessment, the time limit for advancing such a claim would potentially expire on 23rd November 2018, on the 21st and 22nd November 2018 respectively. The claimant waited a further 6 months until 14th May 2019 before presenting her claim. The claimant's assertion that this was due to her mental health was unsupported by the medical advice and should be rejected. There was no reasonable explanation for the delay and it was not just and equitable to extend time.

129. Regarding shift pattern the fact that the preferred pattern worked for her did not mean that another might not also have worked without also adversely impacting the pupils.

Findings in Fact

130. The evidence presented in the case was far ranging with much of it, arguably, more relevant to a complaint of Unfair Dismissal, which was not the complaint before the Tribunal. Notwithstanding, and in recognition of the diligence of parties' representatives in the presentation of the case and the importance of the subject matter to the parties, the Tribunal has made Findings in Fact in respect of much of it.

On the evidence presented and upon consideration of the submissions made, the Tribunal unanimously made the following Findings in Fact.

131. The Claimant was a teacher employed at St Leonard's Primary School by the Respondent for the period August 2013 until 6 September 2019 (page 308).

132. The claimant commenced her employment at St Leonard's Primary School on or around 15th August 2012 as a School Teacher. The claimant was employed on a full time basis and contracted for 35 hours per week.

5 133. Teachers working full time are expected to work 9am-3pm with an additional half hour preparation and correction time daily, Monday-Friday.

134. An additional 190 hours are worked by full-time teaching staff which is divided as required in discussion with staff in each school and used for matters such
10 as professional development, self-evaluation, training, meetings, report, planning, parent interviews.

135. A teacher working full time is required to work 35 hours a week.

15 136. The provision, criterion or practice identified by the Claimant of "*the specific shift pattern expected of the Claimant/a teacher*" is the shift pattern expected of a teacher working full time hours, that is full time 35 hour/week.

137. The Claimant worked full time hours for the period August 2013 up to and
20 including the end of the 2015/16 school session (pages 152, 165 and 170).

138. In April 2015 a workplace adjustment checklist was completed for the Claimant (pages 159 to 163).

25 139. In April 2015 the Claimant had not received her diagnosis of Parkinson's disease.

140. In April 2015 the workplace adjustment checklist was completed by the head teacher of St Leonard's Primary School, Heidi Reid.

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141. The workplace adjustment checklist was completed in April 2015 as a result of the Claimant advising Mrs Reid that she was undergoing assessments for potential spinal stenosis and that she had nerve pain in her right hip and leg and weakness in her right arm/hand.

142. As part of the workplace adjustment checklist carried out in April 2015 a risk assessment action plan was completed (page 162). This risk assessment action plan included actions to be taken to support the Claimant at that time (3.16 of the List of Issues).

143. Mrs Reid referred the Claimant to occupational health in January 2016 and a report was produced dated 17 January 2016 (pages 345-347).

144. Mrs Reid referred the Claimant to occupational health in January 2016 because the Claimant advised Mrs Reid that her symptoms were progressing.

145. The occupational health report dated 17 January 2016 recommended that a workplace assessment be carried out (page 347).

146. Under the heading "Disability Advice" the author of the Occupational Health Report expressed the opinion that the claimant's condition "*is likely to warrant consideration under the disability provisions of the Equality Act 2010 due to its long term nature and impact on her day to day activities without benefit of treatment*".

147. As a result of the recommendation in the occupational health report, a further workplace adjustment checklist was carried out for the Claimant on 3 March 2016 by Marie Howie, Business Manager.

148. An alternative mouse adjustment was added to the Claimant's workstation at this time (3.16 of List of Issues).

149. The workplace adjustment checklist carried out on 3 March 2016 records "Janet purchased laptop stand".

150. The laptop stand was something that the Claimant chose to purchase and prior to purchasing it she had not made a request for it to be provided by Mrs Reid.

5 151. In March 2016 Mrs Reid offer to support the Claimant with her typing by arranging for office staff to type reports for the Claimant. The Claimant refused this offer.

152. On or around April 2016 Mrs Reid wrote to all of the teachers at St Leonard's 10 Primary School and advised them that the teacher, Sharon Milton, would job share with another teacher and all of the teachers were asked if this was something that they would like to be considered for (page 171).

153. The claimant indicated that she wished to be considered for the job share 15 opportunity.

154. The Claimant completed a flexible working request form on 14 April 2016 (pages 172-173).

20 155. The flexible working request made by the Claimant on 14 April 2016 was a request to move from being a full time employee to working 0.5 full time equivalent (FTE) hours.

156. The Claimant noted on the flexible working request form dated 14 April 2016 25 that she would like the change to her terms and conditions to be for a temporary period of 23 months.

157. The Claimant noted in her flexible working request form dated 14 April 2016 that she wanted to take up the job share vacancy available in the school and 30 noted that she had received a recent medical diagnosis of spinal stenosis and possible Parkinson's disease and that that was the reason for her request.

158. Mrs Reid had advised the Claimant that her flexible working request should in the first instance be for a temporary period of 23 months. Mrs Reid advised

the Claimant of this because this was her erroneous understanding of the Respondent's flexible working procedure.

159. In fact the Respondent's Flexible Working Requests Procedure (pages 151A-151E) does not state that any flexible working request must first be for a temporary period of 23 months.

160. Separately and in any event, and notwithstanding Heidi Reid's mistaken communication of the requirements of the respondent's policy, the Claimant did not want to permanently reduce her hours in April 2016 because she was hopeful that at some point in the future she would be able to return to full time hours.

161. If the Claimant had in April 2016 asked to reduce her hours permanently, there would have been no guarantee that there would be a full time role available for her in the future at St Leonard's Primary School should she have subsequently felt well enough to change her mind and return to full time or otherwise increased working hours.

162. The Claimant's flexible working request, dated 14 April 2016, did not specify any particular working (shift) pattern or otherwise request the allocation of any particular shift pattern beyond reduction of her weekly working hours to 50% FTE.

163. At the time of making her flexible working request the Claimant did not raise with Heidi Reid or otherwise discuss with her, a requirement or request for any particular shift pattern to be applied to the job share.

164. Prior to April 2016 the Claimant had never expressed a wish to reduce her hours.

165. Mrs Reid accepted the Claimant's flexible working request made on 14 April 2016 and noted on the flexible working request form that the fact that the

Claimant had medical factors including Parkinson's and spinal stenosis, had informed Mrs Reid's decision (page 174).

166. From the point on or around 14 April 2016, at which point the Claimant advised Mrs Reid that she had a possible diagnosis of Parkinson's Disease, Mrs Reid proceeded on the basis that the Claimant probably had Parkinson's Disease.

167. The Claimant was formally advised by the Respondent by letter dated 25 May 2016 that her flexible working request had been approved and that her requested working pattern would begin on 15 August 2016 (page 179). The working pattern being referred to in the communication is the number of hours the Claimant is required to work, it was not a reference to any particular shift pattern.

168. The letter dated 25 May 2016 stated that the Claimant's hours would change from 35 hours a week to 17.5 hours a week and that it was a temporary change that would be in place until 2 July 2018.

169. Following the acceptance of the Claimant's flexible working request in April 2016, she was never required or expected to work full time hours again.

170. In June 2016, Mrs Reid met with the Claimant and Sharon Milton, who had been identified as her job share partner, to identify and agree a particular shift pattern that the Claimant and Mrs Milton would work from August 2016.

171. There is no specific shift pattern that a teacher job sharing and working 17.5 hours a week would normally be expected to work.

172. At the meeting in June 2016 the Claimant and Mrs Milton proposed a shift pattern whereby the Claimant would work Thursday, Friday, Monday, Tuesday, Wednesday and Mrs Milton would then work Thursday, Friday, Monday, Tuesday, Wednesday and so on. Mrs Reid agreed to this shift pattern being put in place on the basis of all parties assessing how it worked.

173. Mrs Reid had not previously had teachers who were job sharing and working the specific shift pattern which Mrs Reid agreed could be put in place in August 2016 for the Claimant and Sharon Milton. She did not know how effective or problematic it might be vis a vis the learning requirements of the pupils.

174. The working pattern suggested by the Claimant in June 2016 was in place from the new school session starting in August 2016 until the end of the summer term and the start of the summer vacation in June 2017 that is for the whole period during which the claimant was at work.

175. By January 2017 Mrs Reid had become concerned about the impact of the working pattern upon the pupils learning requirements. In January 2017 Mrs Reid advised the Claimant and Mrs Milton that she had concerns about the impact the working pattern was having on the children in the classroom.

176. The discussion in January 2017 regarding the working pattern took place in Mrs Reid's office.

177. Mrs Reid considered that the children in the class were unsettled and she had received complaints from parents about behaviours in the class.

178. At a meeting with them in January 2017 Mrs Reid raised her concerns with Mrs Milton with the Claimant, who by that time had come to consider that the particular shift pattern worked well for her giving her sufficient time to recover and manage symptoms arising from her Parkinson's Disease, while also providing her adequate time to prepare lessons.

179. The Claimant and Mrs Milton while acknowledging the Head Teacher's concerns, stated that they wanted to try to make the shift pattern work and at that time, Mrs Reid agreed to give them a further opportunity to do that.

180. In the academic year 16th August 2016 to 30th June 2017 the claimant had one day of absence due to sickness unrelated to her Parkinson's.

181. On 1 June 2017 Mrs Reid emailed the business manager Marie Howie (page 181) advising the Claimant required access to voice recognition software and a laptop that she could use at home and it was as a result of this that Marie Howie carried out a further workplace adjustment checklist with the Claimant on 12 June 2017 (pages 189-192).

182. On 12 June 2017, as part of the workplace adjustment checklist, a risk assessment action plan was completed (page 192). This noted adjustments required to support the Claimant which included providing the Claimant with voice activated software to allow her to prepare reports, plans etc.

183. Following completion of the workplace adjustment checklist on 12 June 2017, Marie Howie took steps to arrange for the Claimant to have a more suitable chair (page 194).

184. The Respondent did progress obtaining voice activation software for the Claimant following the completion of the workplace adjustment checklist (pages 184-192) (3.16 of the List of Issues).

185. The class which the Claimant and her job-share partner had had for the school session August 16-June 17 was a P7 class. The class which they were to teach was going to change, for the school session August 17-June 18, to a P5/6 class.

186. St Leonard's Primary School had a number of children with particular behavioural needs. Some of these children were in the Claimant and Mrs Milton's P7 class.

187. In June 2017 Mrs Reid spoke to the Claimant and Sharon Milton again about the shift pattern and Mrs Reid advised that she remained of the view that the shift pattern was having a negative impact on the children's learning and that,

therefore, she was proposing to change the working pattern with effect from August 2017.

188. In June 2017 Mrs Reid explained that she held her expressed view about the shift pattern then being worked by the Claimant and her job share partner because she felt that the children were unsettled; that the leadership team were being called to the classroom a lot due to the behaviours of the children; and due to a lack of consistency in learning.

189. In June 2017 Mrs Reid proposed a new shift pattern whereby Sharon Milton would work Monday, Tuesday and every second Wednesday and the Claimant would work Thursday, Friday and every second Wednesday. Under the proposed shift pattern both the Claimant and her job share partner would be in the classroom for at least one day in every week.

190. During the meeting in June 2017 the Claimant communicated her clear preference that the existing staff pattern remain in place.

191. At the meeting in June 2017 Mrs Reid for her part clearly understood the preference with the Claimant had expressed was for there to be no variation of the then existing shift pattern.

192. Mrs Reid's opinion based on her professional judgement as Head Teacher was that the Claimant's preferred shift working pattern was continuing to exacerbate existing behavioural issues (3.3 of the List of Issues), whereas the alternative shift pattern which she proposed introducing had the potential to lessen that adverse impact upon the children while at the same time continuing to support the Claimant in respect of recovery time between teaching blocks and her lesson preparation requirements.

193. The reason for Mrs Reid's wishing at that time to change the shift pattern for another one which would also support the Claimant's needs was because she genuinely considered, based on her professional judgement, that the

then existing shift pattern was creating inconsistency for the children and was negatively impacting their learning (3.3 of the List of Issues).

194. Mrs Reid had concerns about the weekly planning undertaken by the Claimant and Mrs Milton and was of the view that the shift pattern being proposed by her would make the planning task easier as each teacher did not have responsibility for the whole curriculum.

195. Mrs Reid's expectations in terms of planning for classes were reasonable.

196. The (shift) pattern in place for the period August 2016 to June 2017 was having a detrimental impact on the pupils (3.3 of the List of Issues).

197. Mrs Reid had more teaching experience and more experience of dealing with pupils with additional support needs than the Claimant. As Head Teacher she had a strategic and comparative overview of teaching and classes across the school.

198. Mrs Reid was better placed than the Claimant, given her greater experience, to assess the impact of the particular shift pattern on the children in the Claimant's classroom.

199. Mrs Reid had received complaints from parents about behaviours in the Claimant and Mrs Milton's classroom during the 2016/17 school session.

200. Mrs Reid had received more parental complaints in relation to the Claimant and Mrs Milton's classroom than in relation to other classes during the 2016/17 school session.

201. The Claimant and Mrs Milton's classroom required more support from the senior leadership team in the school than other classrooms during the 2016/17 school session.

202. There was a reasonable basis for Mrs Reid to change the shift pattern with effect from 16 August 2017. Her decision to do so was, in the circumstances, reasonable (3.2 of the List of Issues).

5 203. The fact that the Claimant's class was due to change for the school session starting in August 2017 did not undermine Mrs Reid's rationale for the change because all of the classes at the school had children with similar needs to the Claimant's P7 class, including the Claimant's new P5/6 class (3.5 of the List of Issues).

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204. It was reasonable to change the shift pattern in August 2017 at a time when the Claimant would be teaching a different class from the class taught in the previous year (3.5 of the List of Issues).

15 205. Mrs Reid considered that the new working pattern would still support the Claimant with her Parkinson's disease because it still provided her with, and more evenly spread the, rest days in between teaching days and, because the Claimant would no longer be teaching across the whole curriculum, it should allow the Claimant to use more of the non working days for rest, as
20 opposed to her being required to use them as what she described as "mop-up" days (3.6 & 3.8 of the List of Issues).

206. Mrs Reid in making her decision to put in place the new shift pattern with effect from August 2017, took into account the Claimant's disability (3.6 of the
25 List of Issues).

207. The working pattern put in place in August 2017 was designed in part to alleviate any disadvantage the Claimant might experience because of her disability (3.8 of the List of Issues).

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208. Mrs Reid decided to put in place the substitute shift pattern and did so with effect from 16th August 2017.

209. On 21 September 2017 Mrs Reid was made aware that the Claimant was upset in her classroom and Mrs Reid went to see the Claimant and advised her to go home and visit her GP.

210. The Claimant was signed off by her GP for the period 22 September 2017 to 22 October 2017 with the reason given on the fit note being "Parkinson's disease" (page 356).

211. Prior to the Claimant being signed off in September 2017 she had not advised Mrs Reid that she was having problems with the new shift pattern that had been put in place.

212. The Claimant had spoken to Mrs Reid prior to being signed off on 22 September 2017 but the matters which she referred to in that conversation related to personal challenges, which she was facing and not difficulties she was experiencing with the shift pattern which she was working at that time.

213. The Claimant's doctor signed her off again on 18 October 2017 for 28 days with the reason given on the Fit Note being "Parkinson's Disease" (page 357).

214. The Claimant's GP signed her off again on 16 November 2017 until 8 January 2018 with the reason given on the Fit Note being "Parkinson's Disease" (page 358).

215. On 18 October 2017 the Claimant sent a text message to Mrs Reid (page 195-197) and Mrs Reid replied on the same day (page 198).

216. In the Claimant's extensive text message dated 18 October 2017, she made no mention of the shift pattern which she had been working, or made any suggestion that it was impacting upon her adversely.

217. On 5 December 2017 the Claimant sent Mrs Reid an email (pages 199-200).

218. In the email sent by the Claimant on 5 December 2017 she explained that she had been undertaking a CBT course through her doctor which had made her focus on the reasons for her anxiety and stress (page 199).

5 219. In the email from the Claimant dated 5 December 2017, the Claimant, for the first time, identified, as one of a combination of four factors, the shift pattern which she had most recently been working as having, in her belief, a detrimental impact on her health (page 199). In the same email the Claimant goes on to explain why she believes that the original shift pattern was better
10 suited to her.

220. In the email sent by the Claimant on 5 December 2017 the Claimant acknowledged, when explaining her position on the shift pattern, that she also understood and accepted that the needs of the children come first (page
15 199).

221. In the Claimant's email of 5 December 2017 she advised that she was keen to get back to work but she appreciated that she needed to make sure that it was at “the right time”.

20

222. The email of 5 December 2017 was the first time that the Claimant provided the detail, which is contained in this email, explaining why she considered that the change made to her (shift) pattern, in August 2017, was detrimental to her health.

25

223. In her email of 05 December 2017, the Claimant communicated that she had not come to believe, until after the shift pattern was changed and until she subsequently undertook CBT (Cognitive Behavioural Therapy), that the changing of the shift pattern was a contributing factor in the deterioration of
30 her health.

224. On the 14th of December 2017 Mrs Reid replied to the Claimant's email of 5th December 17 (page 201). In that email Mrs Reid advised the Claimant that the previous shift pattern to which the Claimant, in her email of

5th December, had stated she wished to return to was not the shift pattern currently in place. She also advised that she would progress a referral to occupational health and would support the Claimant's return to work with any reasonable adjustments that were recommended and proposing that the Claimant and she should meet to discuss the content of the occupational health report once it had been received; viz

> *"Hi Janet,*
>
> *Thank you for your email. I've been in contact with Lindsey (HR) regarding your absence. Unfortunately the old work pattern* [sic shift pattern] *does not suit the requirements of the school and isn't what is in place at the moment. If you are fit to return it would be on the current pattern. I am in the process of completing the OH referral and am happy to meet with yourself and HR to discuss.*
>
> *Let me know if you want to meet.*
>
> *Thanks Heidi …"*

225. On 14th of December 2017 Mrs Reid wrote to the Claimant (page 203) confirming that having successfully obtained from the Claimant's Case Officer the information which she required to make the referral to Occupational Health, she had completed the online form and that OH would sent the Claimant an appointment via text. She confirmed that the Occupational Health Report would support the Claimant's return to work with any recommended reasonable workplace adjustments and that it would be best she and the Claimant meet after the Report had been received to discuss it, and the shift pattern, at that time.

226. The Claimant and Mrs Reid met on 18 December 2017 and during this meeting the Claimant advised that she felt that she was ready to return to work.

227. On 18 December 2017 the Claimant was still signed off by her GP as unfit for work.

228. Prior to, at the earliest, 5 December 2017, there had been no indication by the Claimant or her GP that she was potentially fit to return to work.

229. The Claimant followed up the meeting on 18 December 2017 with an email on the same date in which she referred to the fact that Mrs Reid had advised the Claimant that if she was to return that it would be to the shift pattern which Mrs Reid had put in place in August 2017 (pages 202-203).

230. Mrs Reid's position at the meeting on 18 December 2017 was that when the Claimant was ready to return to work, that it would be on the shift pattern that she had put into place in August 2017 and that once the Occupational Health Report was received she and the Claimant would meet to discuss the implementation of any reasonable adjustments which were recommended including in relation to the shift pattern and to discuss the shift pattern going forward.

231. As at the meeting of 18th December 2017 Mrs Reid had not taken any final decision regarding further changes to the shift pattern being then worked by the claimant's job share partner in her absence because the Occupational Health Report although instructed had not yet been generated because the claimant had not yet returned to work or identified a date on which she would.

232. There then followed further correspondence between Mrs Reid and the Claimant for the period 19 December 2017 to 21 December 2017 regarding progress of the occupational health referral and the shift pattern that the Claimant would be returning to (pages 201-202).

233. Mrs Reid made the occupational health referral for the Claimant on 21 December 2017 (page 205).

234. A fit note dated 22 December 2017, received by Mrs Reid and which signed the Claimant off until 31 January 2018 also indicated for the first time "*needs amendment to working schedule to allow return to previous working schedule, which allowed time for recuperation between teaching days*" (page 364). That was the first occasion on which any of the Claimant's fit note had made reference to shift pattern.

235. The Claimant sent a further email to Mrs Reid on 7 January 2018 advising that she was fit to return to work but on the old work pattern and indicating "*As my OH referral is on 15 January I would have thought that the outcome of this would be considered, before you make any decision regarding which work [sic SHIFT] pattern I return to*" (page 206).

236. For her part Mrs Reid's position was also that any final decision about the shift pattern to be worked by the Claimant going forward should be informed by the Occupational Health Report and its recommendations.

237. The Claimant attended the occupational health appointment on 15 January 2018 and emailed Mrs Reid on the same date asking for a copy of the occupational health report (page 207).

238. Mrs Reid replied to the Claimant on 16 January 2018 explaining that there had been an error in the uploading of the Report to the system but as soon as she had access to a copy she would provide it to the Claimant (page 207).

239. The error made in uploading the report to the system caused delay in Mrs Reid being in a position to provide a copy of the report to the Claimant.

240. Mrs Reid had also asked the occupational health physician to respond to a number of specific questions regarding the impact of the new shift pattern (the shift pattern then currently in place), on the Claimant's planning and preparation work and regarding whether it would provide adequate time for the Claimant to complete her work and for recuperation prior to undertaking her next shift, in order to inform the planned discussion with the claimant

about, amongst other matters potential adjustment to the shift pattern then in place. Those questions were not responded to in the Occupational Health Report produced as first uploaded. Mrs Reid therefore contacted the occupational health physician to ask that these questions be responded to.

5

241. The occupational health physician emailed Mrs Reid on 22 January 2018 providing a response to the specific questions asked by Mrs Reid (page 210-211).

10 242. The OH report when uploaded in its completed form recorded that it was the Claimant's opinion that the change made to her working [sic shift] pattern in August 2017 provided her with less rest days and had led to a build-up of stress, fatigue and worsening of Parkinson's Symptoms (pages 372-373).

15 243. The OH report, while indicating it was a management decision, recommended further meetings to discuss the option of the Claimant continuing with the previous working [shift] pattern "if operationally possible" (page 373).

20 244. Neither in the Occupational Health Report nor in the email from the occupational health physician dated 22 January 2018, in which she provides answers to the specific questions posed by Mrs Reid about the shift pattern, does the occupational health practitioner express an opinion on the question of which shift pattern would best support a return to work by the Claimant.
25 Rather, in the mail the occupational health physician reiterate the Claimant's expressed view noting and setting out viz "*There is no set routine, however Mrs Kerr strongly believes that her new work pattern* [sic shift pattern] *does not allow her to manage her health and work demands. She believes the old shift pattern allowed her to do this better*".

30

245. The Occupational Health Report dated 15 January 2018 did not state, or otherwise recommend, that any particular shift pattern whether changed, or maintained had to be and be represented as a permanent change to the Claimant's terms and conditions of employment. The Occupational Report

and the Occupational Health practitioner's email are referred to for their terms which are held incorporated for reasons of brevity.

246. Mrs Reid sent a copy of the responses received to her questions to the Claimant on 8 February 2018 (page 210).

247. On 8 February 2018 Mrs Reid emailed the Claimant a letter inviting her to a meeting to discuss her absence and return to work to include discussion of the Occupational Health Report (page 212).

248. The letter sent to the Claimant on 8 February 2018 advised that arrangements had been made for the meeting to take place on 13 February 2018 and it outlined the purpose of the meeting (page 209).

249. The absence review meeting was fixed for 13 February 2018 because this was the date which was suitable for the Claimant's trade union representative.

250. The absence review meeting took place on 13 February 2018 between Mrs Reid and the Claimant. Lindsey Gilmartin from HR and Stuart Brown, the Claimant's EIS union representative were also present at the meeting.

251. Following the meeting on 13 February 2018 Mrs Reid wrote to the Claimant by letter dated 28 February 2018 outlining what was discussed at that meeting (pages 213-214).

252. Mrs Reid advised the Claimant at the meeting on 13 February 2018 that she would agree to the Claimant returning to work on the previous working [sic shift] pattern that being the one which the Claimant had requested. The letter dated 28 February 2018 reflects that this is what Mrs Reid had told the Claimant at this meeting. The Claimant's preferred shift pattern was restored to her on 13th February 2018.

253. In so deciding that the Claimant might return to work on the previously in place shift pattern which she had requested ("her preferred shift pattern") Mrs Reid did so notwithstanding her continuing concerns regarding the adverse impact upon the pupils which the prior shift pattern had had and, notwithstanding the absence of any express recommendation or identification of the same as a reasonable adjustment by the Occupational Health practitioner.

254. In so deciding, Mrs Reid did so:-

(a) with the aim of supporting the Claimant's return to work and taking account of the Claimant's own strongly expressed view that the prior working pattern best suited her health,

(b) the fact that she had stated at the meeting that the medical advice that she had received from her GP was that she was fit to return to work if she were able to return to the prior shift pattern; and further,

(c) notwithstanding the Claimant's acknowledgement at the meeting that the then currently in place alternative shift pattern also provided the Claimant with what she indicated she required was two days "mop up time" and ample rest days between working.

255. Mrs Reid took no permanent decision about either the Claimant's work pattern or shift pattern without obtaining medical evidence from the Claimant's GP.

256. The letter dated 28 February 2018 records that Mrs Reid had indicated at the meeting on 13 February 2018 that she would meet with the Claimant and her job-share partner throughout the rest of the school session to monitor and evaluate how the pattern was working for the Claimant, for the pupils and for the school.

257. Mrs Reid told the Claimant at the meeting on 13 February 2018 that the working pattern would be monitored in the same way monitoring took place across the whole school.

258. Monitoring in the school was carried out through planning meetings and teaching meetings.

259. The letter dated 28 February 2018 record that Mrs Reid had also explained to the Claimant, at the meeting on 13 February 2018, that she would be required to complete a new request for a permanent reduction in her working pattern (reduction in her hours to 50% Full Time Equivalent) by the end of the school session as her temporary reduction in hours, previously granted on the 14th of April 2016, would come to an end in June of 2018.

260. As a consequence of the Claimant's temporary reduction in hours previously granted not representing a permanent change to the Claimant's terms and conditions in February of 2018, the particular shift pattern upon which the Respondent had agreed the Claimant could and would return to work when fit and able to, was also not a permanent change, at that time, being, of necessity, aligned with the remainder of the period of her temporary change in working pattern (reduction in working hours to 50% Full Time Equivalent).

261. Notwithstanding that as at 13th February 2018 the change agreed to was not a permanent change and, let it be assumed that the PCP relied upon was still being applied to the Claimant after the 15th of August 2016, which the Tribunal has not found in fact to be the case, by agreeing in advance of any return to work that the Claimant could return on her then preferred prior shift pattern, the Respondent took such steps as it was reasonable to take, as at the 13th of February 2018, to avoid the disadvantage identified and given notice of as founded upon by the Claimant in her pleadings (3.9.1 of the List of Issues).

262. Mrs Reid agreed on 13 February 2018 to the Claimant returning to work on the shift pattern that she had requested because she wanted to support the Claimant's return to work.

263. Mrs Reid's concerns about the adverse impact upon pupils, associated with the Claimant's preferred shift pattern, remained as at 13 February 2018 but, in seeking to balance and in balancing the needs of the children with those of the Claimant, she agreed to the preferred shift pattern being re-instated until at least the end of the current school session June 2018 (3.7 of the List of Issues).

264. Mrs Reid's decision, on 13 February 2018, was not incompatible with, nor did it contradict, her rationale for changing the shift pattern in August 2017. Rather, the decision was informed by Mrs Reid's receptiveness to the information in the Occupational Health Report received in January 2018 and of the Claimant's GP's statement relayed orally by the claimant at the 13 February meeting and appearing, for the first time, in the Fit Note of 22nd December 2017, in the context of which she wanted to support the Claimant (3.7 of the List of Issues), while continuing to monitor the shift pattern's impact upon the educational interests of the pupils.

265. The Claimant returned to work on 19 February 2018.

266. The Respondent purchased a sit and stand desk for the Claimant in February 2018 (page 180) (3.16 of the List of Issues).

267. Prior to the sit and stand desk being purchased the Claimant had this desk on a trial period to assess if it supported her (3.16 of the List of Issues).

268. Following the Claimant's return to work in February 2018 Mrs Reid monitored the working pattern. She did this through classroom visits, informal discussions with Mrs Milton and the Claimant and through discussions with the Claimant's line manager, the Deputy Head Teacher and her job share partner.

269. On 9 March 2018 the Claimant lodged a grievance with the Education Officer at the time, Angela Logue (pages 321C to 321D).

5 270. The Claimant's grievance related to two main complaints as follows (1) "*The Head Teacher took the decision to amend flexible working arrangement without due process*"; and (2) that the "*Respondent's attendance management policy was not followed during the Claimant's absence from September 2017 to February 2018*" (pages 313 to 314).

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271. On 13 March 2018 Angela Logue forwarded a copy of the Claimant's grievance to Mrs Reid (page 321C).

272. On 13 March 2018 Mrs Reid responded to Angela Logue making a number of
15 points regarding the grievance raised by the Claimant (pages 321A to 321C).

273. Mrs Reid also produced a document for Angela Logue showing a comparison of the two working patterns (pages 321E to 321F).

20 274. The document produced by Mrs Reid, showing a comparison of the two working patterns, accurately demonstrated that with the working pattern requested by the Claimant, she would be required to teach the whole of the curriculum whereas with the working pattern put in place by Mrs Reid in August 2017, the Claimant was not required to teach across the whole
25 curriculum.

275. The document prepared by Mrs Reid, showing a comparison between the two working patterns, accurately demonstrated that under the working pattern put in place by her in August 2017, the Claimant would work for two days and
30 would then have four days rest before working for three days and then having five days' rest. This compared to the working pattern requested by the Claimant whereby she would work for two days and have only two rest days, work for three days and have a period of seven days' rest.

276. The document prepared by Mrs Reid comparing the two working patterns accurately demonstrated that under the working pattern requested by the Claimant, the teacher of the classroom would alternate, for a whole week, week by week whereas, under the working pattern put in place by Mrs Reid in August 2017, the pupils would always have the same teacher on a Monday, Tuesday and Thursday and Friday, with the teacher only alternating on a Wednesday.

277. The working pattern introduced by Mrs Reid, objectively viewed, was likely to, and in the professional opinion of Mrs Reid in her capacity of Head Teacher, did, make the process of passing on information between job share partners easier because each job share partner was not teaching the whole curriculum.

278. A change of the shift pattern to that proposed by Mrs Reid in June 2017 had the potential to positively impact on the behavioural issues with pupils which Mrs Reid had observed occurring under the previous working pattern (3.4 of the List of Issues).

279. The alternative shift pattern provided similar and broadly equivalent support to the claimant such that, when taken together with its potential to lessen the absence impact upon pupils and learning, its putting in place, albeit on a trial basis, was such a step as was reasonable to take, in the circumstances, to avoid the disadvantage. It's introduction did not constitute a breach of section 20(3) EqA duty.

280. In Mrs Reid's email of 13 March 2018 she made a number of points with which her oral evidence to the Tribunal was consistent; viz:

(a) That in June 2016 she had agreed to the working pattern requested by the Claimant but had indicated that they would have to see how it worked out for the children, for the school and for the Claimant.

(b) That in the school session 2016-17 it became clear to her that the shift pattern in place was having an adverse impact upon pupils' behaviour, motivation and engagement with learning, with cluster head teachers visits and LP visits highlighting some issues within the class.

(c) That Mrs Reid had spoken to the Claimant and Mrs Milton in January 2017 to indicate that she considered that the then in place shift pattern was not working for the pupils and that she, Mrs Reid, believed that some change to it was needed. She noted that at that time both job share partners, including the Claimant, indicated that they wanted to try and make the shift pattern more effective and, that as a result, Mrs Reid had allowed the pattern to continue until the summer of 2017.

(d) That she had spoken to the Claimant and her job share partner again in June of 2017 to advise that she considered that there was a requirement now to change the shift pattern for the next school session and that a new shift pattern was agreed. Mrs Reid noted that in so doing she was conscious of the Claimant's need to rest and therefore of the need to ensure that there were sufficient days in the new shift pattern for recuperation and that the reduction in working days would also reduce the Claimant's workload as she would be teaching and would be planning for fewer areas of the curriculum.

(e) Mrs Reid noted that the Claimant did come and speak to her to explain that she, the claimant, didn't want any change to be made to the pre existing shift pattern and that she, Mrs Reid, wrote in response that they would give the new pattern a try.

(f) That at no point in the lead up to the Claimant being signed off sick from 21 September 2017, did she approach Mrs Reid to advise that she wasn't coping with the working pattern and that it was causing her stress. Mrs Reid made reference in her

email to also having a discussion with Kevin Funnel during this period.

(g) Mrs Reid explains in her email correspondence about making an OH referral for the Claimant and that following the OH appointment, when she went into the file to view the occupational health report it was not a report relating to the Claimant. Mrs Reid advises that because of that, the report was delayed in being available to all parties.

(h) Mrs Reid explained that the report was ready on 18 January 2018 and that she called the occupational health practitioner to ask where the response was to specific questions posed by her and she was advised that they hadn't been included. Mrs Reid explained that afterwards she received a response to her questions on 22 January 2018.

(i) Mrs Reid records that the return to work meeting for the Claimant was set for 13 February 2018 as that was the date suitable for the EIS representative.

(j) Mrs Reid records in her email that in discussion with Angela Logue and Lindsey Gilmartin, she had gone into the return to work meeting to agree to the old pattern until the summer with agreed monitoring and evaluating.

(k) Mrs Reid explained that on the Claimant's return to work she met with the Claimant to explain that she understood that it was a difficult time for her and that she was living with a disability, that the decision had been made to allow them to work together. Mrs Reid noted that during the discussion the Claimant told her that she didn't have to plan and that she could plan "on the back of a fag packet".

(l) Mrs Reid noted that further workplace adjustments had been implemented since the Claimant's return including a stand/sit

desk and Dragon speaking software with home access on the laptop.

(m) Mrs Reid noted and stated in evidence that throughout this case she had always tried to do the best for the children whilst keeping in mind the Claimant's disability and her need for rest between working days.

(n) Mrs Reid noted in her email correspondence that she was not “HR trained”.

281. Mrs Reid referred to having spoken to Kevin Funnel because she had asked him if she was allowed to say that she did not consider that a shift pattern met the needs of children, if that was her view.

282. When Mrs Reid wrote in her email that she was not HR trained, she meant that she was not a HR professional but she has received some training from the Respondent in relation to HR policies and procedures.

283. In her grievance, the Claimant stated that she was seeking the following resolution to her grievance: "*Acknowledgement that this situation could have been avoided and that it was not handled appropriately; and an apology, and recognition of the significant distress and ill health this has caused me, and acknowledgement of the lack of support for my disability; and an assurance that I will be supported in the future regards my disability*" (page 314).

284. The Claimant did not, as part of her grievance, ask that the change to her working pattern (reduction in her working hours) and/or to her shift pattern be reflected as a permanent change to her terms and conditions of employment.

285. Notwithstanding the fact that the change to her working pattern had not been put in place as a permanent change to her terms and conditions of employment, as at the date of the Claimant’s return to work on 19 February 2018, the Claimant nevertheless was able to and did return to work at that

time and was able to and did fulfil her contractual duties while being allowed to work on her preferred shift pattern.

286. The Claimant's position, as stated, in her grievance was that she was unhappy with what had happened in the past when Mrs Reid had changed the working pattern in June of 2017and was unhappy with the way in which her subsequent absence had been handled. Her grievance, as stated, was not that she was unhappy with the position regarding her preferred shift pattern, as at 9th March 2018, the date upon which she lodged her grievance.

287. Following the Claimant's return to work on 19 February 2018 and until the end of the 2017/18 school session, the PCP given notice of, let it be assumed that construction of it contended for by the respondent is correct, was not applied to the claimant; nor was the claimant placed at the substantial disadvantage identified by the claimant in her pleadings, in that period.

288. Notwithstanding that for the period February 2018 to June 2018 the reduction in the Claimant's working hours and the change to her preferred shift pattern had not been made as permanent changes to her contract of employment, The disadvantage to which the Claimant contends she was put by the identified PCP construed as the claimant asserts it was avoided in that period and the Claimant was able to fulfil her contractual duties. The disadvantage was avoided notwithstanding the fact that the reduction in the claimant's working hours and the restoration of her preferred shift pattern had not been declared to be "permanent".

289. On 16 March 2018 Angela Logue sent a letter to the Claimant acknowledging her grievance and encouraging her to resolve it informally in the first instance (page 322).

290. On 26 March 2018 a meeting took place between Mrs Reid, Mrs Milton and the Claimant, to discuss issues with the behaviour of some of the children in the Claimant and Mrs Milton's class (pages 218-219).

291. The meeting on 26 March 2018 was a means by which Mrs Reid was seeking to support the Claimant and Mrs Milton with issues they were experiencing with their class.

5 292. Mrs Reid took notes of this meeting (pages 218-219).

293. The notes of this meeting record, viz;- "*Due to the number of pupils highlighted and the return of both teachers to sharing the class over a two week period Heidi suggested that the time for both Sharon and Janet to* 10 *spend with the children identified discussing expectations, class rules and routines would be a good place to start*" (page 219).

294. At the meeting on 26 March 2018, Mrs Reid referred to the fact that both of the teachers had now returned to the working pattern whereby the class was 15 shared over a two week period. Mrs Reid referred to this fact as she considered that it was a factor contributing to the difficult behaviours of some of the pupils in the class that were discussed at the meeting on 26 March 2018.

20 295. The Claimant produces a document (at pages 215-217) said by the Claimant in evidence to have been prepared by her and her job share partner Mrs Milton in advance of the meeting of 26th March 2018 for use by them at the meeting. That document was not provided to Mrs Reid at the meeting on the 26th of March 2018.

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296. At St Leonard's Primary School there were pro-active management plans in place for children with particular behavioural needs which detailed strategies for dealing with the child's behavioural needs.

30 297. There were pro-active management plans in place for some of the children in the Claimant's P5/6 class.

298. One pupil in the Claimant's P5/6 classroom had written a letter to the school detailing her negative experience of the class as a result of the behaviours

displayed by some pupils in the class (page 216). This pupil's parents had also asked for a meeting with the school.

299. At the start of every school session there was annual training provided to teachers and a reminder of relevant policies.

300. Training was provided to teachers throughout the school session by Mrs Reid and by external providers.

301. The training provided to teachers covered nurture and strategies.

302. In the event the Claimant missed a training session due to her not working full time hours, the information from the training session was available on the school's intranet.

303. A comment was made by a parent at a parent's evening regarding their child being taught exactly the same thing by the two job share partners. That was an example of issues arising from the operation of the Claimant's preferred shift pattern which Mrs Reid observed.

304. On 29 March 2018 Mrs Reid emailed the Claimant, Mrs Milton and other teachers to advise them that their temporary reduction in working hours was due to end on 29 June 2018 (page 220).

305. The email from Mrs Reid on the 29th of March 2018 explained that when the temporary reduction to the teachers' hours came to an end, they would return to their substantive working hours in the absence of further application but, if they wished as an alternative to reapply for a reduction in hours it would now need to be for a reduction on a permanent basis following the 23 months' temporary arrangement.

306. At the time of writing her email of 29th March 2018, Mrs Reid's genuine, but now accepted by her erroneous, understanding of the Respondent's flexible

working policy for any teacher was that any change would be on a temporary basis for 23 months in the first instance.

307. By letter dated 18 April 2018 Angela Logue wrote to the Claimant acknowledging that the Claimant wished her grievance to proceed to the first formal stage and inviting her to a grievance meeting on 2 May 2018 (J-324).

308. A grievance meeting in relation to the Claimant's grievance took place on 2 May 2018 (J-325 to 334).

309. At the grievance meeting on 2 May 2018 the Claimant was accompanied by her trade union representative. The Claimant stated during the grievance meeting that Mrs Milton had been sending children to management more often and that Mrs Reid had said that she was fed up with it (J-326).

310. Mrs Reid did not change the job sharers' shift pattern in August 2017 because she was annoyed at Mrs Milton sending children to the leadership team.

311. Mrs Reid did speak to Mrs Milton on a one to one basis about her approach as a result of the number of children that Mrs Milton was sending to the leadership team to provide Mrs Milton with support.

312. Mrs Reid made notes in advance of the Claimant's return to work meeting with her in February 2018. She referred to those notes in the course of the meeting.

313. It was not inappropriate for Mrs Reid to have made notes for her to have regard to during her meeting with the Claimant on her return to work, or to refer to them in the course of the meeting.

314. The Claimant's trade union representative explained during the grievance meeting that at the return to work meeting on 13 February 2018 Mrs Reid had agreed to the Claimant returning to her original work pattern (J-329).

315. The Claimant's trade union representative advised during the grievance meeting that the Claimant was not looking for huge things, just recognition and closure to move on (J-334).

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316. The Claimant did not raise at the grievance meeting, nor did her Trade Union representative raise, any question about, or request that, when the Claimant returned to work on 19th February 2018, or at any time subsequently, the shift pattern, on which the Respondent agreed to her returning, should have been
10 put in place permanently.

317. On 9 May 2018 the Claimant completed another flexible working request form (J-221-222).

15 318. The flexible working request made by the Claimant on the 9th of May 2018 included, on that occasion, and in addition to a reiterated request for a change to her working pattern to 50% FTE, a request that the specific shift pattern that she was then working with Mrs Milton be also confirmed as in place.

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319. The Claimant indicated on her flexible working request form completed on 9 May 2018 that she wanted the requested changes to be permanent (page 222).

25 320. The flexible working application form is designed for use by employees when requesting a change to working pattern, that is a change from their otherwise substantively contracted working hours such as, in the case of the Claimant, for example, a reduction in working hours from full time to 50% Full Time Equivalent. The application form is not designed for use in requesting the
30 putting in place of a particular shift pattern.

321. The two requests set out by the Claimant in her second flexible working application, namely a request that her hours be permanently reduced to 50% Full Time Equivalent and her request that she be permanently allowed to

work on her preferred shift pattern, notwithstanding the design of the form upon which they were made, were concurrently considered by the Respondent’s Mrs Reid.

322. Mrs Reid indicated on the flexible working request form dated 9 May 2018 that she required a meeting to discuss the request with the Claimant (page 223).

323. Mrs Reid indicated on the flexible working request form that she had been unable to meet with the Claimant and she had sought to meet with her on 22 May 2018 (page 223).

324. Mrs Reid wanted to meet with the Claimant to discuss her flexible working request in order to discuss how it could be accommodated.

325. Mrs Reid did not indicate that she wanted to meet with the Claimant to discuss her flexible working request because she expected to refuse the request.

326. On 9 May 2018 Mrs Reid wrote to the Claimant and acknowledged receipt of her flexible working request (page 226).

327. On 11 May 2018 Mrs Reid emailed the Claimant and Mrs Milton with a copy of the note of the meeting that Mrs Reid had taken of the meeting on 26 March 2018 (page 228).

328. Mrs Reid invited the Claimant and Sharon Milton to arrange a time to come to Mrs Reid's office to read through the note of the meeting of 26 March 2018 prior to signing it (page 228).

329. Mrs Reid asked the Claimant and Mrs Milton to provide dates when they would be free in order to develop a support plan around behaviour management (page 228).

330. The Claimant responded to Mrs Reid's email of 11 May 2018 by email on 14 May 2018 (pages 227-228).

331. In the Claimant's email of 14 May 2018 she advises that she and Mrs Milton will get their diaries together and come back to Mrs Reid with some dates to meet.

332. The Claimant and Mrs Milton did not revert to Mrs Reid. They did not ever provide her with any dates on which they could meet in order to develop a support plan around behaviour management.

333. Mrs Reid responded to the Claimant's email of 14 May 2018 by email on 16 May 2018 advising that the meeting on 26 March 2018 was not a formal meeting and that the minutes were a summary of the discussion points (page 230).

334. In March 2018, it was Mrs Reid's practice to take notes of all of her meetings with teachers to ensure she had a record of these discussions.

335. On 21 May 2018 the Claimant replied to Mrs Reid's email of 16 May 2018 (page 230).

336. The Claimant attached to her email of 21 May 2018 a document prepared by her and Mrs Milton (pages 231-237). Mrs Reid acknowledged receipt of that document by email dated 22 May 2018 (page 229).

337. By letter dated 17 May 2018 Mrs Reid wrote to the Claimant and advised that she wished to meet to discuss the Claimant's flexible working request. The letter invited the Claimant to meet on 22 May 2018 (page 238).

338. Mrs Reid emailed the letter inviting the Claimant to a meeting on 22 May 2018 on 18 May 2018 (page 240).

339. The Claimant advised Mrs Reid that she was waiting for her trade union representative to confirm his availability to attend the meeting on 22 May 2018 before then advising Mrs Reid that she would not be able to attend the meeting on 22 May 2018 (pages 239-240).

340. Mrs Reid emailed the Claimant on 22 May 2018 advising that the recommendation within the Respondent's policy is to meet within 28 days of receipt of the flexible working request which means a meeting should take place by 6 June 2018. The email noted that the Claimant was travelling to Malawi from 24 May 2018 to 1 June 2018 and that Mrs Reid wanted to arrange a meeting the week beginning 4 June 2018 (page 239).

341. In May of 2018 the Claimant travelled to Malawi as part of a team representing St Leonard's School who were initiating a partnership with schools there. The claimant successfully participated in the visit.

342. During the Claimant's trip to Malawi, her mother died which meant that on her return from Malawi she had a period of bereavement leave and was unable to meet Mrs Reid the week beginning 4 June 2018.

343. By email dated 15 June 2018 the Claimant emailed her then trade union representative, Stuart Brown, advising that she considered there was an irretrievable breakdown in the relationship between Mrs Reid and herself and Sharon Milton (page 241).

344. In the Claimant's email of 15 June 2018 she advised that both she and Mrs Milton were requesting a transfer.

345. On 18 June 2018 Mrs Reid sent an email to Angela Logue and Lindsey Gilmartin regarding Mrs Milton (page 247A).

346. In Mrs Reid's email of 18 June 2018, she notes that Mrs Milton is absent and that she will not be able to speak to her about her transfer request before the

end of term and that she requires to send a teacher/staffing information to staff and parents (page 247A).

347. In Mrs Reid's email of 18 June 2018 she seeks advice on whether or not to send this information out without showing the Claimant and Sharon Milton being allocated a class or if she should add them where Mrs Reid had planned (page 247A).

348. As at 18 June 2018 Mrs Reid had not been able to speak to the Claimant about her flexible working request.

349. As at 18 June 2018 Mrs Reid was aware that the Claimant and Sharon Milton had made a request to transfer from St Leonard's Primary School and Mrs Reid did not know the outcome of that request.

350. As at 18 June 2018, Mrs Reid knew where she would place the Claimant and Sharon Milton in St Leonard's Primary School if they were not to be transferred to another school.

351. Mrs Reid wanted to send the teacher/staffing information to staff and parents to give pupils, particularly those with additional support needs, the opportunity to meet with their teachers before the end of the current school session and before the start of the next.

352. On 18 or 19 June 2018 Mrs Reid sent a letter to the parents with the staffing arrangements for the next school session (page 248B).

353. The letter sent to parents by Mrs Reid with the staffing information did not state what class the Claimant and Mrs Milton would have in the next school session.

354. When Mrs Reid sent the letter to parents with the staffing information she did not know the outcome of the Claimant and Mrs Milton's request to transfer from St Leonard's Primary School.

355. The letter sent to parents by Mrs Reid with the staffing information referred to the fact that two teachers had been appointed as temporary principal teachers and that they would be supporting the development of the school's nurturing approaches. It stated that these temporary principal teachers would each be job-sharing their class with another teacher to allow them to support development across the school and that Mrs Reid would forward that information once confirmed.

356. It was Mrs Reid's intention, when she sent the staffing information to the parents, that if the Claimant and Mrs Milton were remaining at St Leonard’s Primary School they would each job-share with the temporary principal teachers.

357. Mrs Milton and the Claimant job-sharing with the temporary principal teachers would have no impact on the other class allocations identified in the letter to parents (3.11.4 of the List of Issues).

358. The fact that Mrs Reid sent the staffing information to parents without including the Claimant and Mrs Milton does not, in the circumstances, demonstrate that Mrs Reid was not planning to allocate the Claimant to a class with the working pattern requested, if she were to remain at St Leonard’s following her transfer request (3.10 of the List of Issues).

359. On 20 June 2018 the Claimant confirmed that she was happy that the notes of the grievance meeting were an accurate account of the meeting (page 335).

360. On 20 June 2018 Angela Logue wrote to the Claimant about her request to transfer from St Leonard’s (page 255).

361. In Angela Logue's email of 20 June 2018 to the Claimant she advises that if both the Claimant and Mrs Milton confirm their request to transfer school

therefore fulfilling one full-time vacancy that the request could be met at Pathhead Primary School Kirkcaldy from August 2018.

362. The position at Pathhead Primary School would be on the basis of the working pattern that the Claimant was currently working and wished to continue working.

363. The Claimant responded to Angela Logue on the same day (pages 254-255).

364. In the Claimant's response to Angela Logue she advises that she is not making the transfer request in order to allow her working pattern to be accommodated, but rather, because she considered that having taken out a grievance about Mrs Reid, her relationship with her had broken down and that this is the reason for the Claimant requesting a transfer.

365. In the Claimant's email of 20th June 2018 to Angela Logue she stated her understanding, and acknowledged, that the Respondents had already made a reasonable adjustment under the Equality Act by allowing her to return to work on the shift pattern which she considered best supported her, and further acknowledged that that adjustment was in place.

366. In the Claimant's email to Angela Logue on 20 June 2018 she advised that in order to continue her work with the school in Malawi, she did not wish to move to Pathhead Primary School and would prefer a move to a school in the Dunfermline area which would allow her to continue with the project.

367. The Claimant advised Angela Logue in her email of 20 June 2018 that if she could not be accommodated in a school in Dunfermline, she wished in those circumstances to remain at St Leonard’s.

368. At the time that she made her transfer request, on 15th June 2018, the Claimant considered that the Respondent had already made a reasonable adjustment, in furtherance of what she considered was a duty to do so arising under section 20 of the Equality Act 2010, with regards to the shift pattern

which she was required to work. The Claimant so considered notwithstanding the fact that the reduction in her working hours and her preferred shift pattern was not represented, at that time, as a permanent change to her Contract of Employment.

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369. The Respondent's offer of an alternative school at which the Claimant could be placed on the working pattern sought, was another means of the Respondent implementing the reasonable adjustment sought by the Claimant.

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370. By letter dated 22 June 2018 the Claimant received the outcome to her grievance (pages 336 to 338).

371. The outcome to the Claimant's grievance was that it was partially upheld.
15 The part that was upheld was that a formal process should have been followed prior to the working pattern being changed in August 2017 and in particular the managing workforce change principles should have been followed. The Claimant's grievance was not upheld insofar as it related to the management of the Claimant's return to work.

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372. The outcome to the Claimant's grievance found that an occupational health referral was not requested prior to December because at that time there was no indication from the Claimant that she was in a position to consider a return to work and that once she had indicated that she was feeling fit to return, an
25 occupational health referral was made (page 337).

373. The outcome to the Claimant's grievance confirmed that it would have been expected that an occupational health referral would have been made where an employee raises concerns regarding their health or disability in relation to
30 working a particular shift (page 337).

374. The Managing Workforce Change: Changes to Terms & Conditions Procedure (pages 151F-151J) states that it should be used "as a means of removing or reducing the need for redundancies or achieving business

efficiencies" (page 151F); and refers to potentially requiring to collectively consult (page 151G).

375. Following the outcome to the Claimant's grievance, Mrs Reid was advised that she should have followed the principals in the Managing Workforce Change: Changes to Terms & Conditions Procedure in relation to her varying of the shift pattern in August 2017.

376. Mrs Reid was never provided with details as to exactly what she should have done under the Managing Workforce Change principals with regards to amending the Claimant's shift pattern in August 2017.

377. In a letter dated 22 June 2018 Mrs Reid explained her decision in relation to the Claimant's flexible working request (page 257).

378. Mrs Reid did not post this letter to the Claimant but gave it to her on 26 June 2018 (page 223).

379. On 26 June 2018 Mrs Reid verbally explained to the Claimant her decision on the Claimant's flexible working request.

380. In the decision letter dated 22 June 2018 Mrs Reid stated:-

> "*after careful consideration of the evidence and the needs of the learners, I strongly believe that the requested work pattern has caused there to be an inconsistency in approach to meeting the emotional, social and behavioural demands of all the children. The work pattern has also effected the coherence and continuity and learning experience and teaching approaches, impacting on quality*".

381. Mrs Reid did in fact consider that the working pattern was having a detrimental impact on the children in the classroom as per the letter dated 22 June 2018 and she explained that to the Claimant on 26 June 2018.

382. Mrs Reid's view of the impact the working pattern was having on the children in the classroom was informed by her professional judgement and was based upon; her observations of the classroom, discussions with the deputy head teacher and the fact she was receiving complaints from parents.

383. The working pattern in place since February 2018 had had some detrimental impact on the pupils in the class (3.11.2 of the List of Issues).

384. In her letter dated 22 June 2018 Mrs Reid further states that "*in considering your health needs, I would be able to accommodate 0.5 FTE working pattern of Wednesday, Thursday, Friday, Monday and Tuesday alternate weeks, job sharing with one of our principal teachers next session for a trial period from 13 August-5 October 2018*". The shift pattern being identified and agreed to by Mrs Reid in that communication was the claimant's preferred shift pattern.

385. Mrs Reid's decision on the Claimant's flexible working request was to agree to the requested working pattern and the claimant's preferred shift pattern continuing to be in place from the start of the next school session.

386. Mrs Reid's decision regarding the Claimant's "flexible working request", in so far as the same related to the shift pattern which the Claimant would work, was that the Claimant's job share partner would change with effect from August 2018 and that the Claimant's continuing preferred shift pattern with her new job share partner would be subject to a trial period until 5 October 2018 (3.11 of the List of Issues).

387. The length of the trial period was reasonable, in the circumstances, because the pace and progression of learning, which Mrs Reid would be monitoring in particular, could be assessed over a short period of time (3.12 of the List of Issues).

388. The Respondent's Flexible Working Requests Procedure expressly refers to the possibility of agreeing a trial in response to a flexible working request (page 151C).

389. Such a trial period was separately reasonable, in the circumstances, in the context of complying with a section 20(3) EqA duty.

5 390. In her letter dated 22 June 2018 Mrs Reid stated:-

> "*in making my decision I believe this would allow for an increase in consistency of approaches and support continuity and learning experiences. The principal teacher would be one FTE each week, allowing for regular communication with your job share partner in school*".

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391. Mrs Reid considered that changing the Claimant's job share partner to a principal teacher would potentially have a material impact on how the working pattern operated and that it had the potential to improve its operation and lessen the adverse impact upon pupils in the class which she had observed was associated with the claimant's preferred shift pattern (3.11.3 of the List of Issues).

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20 392. Mrs Reid's decision to agree to the working pattern being in place with the Claimant job sharing with a principal teacher until at least 5 October 2018, did not contradict the reasons given for the previous decision to change the shift pattern; Mrs Reid was making a substantive change to the operation of the shift pattern from August 2018, by changing the job share partner. That was a change which she believed had the potential to counter the adverse impacts on pupils which were associated with its previous operations and which she had observed (3.7 of the List of Issues).

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393. The letter dated 22 June 2018 stated that the arrangement would be monitored and reviewed by the end of the trial period.

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394. The letter dated 22 June 2018 advised the Claimant of her right to appeal against the decision.

395. The Claimant did not appeal against the decision.

396. Mrs Reid noted on the Claimant's flexible working request form that she was agreeing to a “modified or alternative arrangement” for the Claimant and that there would be a trial period of the working pattern job sharing with one of the principal teachers (page 223).

397. Mrs Reid so indicated on the form that she had agreed to a “modified or alternative arrangement” because the Claimant's job share partner was to be changed.

398. Mrs Reid indicated on the Claimant's flexible working request form that she had communicated her decision to the Claimant on 26 June 2018 (page 223).

399. Mrs Reid’s decision regarding the Claimant’s second flexible working request was not influenced by the fact that the Claimant had raised a grievance about Mrs Reid.

400. No cogent alternative reason for the decisions of Mrs Reid, let it be assumed that they were not made because of her considered view that the shift pattern was having a detrimental impact on the pupils in the class, was provided in evidence.

401. The Claimant’s flexible working request made on 9 April 2018 was not refused by the Respondent. Neither was her request that her preferred shift pattern be made permanent refused by the Respondent.

402. Following the Claimant and Mrs Reid’s discussion on 26 June 2018, of Mrs Reid's decision on the Claimant's flexible working request, the Claimant and Mrs Reid had a further discussion on 27 June 2018 (page 264).

403. On 27 June 2018 Angela Logue replied to the Claimant's email of 20 June 2018 regarding the transfer request (pages 250-251).

404. In Angela Logue's email of 27 June 2018 she advised the Claimant that there were no permanent vacancies in the west Fife area at that time.

405. The Respondent wrote to the Claimant by letter dated 29 June 2018 confirming the extension of the Claimant's flexible working arrangement (page 260).

406. The letter dated 29 June 2018 stated that the flexible working arrangement would end on 5 October 2018 which was the end of the trial period.

407. On 14 August 2018 Mrs Reid sent an email to the Claimant with a note of what she had discussed with the Claimant on 26 June and 27 June 2018 (pages 264-265).

408. In the email dated 14 August 2018 Mrs Reid has referred to how the Claimant's request could be accommodated "next session".

409. When Mrs Reid referred in her email of 14 August 2018 to the next session, she was referring to the full academic session for 2018/19.

410. The email of 14 August 2018 is an accurate reflection of what the Claimant and Mrs Reid had discussed on 26 June and 27 June 2018.

411. During the discussion on 27 June 2018 Mrs Reid explained to the Claimant the different possible outcomes at the end of the trial period.

412. All of the possible outcomes explained by Mrs Reid involved either the Claimant continuing to work her preferred requested working pattern and her preferred shift pattern or an alternative shift pattern being put in place which was supported by medical advice.

413. The Claimant was not advised that either her or her preferred shift pattern working pattern would definitely be removed at the end of the trial period.

414. In her email of 14 August 2018 Mrs Reid noted that on 27 June 2018 the Claimant had asked about what “monitoring would look like”, and that Mrs Reid had stated: "*that monitoring of the arrangement would be in line with whole school procedures and would involve yourself, me and the PT talking and sharing openly what was working or not. This would probably involve meeting regularly to share and discuss*".

415. What Mrs Reid was proposing to monitor in respect of the Claimant included pace and progression of learning and this was in line with what was monitored for all teachers. The reason for it being specifically highlighted to the Claimant was because of Mrs Reid's concerns that the shift pattern had a detrimental impact on amongst other things on the children’s pace and progression in the classroom.

416. Notwithstanding the fact that the shift pattern would be on a trial basis until October 2018 and in all the circumstances pertaining, the Respondent, in it putting in place in February 2018 and in extending it, did take such steps as it was reasonable to take to avoid the disadvantage identified as relied upon by the Claimant let it be assumed that the PCP relied upon was being applied to the Claimant at that time (3.11.1 of the List of Issues).

417. The working pattern being in place for a trial period would have avoided the disadvantage identified by the Claimant until at least October 2018 (3.11.5 of the List of Issues).

418. The decision of Mrs Reid regarding the Claimant’s second flexible working request was based on the evidence available to Mrs Reid at the time (3.13 of the List of Issues).

419. Sharon Milton’s working pattern was also to change for the school session starting in August 2018.

420. On 13 August 2018 the Claimant was signed off sick with the reason being noted on the fit note as "anxiety and low mood due to work situation". The Claimant was signed off at that time until 10 September 2018 (page 380).

5 421. The Claimant had in place the shift pattern that she requested continually from 19 February 2018 until her absence began in August 2018 and beyond.

422. The principal reason for the Claimant's absence from 13 August 2018 was not a failure on the Respondent's part to make a reasonable adjustment.

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Contractual Sick Pay Allowance

423. Under the SNCT Handbook, (Policy), employees of the Respondent are entitled to a sickness allowance in any one 12 month period the amount of
15 which is based on their length of service (page 113).

424. Under part 6.8 of the SNCT Handbook the Respondent has discretion to extend the periods of sickness allowance, where appropriate (page 113).

20 425. Under part 6.20 of the SNCT Handbook there is provision for an employee to receive a separate allowance where the employee is absent due to sickness or disablement as a result of a work related injury or illness (page 115).

426. Part 6.36 of the SNCT Handbook provides that where an employee is
25 suffering from a long-term medical condition, the Respondent should give careful consideration to extending the period of sickness allowance, particularly when the prognosis is that he/she will be able to return to work or where the illness will bring the employee under the terms of the Equality Act 2010 (page 116).

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427. The Claimant's Parkinson's Disease is not the result of work related injury or illness.

428. On 3 September 2018 the Claimant's trade union representative Pauline Stewart emailed the Respondent's Shelagh McLean regarding a number of employees on long-term sickness absence, including the Claimant (pages 266-267).

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429. In the case of the Claimant the application for extension of sick pay was made on the grounds that "*because Janet's absence is through the actions of her Head Teacher we request that any earnings lost through absence be returned and her sick pay period returned to full pay until the situation is resolved.*" As is specified in the detailed paragraph setting out the grounds at page 267 of the bundle, the situation being referred to was that of changes to the Claimant's preferred shift pattern, that is to say the application was one which was made in terms of paragraph 6.20 of the SNCT Handbook. The application which was made and which was subsequently refused by Mrs McLean was not one made in terms of paragraph 6.36 of the SNCT Handbook.

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430. The email of 3 September 2018 was sent to Mrs McLean following a verbal conversation between Mrs McLean and Mrs Stewart during which Mrs McLean had asked for more information to be provided about the cases referred to by Mrs Stewart.

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431. In Mrs Stewart's email of 3 September 2018 she was asking that the Claimant continue to receive full sick pay until the situation with the working (shift) pattern had been resolved.

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432. Shelagh McLean considered this request made regarding the Claimant's sick pay.

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433. Mrs McLean spoke to Sarah Else or Heidi Reid to obtain more information about the up to date position regarding the Claimant's case following receipt of the email dated 3 September 2018.

434. In addition to giving consideration to the information provided by Pauline Stewart, Shelagh McLean spoke directly with the claimant's school prior to making her decision not to reclassify (extend) the claimant's sick pay entitlement, in order to be appraised of the then current up to date position regarding the claimant's potential return to work. Shelagh McLean spoke with either the Education Manager or the Head Teacher.

435. She was advised by the school that the claimant was ready to return to work and that the requested adjustment namely that she be allowed to return on her preferred shift pattern, was already in place and available at and could and would be given effect to immediately upon, the claimant confirming a return date.

436. Standing the above position, and given consideration to the following matters,

- The claimant had indicated that she was ready to return to work and that

- the respondent had confirmed that that could and would be on her preferred shift pattern and, on her return the claimant would be in receipt of normal full pay and would also begin of new the reaccrual of the replenishment of her contractual sick pay entitlement and that a reclassification of her contractual sick pay entitlement at that point was not required to facilitate the claimant's return to work. Thus having considered matters she exercised her discretion in favour of not reclassifying the claimant's sick pay allowance.

concluded that there was no reason for any further delay in return to work.

437. Shelagh McLean's so deciding was not incompatible with Sarah Else's supporting of the claimant's return to work.

438. Shelagh McLean advised Kirsty McElroy of her decision in September of 2018.

439. Shelagh McLean understood that she had discretion under part 6.8 of the SNCT Handbook to extend sick pay allowance in certain circumstances.

5 440. In Shelagh McLean's consideration Part 6.20 of the SNCT Handbook was not applicable to her decision regarding the Claimant's sick pay because the Claimant's absence was not due to a work related injury/illness but, as confirmed in all of her sicknotes, was due to "Parkinson's Disease".

10 441. In or around September 2018 Mrs McLean had one of her regular meetings with Mrs Stewart following receipt of Mrs Stewart's email of 3 September 2018. At the meeting Mrs McLean orally advised Mrs Stewart of her decision to not exercise her discretion to extend sick pay for, amongst others, the Claimant.

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442. Shelagh McLean made the decision in September 2018 that no additional sick pay would be paid to the Claimant (3.24 of the List of Issues). She communicated that decision to Mrs Stewart, verbally in and not later than 30 September 2018.

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443. Shelagh McLean made the decision regarding the Claimant's sick pay because she understood that the situation with the shift pattern had been resolved and, further, that the Claimant would be able to return to work shortly with the reasonable adjustment which she had sought in place, and
25 that the Respondent was working towards facilitating a return to work for the Claimant on that basis (3.26.1 of the List of Issues).

444. Returning the Claimant to work as soon as possible would not only mean she was receiving full pay again but would allow her to start accruing sick pay
30 entitlement again.

445. When on 21 January 2019 Pauline Stewart raised the issue of reclassification of the claimant's sick pay with Kirsty McElroy who in turn referred to Shelagh McLean, Shelagh McLean advised Kirsty McElroy; that she had already

refused the application and had communicated that decision directly to Pauline Stewart in September 2018, and had reminded her orally of that decision and communication following receipt of Pauline Stewart's email of 5 November 2018.

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446. As at 30th September 2018, the date by which the respondents, having given consideration to a requested adjustment for reclassification (extension) of the claimant's contractual sick pay entitlement, took a positive decision not to make the requested adjustment, the respondents were able to take account of, the following medical evidence regarding the claimant's condition and its impact upon her:- ;

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(a) the Occupational Health Report of 15th January 2016,

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(b) the pain referral assessment request at page 349-351 of the Bundle,

(c) the medical report of Dr Katja Lassak, Consultant Neurologist dated 31st October 2016 (J352 and 353),

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(d) the report of Suzanne Saunders, Pharmacist Supplementary Prescriber, Fife Integrated Pain Management Service dated 3rd February 2017 (J354 and 355),

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(e) the claimant's Fit Notes dated:-

(i) 22nd/09/2017 (reason for absence Parkinson's Disease), 18th/10th/2017 (reason for absence Parkinson's Disease), 16th/11/2017 (reason for absence Parkinson's Disease),

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(ii) the correspondence from the Fife Health and Social Care Partnership dated 6th November 2017 relating to the online treatment programme,

Beating the Blues, (cognitive therapy) to which the claimant was referred by Dr Lin (J359-363),

(f) the claimant's Fit Notes dated:-

(i) 22nd/12/2017 (reasons for absence Parkinson's Disease) including for the first time a narration of the claimant's view, expressed to her doctor, that she wanted her working schedule (shift pattern) to be restored to that which she had worked prior to 16th August 2017, (her preferred shift pattern), to allow for recuperation between teaching days,

(ii) the claimant's Fit Note of 24/01/2018 (reasons for absence Parkinson's Disease – no reference to requiring a change in shift pattern,

(k) the report of Dr Lassak dated 9th of January 2018 recording the claimant's statement made to him that she was, as at the 9th of January 2018, "*keen to return to work and it would be preferable if she worked her previous shift pattern which allowed her longer periods to recover*" and Dr Lassak's statement that he "*would support her in her request to do that*". (J368),

(l) the Occupational Health Report of 15th January 2018;

(i) in which the Occupational Health Practitioner expressed the opinion that following a resolution of/compromise in relation to the requested adjustment/restoration of the preferred shift pattern a return to work by the claimant would take place, and

(ii) which records the claimant's statement made to the Occupational Health Practitioner that, as at 15th January 2018:- "Since her absence and time off work Mrs Kerr now feels well and ready to return to work however, strongly believes returning to her new working rota (that is to say the working rota onto which she had been changed by the respondents on 16th August 2017) "will continue to have a detrimental effect on her health".

(iii) And, under the heading "Management Advice" that while remaining a management decision, the Occupational Health Advisor recommended a further meeting to discuss the option of allowing the claimant to return to her previous (preferred) shift rota "if operationally possible",

(iv) the medical report of Dr Sara Lim dated 16th February 2018 relating to her interactions with the claimant on 22nd September 2017, 18th October 2017, 16th November 2017 and 19th December 2017 and recording the claimant's statements to her, as at the 19th of December 2017, that her mood had improved and that she was keen to get back to work, preferably on her old work schedule (that is her preferred shift pattern) and hoped to begin (return to work) at the start of the new school term in January 2018.

447. On 13th February 2018 the respondent advised the claimant, at the sickness absence meeting of that day, that in light of the various elements of medical evidence which they had considered and notwithstanding the Head Teacher's

continuing concerns about the adverse impact that the claimant's preferred shift pattern had had, and if restored would again have, on the pupils in the class, the respondents had decided to restore, and as at that day had restored, the claimant's preferred shift pattern upon which she would be allowed to return to work.

448. The claimant returned to work on 21 February 2018.

449. The respondent did consider making the adjustment contended for but concluded that it was not an adjustment which if taken would avoid the disadvantage.

450. Had the claimant returned to work on 11th October 2018, upon expiry of her Fit Note and as indicated in it, she would have returned to full pay and would have begun to accrue, of new, further contractual sick pay.

451. It was reasonable for the Respondent to consider that facilitating the Claimant's return to work should be the primary aim and that continuing to pay the Claimant full sick pay did not contribute to that aim (3.26.2 of the List of Issues). It was reasonable, in the circumstances, for the Respondent to consider and decide that it would not have been appropriate to reclassify the Claimant's sick pay allowance (3.26.3 of the List of Issues).

452. On its preponderance and on the balance of probabilities, the evidence before the Tribunal did not establish that reclassifying (extending) the claimant's sick pay entitlement, whether in terms of their own policy or otherwise, would have avoided the substantial disadvantage given notice of as relied upon; That is to say did not establish that it would have avoided "*an increased risk of her being unable to perform her contractual duties of employment on account of ill health arising from the identified PCP, and by extension, the increased risk of her being dismissed or otherwise having her employment terminated on the grounds of non-performance/capability.*"

453. In the circumstances their omission, being a failure to re-classify (extend) the claimant's contractual sick pay entitlement, did not constitute a failure of a section 20(3) duty.

5 454. In the 6 month period following the Claimant's return to work on 13th February 2018 had available to them and able to consider the following medical evidence from the Claimant's medical adviser:

(a) the correspondence of 30th April 2018 from the Fife Health and
10 Social Care Partnership confirming that the claimant had concluded 6 sessions of cognitive behavioural therapy felt better and also felt that she did not require to proceed with any further sessions and thus had been discharged from the service. (J-377).

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(b) The report of Gillian Aldrich, Parkinson's Nurse Specialist, to Dr S Lin, (the claimant's GP), dated the 17th of May 2018 relating to her review of the claimant on 11th May 2018 and recording the claimant's statement, made to her, that she
20 continued to work at the local primary school on a job share and was active and involved in regular exercise which had all been beneficial to her Parkinson's but continued to have a heavy feeling in her leg which might benefit from an increase in her medication dosage,

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(c) the report of Dr Katja Lassak, Consultant Neurologist relating to his review of the claimant carried out on 11th June 2018 which records a reference by the claimant to a change of her working pattern which "does not allow her longer periods for
30 recovery as did the previous work pattern" (at the time of making those statements to Dr Lassak the claimant's previous work pattern had in fact been restored to her and she had been working since 13th February 2018),

(d) the claimant's Fit Note dated 13th/08/2018 (reason for absence anxiety and low mood due to work situation) and the statement that at the end of the Fit Note period namely 10/09/2018 the claimant's doctor would not need to assess her fitness for work again, that is to say, an effective prognosis of the claimant would be fit for return on the 10th of September 2018.

455. In August 2018 Mrs Reid had a period of sickness absence and at the same time a new education officer, Sarah Else, was given responsibility for the cluster of schools which included St Leonard's Primary School.

456. Sarah Else was provided with a handover by the previous education officer, Angela Logue, which included discussion of the Claimant's circumstances.

457. Sarah Else was advised that following the outcome to the Claimant's grievance that the working pattern that the Claimant had requested was to be put into place.

458. From August 2018 onwards, Mrs Else took responsibility for managing the Claimant's absence from work.

459. Sarah Else spoke to Mrs Reid and during that discussion Mrs Reid confirmed that she was willing to put in place the working pattern that the Claimant wanted if that was what was required to support the Claimant to return to work.

460. Mrs Reid advised Mrs Else that she had made a personnel change in order to provide additional support and that what she was referring to was the change in the Claimant's job-share partner to one of the temporary principal teachers.

461. Mrs Else did not have knowledge of what the position had been with regards to the Claimant's shift pattern since the outcome of her grievance or indeed since the Claimant's return to work in February 2018.

462. Mrs Else did not have knowledge of Mrs Reid's decision on the Claimant's last flexible working request, namely to agree to the shift pattern continuing to be in place with a change to the job-share partner and of arrangement being subject to a trial period.

463. Sarah Else met with the Claimant on 4 September 2018 (pages 270-274).

464. The Claimant was accompanied at the meeting on 4 September 2018 by her trade union representative, Pauline Stewart and Lindsey Gilmartin, HR representative was also present at the meeting.

465. At the meeting on 4 September 2018, Lindsey Gilmartin took handwritten notes (pages 270-274).

466. The handwritten notes of the meeting on 4 September 2018 reflect the key points discussed during that meeting.

467. A summary of the absence review meeting on 4 September 2018 and subsequent absence review meetings were added to the Respondent's case management record system (pages 268-269).

468. At the meeting on 4 September 2018 Sarah Else advised the Claimant that the working pattern that she was requesting would be put into place and that it would not be changed (page 274), that is to say without qualifications in time or trial.

469. From September 2018 the Respondent made permanent the reasonable adjustment requested and contended for by the Claimant which they had first put in place on 14th August 2016 and again in June 2017 and which had remained in place since that latter date (3.15 of the List of Issues).

470. At the meeting on 4 September 2018 the Claimant indicated that she was not yet ready to return to work and she didn't want to put her health in jeopardy by returning too soon (page 274).

471. At the meeting on 4 September 2018 there was discussion about whether or not the Claimant would be willing to return to St Leonard's Primary School when fit on the working pattern requested (page 274).

472. At the meeting on 4 September 2018 the Claimant was advised that if, when fit, the Claimant did not want to go back to St Leonard's, the Respondent would look for other schools within the geographic area to which she could move (page 274).

473. It was agreed at the end of the meeting on 4 September 2018 that the Claimant would give some more thought to whether or not she did want to return to St Leonard's and that Mrs Else for her part would explore what other options there might be for the Claimant if she did not want to return to St Leonard's.

474. On 10 September 2018 the Claimant was signed off for a further period until 21 October 2018 on the grounds of "*anxiety and low mood due to work situation*" (page 381).

475. On 12 September 2018 the Claimant's sick pay moved to half pay.

476. On 26 September 2018 the Claimant's trade union representative, Mrs Stewart, contacted Lindsey Gilmartin and Mrs Else to advise that she had spoken to the Claimant the previous day and that she was not yet in a position to return to work and suggested that a meeting scheduled for next Tuesday be moved to early in the new term (page 276).

477. On 26 September 2018 the Claimant triggered Early ACAS Conciliation (page 7).

478. Following Mrs Stewart's email of 26 September 2018 there followed emails seeking to arrange a date for a meeting in November 2018 (pages 275-276).

479. On 19 October 2018 Mrs Stewart contacted Mrs Else and Ms Gilmartin to advise that the Claimant had indicated that she felt that it would be beneficial for her recovery and health to not return to St Leonard’s Primary School (page 284).

480. As a result of the Claimant’s decision to not return to St Leonard’s Primary School, the Respondent sought to identify another school in which the Claimant could be employed on a 50% Full Time Equivalent basis but which could also accommodate her preferred shift pattern.

481. On 22 October 2018 the Claimant was signed off again on the grounds of anxiety and low mood due to work situation (page 382).

482. On 26 October 2018 ACAS issued the Early ACAS Conciliation Certificate (page 7).

483. On 31 October 2018 the Claimant visited a Consultant Neurologist who issued a letter to the Claimant’s GP on 15 November 2018 which recorded that she was now seeing a counsellor which was very effective and she had the support of her Union; that during the summer when her stress levels had been raised she was not able to exercise as much but more recently she has increased her exercise levels again; and that the Claimant’s Parkinsonian symptoms were now relatively well controlled (pages 387-388).

484. The next absence review meeting with the Claimant took place on 2 November 2018 and the Claimant was accompanied by her trade union representative Mrs Stewart and Lee-Ann French attended from HR (pages 288-289).

485. The HR representative Lee-Ann French made handwritten notes of the meeting on 2 November 2018 which were an accurate reflection of the key points discussed at that meeting (pages 288-289).

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486. Sarah Else also made notes at that meeting (page 287).

487. Following the absence review meeting on 4 September 2018 and the one on 2 November 2018, Mrs Else had explored what other options there might be for the Claimant to return to work.

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488. At the absence review meeting on 2 November 2018 the Claimant indicated that she was not at that time fit to return to work but that she hoped to be so after Christmas and that she hoped to be able to confirm the position after 3 December 2018 when her current fit note expired (page 288).

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489. At the absence review meeting on 2 November 2018 the Claimant was asked if she would consider working across two schools.

490. The Claimant was asked if she would consider working across two schools because that may have made it easier to identify opportunities for the Claimant to return to work on the working pattern requested.

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491. The Claimant advised at the meeting of 02 November 2018 that she did not wish to return on the basis of working across two schools.

25

492. At the absence review meeting on 2 November 2018 Sarah Else asked the Claimant if she would be open to being placed “supernumerary” and the Claimant responded positively to that suggestion indicating that she would be open to doing so.

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493. At the absence review meeting on 2 November 2018 the Claimant enquired about a learning support teacher post at Woodmill Secondary School.

494. Sarah Else explored the support for learning teacher post at Woodmill Secondary School but at that time the post at Woodmill was full-time, whereas the Claimant wished to work 50% FTE.

5 495. At the meeting on 2 November 2018, Mrs Else reassured the Claimant that there had never been any questions around her competence as a teacher but rather it had been felt that her preferred working pattern did not work for the pupils at St Leonard's Primary School.

10 496. Prior to the absence review meeting on 2 November 2018 Mrs Else had looked at two primary schools, namely Benarty and Toryburn (page 287).

497. Mrs Else understood that Benarty and Toryburn primary schools would not be suitable for the Claimant because of their location in the context of what the
15 Claimant had advised were her requirements about location.

498. On 5 November 2018 Mrs Stewart sent an email to Shelagh McLean again regarding extending the provision of full sick pay to the Claimant (pages 290-291).

20

499. Mrs McLean understood that on 5 November 2018 Mrs Stewart was repeating the request she had made in September 2018.

500. Mrs Stewart did not provide any new information to Mrs McLean about the
25 situation with the Claimant.

501. In November 2018 following receipt of the email of 5 November, Shelagh McLean spoke to Mrs Stewart again and reminded her that she had already advised her of her decision that the Claimant would not receive any additional
30 sick pay to that already provided for (3.25 of the List of Issues).

502. The Claimant's fit notes for the period August 2018 to November 2018 refer to the reason for the Claimant's absence being "anxiety and low mood due to work situation" (pages 380-382).

503. For the period of the Claimant's absence August 2018 to November 2018 the expectation communicated by the Claimant was of being able to return to work, at some point in the future, provided she had the working pattern sought.

504. For the period of the Claimant's absence August 2018 to November 2018 the focus of the Respondent was on supporting the Claimant to return to work on the working pattern sought.

505. In the period following the expiry, on 10th October 2018 of her previous Fit Note the claimant remained unfit for work certified by 3 successive Fit Notes (respectively dated 22nd/10/18, 21st/01/2019 and 1st/04/2019 the latter certifying the claimant unfit to work up to and including August 2019 and produced respectively at J-382, J-384 and J-385). In all 3 Fit Notes the claimant's unfitness for work was certified on an unqualified basis. In all 3 Fit notes there was struck out by the certifying medical General Practitioner the phrases;

- *"You may be fit for work taking account of the following advice ---*
- *and if available and with your employer's agreement, you may benefit from:-*
    - *"A phased return to work",*
    - *"altered hours",*
    - *"amended duties",*
    - *"workplace adaption" were all scored out by the claimant's GP*

506. By letter dated 16th of the 8th 2018 (J-386) Gillian Aldrich, the Parkinson's Nurse Specialist advised the claimant's GP that the claimant had had interaction with her in the previous week and had reported that she felt that her Parkinson's symptoms were worse, she had noticed that the pain had

increased. As previously her Parkinson's symptoms were worse on her right side.

507. By report dated 27th November 2018 (J-387 and 388) Dr Katja Lassak, Consultant Neurologist, wrote to the claimant's GP having reviewed the claimant on 31st/10/2018 (dated 15/11/2018) that the claimant had reported on 31st of October 2018 that she was feeling "relatively well".

508. By report dated 5th December 2018 Gillian Aldrich, Parkinson's Nurse Specialist (J-389 and 390) wrote to the claimant's General Practitioner reporting on her interaction with the claimant at the clinic of the 4th of December 2018. In that correspondence the claimant is recorded as making statements and comments relating purely to her Parkinson's. No reference to stress or work related issues appeared in the correspondence.

509. By letter dated 1st April 2019 (J-392 and 393) the Parkinson's Nurse Specialist wrote to the claimant's GP reporting on her examination of the claimant on the 26th of March 2019 in which she records the claimant as referring to work stresses as something which she had previously had (that is to say something which she was not then currently having).

510. Following a further referral by the respondents of the claimant to Occupational Health, the Occupational Health Practitioner issued a report dated 8th May 2019 following her face to face assessment of the claimant on that date, (J-394 and 395). In the report:-

(a) Under the heading "*OH Opinion*" the Occupational Health Practitioner stated:-

> "*Based on the history and information provided to me during the consultation and the information you provided in the referral, I can now give my opinion in response to the questions asked in the referral.*

*Following assessment, observation and evaluation today, in my opinion taking into account the information available, Janet's symptoms appear to have progressed and are having a significant impact on her day to day activities. Her confidence appears to have now been affected and it's unlikely due to the combination of her physical and emotional wellbeing that she would be unable [*sic – able] *to return to the demands of her teaching role which requires significant mental endurance.*"

(b) Under the heading "*Management Advice*" the Occupational Health Practitioner gave the following responses to the questions posed:-

What is the employee's current fitness for work?
"*It is my opinion Janet remains unfit for work due to the progressive symptoms of Parkinson's.*
Likely date of return to work?
"*I do not foresee a return to work due to the progressive symptoms related to Parkinson's and the impact these have on Janet on a day to day basis."*
What effect will this condition have on the employee's ability to carry out his/her duties?
"*Due to both the physical and emotional symptoms related to Parkinson's, it is my opinion Janet would be unable to carry out her contractual duties."*
Are there any particular duties the employee cannot do?
"*Due to the symptoms related to Janet's condition I do not anticipate she would be able to complete her duties."*
What duties can the employee perform?
"It is my opinion Janet remains unfit for work."

Is the condition likely to recur in the future?

"*Janet has a progressive condition.*"

Are there any modifications/adjustments which would alleviate the condition or aid rehabilitation?

5 *"I do not feel there are any adjustments which would facilitate a return to work at present, given her symptoms had progressed."*

(c) And under the heading "*Review Date*" the following:-

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"*As there is no foreseeable return to work, I will require further medical evidence to assist in this case and have obtained appropriate consent to write for this today. I will provide an update once I have had sight of this.*"

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By letter dated 20th May 2019 (J-396) the claimant's General Practitioner Dr Lin wrote to the Occupational Health Practitioner providing the further medical evidence requested.

20 The letter of 20th May 2019 from Dr Lin included the following statements:-

"*In terms of clinical barriers to return to work, given that Janet works as a primary school teacher, her current level of functioning with her mobility and tremors, as well as her fatigue ability would provide a*
25 *substantial barrier to return to work as Parkinson's is a progressive disease, these are likely to deteriorate further even with support.*

As I am not an occupational health physician I do not have specific recommendations to support Janet at work and I also cannot comment on her ability to render regular and sufficient service in the
30 *future, although, as previously noted, Parkinson's Disease is progressive and is unlikely to improve dramatically from her current position and, is indeed likely to gradually deteriorate.*"

In the concluding paragraph Dr Lin states:

> "*It is my opinion that Janet would struggle significantly with a return to work and remaining in employment.*"

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511. On 8 November 2018 Mrs Stewart emailed Sarah Else indicating that Sharon Milton wanted to request a move with the Claimant (page 296).

512. Sarah Else explored options for the Claimant to move with Sharon Milton but that would have required a full time vacancy to be available, such that both could be accommodated.

513. Mrs Else was subsequently made aware that Sharon Milton had advised Mrs Reid that in fact she did not want to move with the Claimant. The consequence of the claimant's job share partner not wishing to move with the claimant was that any potentially suitable post would require to already be 50% FTE or another 50% FTE job share partner who was also prepared to move to the same post and school was available and could be identified.

514. On 21 November 2018 the Claimant's Trade Union passed on information to the Claimant from Dentons which included being advised that the deadline for submitting a claim was Friday 23 November 2018 (J-55).

515. On 30 November 2018 the Respondent's Kirsty McElroy emailed Dentons regarding the Claimant (J-300).

516. In Mrs McElroy's email of 30 November 2018 it was confirmed that the Claimant had been permanently returned to her previous shift pattern and that the Respondent would not seek to vary it in the future without consulting the Claimant and taking medical advice as appropriate.

517. The email from Mrs McElroy dated 30 November 2018 confirmed that the Claimant had already been returned to her previous shift pattern.

518. The Claimant had been returned to the shift pattern requested on a permanent basis from 4 September 2018 when she met with Mrs Else (3.15 of the List of Issues).

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519. In the event that the Claimant had not been signed off sick and had returned for the start of the school session in August 2018, she would have returned on her preferred shift pattern.

10 520. On 4 December 2018, the Claimant attended a clinic with a Parkinson's Nurse Specialist who sent a letter to the Claimant's GP on 5 December 2018 in which it is recorded that the main issue the Claimant was facing at that time related to her right leg and foot.

15 521. There was an absence review meeting arranged for December 2018 which did not go ahead.

522. The absence review meeting arranged for December 2018 did not go ahead because Mrs Else understood that it had been cancelled due to the

20 Claimant's health.

523. The Claimant and Mrs Stewart, who did not think it had been cancelled, attended the location for the meeting in December 2018.

25 524. The next absence review meeting took place on 17 January 2019 when the Claimant was accompanied by her trade union representative, Mrs Stewart and Ms Gilmartin was in attendance as the HR representative (page 301).

525. Ms Gilmartin took notes of the meeting on 17 January 2019 which reflect the

30 main points discussed at that meeting (page 301).

526. Since the last absence review meeting on 2 November 2018, Mrs Else had continued to explore options for the Claimant to return to work on the working pattern requested.

527. Between 4 September 2018 and 17 January 2019 there were no permanent positions available at a primary school in the geographical area sought by the Claimant in which she could be placed.

528. At the absence review meeting on 17 January 2019 the Claimant advised that her health was not good and that she was not in a position to return to work.

529. At the absence review meeting on 17 January 2019, Mrs Else advised the Claimant that there were a number of options available if the Claimant was fit to return on a supernumerary basis (page 301).

530. At the meeting on 17 January 2019 Mrs Stewart the Claimant's Trade Union representative proactively raised the possibility of ill-health retirement for the Claimant.

531. The Respondent was not considering ill-health retirement or otherwise considering dismissal of the Claimant at the absence review meeting on 17 January 2019 and considered that it would have been premature to do so.

532. Mrs Else did not discuss with the Claimant any specific schools to which she could return to on a supernumerary basis at the meeting on 17 January 2019, because the Claimant had advised, early in the meeting that she was not yet fit or able to return to work.

533. Mrs Else did advise the Claimant at the 17 January 2019 meeting that as and when she was ready to return to work, that could be immediately arranged on a supernumerary basis on her preferred shift pattern.

534. From 17 January 2019 onwards there was nothing further that the Respondent could do to support the Claimant's return to work (3.1 of the List of Issues).

535. Following the absence review meeting on 17 January 2019, Ms Gilmartin emailed to the Claimant on 18 January 2019, for her information, copies of the relevant forms for the ill-health retirement process (page 302). She did so only because the Claimant and her Trade Union representative had asked that she do so.

536. In Ms Gilmartin's email of 18 January 2019 she wrote "*This is for your information and would only be taken forward if you felt that this was the route you wished to progress*".

537. The Respondent had no intention of progressing the Claimant through ill-health retirement and the Claimant was only provided with the relevant forms for this process because they had been requested on her behalf by her trade union representative.

538. On 3 December 2018 the Claimant was signed off again by her GP until January 2019 because of "*anxiety and low mood due to work situation and Parkinson's disease*" (page 383).

539. On 21 January 2019 the Claimant was signed off until 1 April 2019 again on the grounds of anxiety and low mood due to work situation and Parkinson's disease (page 384).

540. On 25 January 2019 Mrs Stewart emailed the Respondent's Kirsty McElroy forwarding the email that she had sent to Shelagh McLean on 5 November 2018 regarding the Claimant's sick pay (page 292).

541. In Mrs Stewart's email of 25 January 2019 she indicated that she thought that the request should have been made to Kirsty McElroy.

542. The person who made the decision in relation to the request regarding the Claimant's sick pay was Shelagh McLean and she was the person with authority to approve that request.

543. In January 2019 Shelagh McLean had no further discussions with Mrs Stewart regarding the Claimant's sick pay, nor did she otherwise respond to Mrs Stewart’s email of 25 January 2019.

5 544. Mrs McLean had previously spoken to Kirsty McElroy about her decision at or about the time of making it in September 2018.

545. By January 2019 the Claimant’s health, had deteriorated because of Parkinson’s Disease and there was no indication of when, or if, she might be 10 in a position to return to work even with the adjustment of the working pattern sought by the Claimant and which was already in place.

546. Extending the Claimant's sick pay would not have avoided the disadvantage identified. That is to say, extending the Claimant's sick pay would not have 15 assisted the Claimant to fulfil her contractual duties of employment (3.23 of the List of Issues).

547. The Claimant advised the Employment Tribunal, at the Open Preliminary Hearing on 3 October 2019, that she had felt her mental health situation 20 began to improve in the New Year of 2019 (page 56).

548. On 26 March 2019 the Claimant attended a clinic with the Parkinson’s Nurse Specialist who issued a letter to the Claimant’s GP on 1 April 2019 in which it is recorded that there were no issues with her mood at present, although she 25 did have a lot of work stresses previously (pages 392-393).

549. Following the absence review meeting on 17 January 2019, and at or around Easter 2019, a referral was made to Occupational Health in relation to the Claimant.

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550. There was some delay between the referral being made by the Respondent to OH and the Claimant being provided with an appointment by OH.

551. An Occupational Health report was sent to Mrs Else on 8 May 2019 (pages 394 to 395).

552. The Occupational Health report dated 8 May 2019 advised *“following assessment, observation and evaluation today, in my opinion taking into account the information available, Janet’s symptoms appear to have progressed and are having a significant impact on her day to day activities.”*

553. The Occupational Health report dated 8 May 2019 advised;-

(a) that the Claimant remained unfit for work due to the progressive symptoms of Parkinson’s;

(b) the Occupational Health Practitioner did not foresee a return to work due to the progressive symptoms related to Parkinson’s;

(c) that due to the physical and emotional symptoms relating to Parkinson’s it was the Occupational Health practitioner’s opinion that the Claimant would be unable to carry out her contractual duties, and,

(d) that the Occupational Health practitioner did not feel that there were any adjustments which would facilitate a return to work at that time for the Claimant given that her symptoms had progressed.

(e) That the Occupational Health Practitioner considered that the Claimant would not be able to undertake other employment within the respondent’s organisation.

554. There was nothing that the Respondent could do to support the Claimant to return to work from 8 May 2019 onwards (3.1 of the List of Issues).

555. The Claimant submitted her ET1 claim form on 14 May 2019 (page 12).

556. The Claimant's husband completed most of the claim form on her behalf (page 56).

557. At the point the Claimant submitted her claim with the Employment Tribunal the relevant fit note recorded that she was unfit for work "due to Parkinson's Disease and anxiety and low mood due to the work situation" (page 385).

558. All of the Claimant's fit notes for the period August 2018 to 14 May 2019 referred to the Claimant suffering from anxiety and low mood due to the work situation. The majority also referred to the Claimant's Parkinson's Disease.

559. The Claimant's mental health did not prevent her from lodging her claim prior to 14 May 2019.

560. An email from Kevin Funnel to Sarah Else dated 28 May 2019 provided a note of options which considered could be to support the Claimant's return to work.

561. Two of the options noted in the email from Kevin Funnel to Mrs Else on 28 May 2019 had been discussed with the Claimant by Sarah Else, namely that the Claimant be placed supernumerary or that she be assigned to a true vacancy if and when one could be identified at a school which met her stipulated criteria regarding location at a time when she was fit and able to return to work.

562. The third option, of moving the Claimant to "permanent supply", which is noted in Kevin Funnel's email of 28 May 2019 had not been discussed with the Claimant. This would have involved the Claimant being placed in a range of different schools and would not have been suitable for the Claimant. Mrs Else knew that the Claimant did not want to and would not consider the option of being placed on "permanent supply".

563. Prior to the email from Kevin Funnel to Mrs Else on 28 May 2019, Mrs Else had spoken to Kevin Funnel at regular points about the Claimant's case with a view to finding a school in which the Claimant could be placed.

564. The email from Kevin Funnel was sent to Sarah Else following Sarah Else mentioning the Claimant's case to her line manager who then raised it at a meeting of the heads of service at which Kevin Funnel attended.

565. On 30 May 2019 Sarah Else met with Mrs McElroy to discuss the Claimant's case (page 303).

566. During the meeting Mrs Else had with Mrs McElroy on 30 May 2019 there was discussion about the different points which Mrs Else should, in her turn, usefully discuss with the Claimant at the next attendance review meeting.

567. Mrs Else discussed with Mrs McElroy on 30 May 2019 that she should discuss with the Claimant; the exploring of options across other schools, the possibility of redeployment to another type of role with the Respondent, and at that stage, inquire of her whether or not she wished to pursue permanent ill health retirement.

568. Notwithstanding receipt of the Occupational Health report dated 8 May 2019, the Respondent continued to explore and consider options for supporting the Claimant's return to work beyond that date.

569. On 26 June 2019 another attendance review meeting took place at which the Claimant was accompanied by her Trade Union representative, Mrs Stewart and Lee-Ann French attended as the HR advisor (pages 305 to 306).

570. Notes of the meeting on 26 June 2019 are produced at (J-305 and 306). The notes reflect the main points discussed.

571. At the attendance review meeting on 26 June 2019 Mrs Else advised the Claimant that the Respondent had considered other options for the Claimant

returning to work and that the Respondent wanted to try and support the Claimant.

572. At the attendance review meeting on 26 June 2019 the Claimant advised Mrs Else that she had got herself worked up about the possibility of being placed "supernumerary" and that she felt she needed a settled environment and that being supernumerary would be too stressful. This was the first time that the Claimant had told Mrs Else that this is how she felt about being placed supernumerary. It contrasted with the positive manner in which she had responded to that possible option at an earlier meeting.

573. At the attendance review meeting on 26 June 2019, the Claimant advised that she knew that progressing ill health retirement was the right thing to do.

574. At the attendance review meeting on 26 June 2019 the Claimant proactively handed to the Respondent completed SPPA forms in order for her ill health retirement application to be processed, being forms completed by her before the meeting.

575. At the meeting on 26 June 2019 there was no discussion about what options there might be at that time for the Claimant to return to work because she indicated that she had made a decision that she wanted to be ill health retired. The Claimant had already been advised and was aware that the option of being classified as and returning to work as "supernumerary" was already available to her and would be given effect to if and as soon as she was fit to, and confirmed a date on which she would, return to work with all that was required of her, at that time, being her confirming in which school she wished to be placed.

576. The Claimant had decided that she wanted to progress ill health retirement prior to the meeting on 26 June 2019.

577. Mrs Else did not seek to dissuade the Claimant from applying for ill health retirement because Mrs Else did not consider that this would have been an appropriate thing for her to do.

5 578. At the attendance review meeting on 26 June 2019, the Claimant was not fit to return to work and could not provide a date by which she expected she would be fit.

579. In the period since the last attendance review meeting in January 2019 to 26
10 June 2019, Mrs Else had continued to explore options for the Claimant to return to work on the working pattern requested.

580. As at 26 June 2019 there was no school identified in which the Claimant could be placed permanently with her preferred working pattern, had she
15 been fit to return.

581. To be in a position to discuss any specific schools to which the Claimant could return on a supernumerary basis, she would require to have been fit to return to work at the time of discussion because otherwise, the positions
20 would be filled by another teacher.

582. The claimant knew and or with the benefit of her continuous Trade Union support, ought reasonably to have known, in relation to supernumerary and a true vacancy options that they could be positively identified and confirmed
25 only at the point at which they could also be implemented, which point could not arise until the claimant confirmed that she was fit to return to work and would do so by a specified date.

583. The claimant knew or ought reasonably to have known that it was not
30 possible to identify and confirm any such specific option until the claimant had identified her return to work date because such options reflected real requirements in particular schools and could not be preserved or held open for the claimant for unspecified periods of time because. Rather, they

required to be filled and, in the interim, they would be filled by Head Teachers and thus not be available as an option for the claimant.

584. Sarah Else did not contact the Claimant in-between attendance review meetings because she considered that that could cause additional stress to the Claimant.

585. The Claimant and the representative understood what the next steps were after each attendance review meeting and that the up to date position would then be discussed at the next attendance review meeting.

586. Throughout the Claimant's absence, beginning on 13 August 2018 and including at the attendance review meeting on 26 June 2019, she was supported by her trade union representative.

587. The Claimant had specified to Sarah Else the particular geographical area within which she wanted to be placed in a school and within which only she was prepared to return to work on her already in place preferred shift pattern.

588. Between 4 September 2018 and 26 June 2019 there were no specific schools identified within the geographic area stipulated by the Claimant to which the Claimant could return on the shift pattern contended for, apart from St Leonard's Primary School to which she was <u>not</u> prepared to return because of her declared lack of confidence in the Head Teacher (3.19 of the List of Issues).

589. Between 4 September 2018 and 26 June 2019 there were no specific schools identified in which the Claimant could return to work on the shift pattern contended for apart from St Leonard's Primary School for amongst others the following reasons:

(a) No permanent position (true vacancy) became available (3.20 of the List of Issues); and

(b) At every attendance review meeting in the period the Claimant indicated that she was not fit to return to work absent which no meaningful discussion of specific schools the Claimant could return to on a supernumerary basis could be progressed to the point of identifying one (3.19 of the List of Issues).

590. The Claimant subsequently advised at the meeting of 26 June 2019 that she would not in any event have agreed to returning on a supernumerary basis had there been a discussion of specific schools as she had reached the view that to do so would be too stressful.

591. The Claimant did not indicate at any of the attendance review meetings that a barrier to her health improving was the lack of discussion about a specific school to which she could return.

592. The Occupational Health report dated 8 May 2019 did not advise that the discussion of a specific school to which the Claimant could return would be a means of supporting the Claimant to return to work.

593. In the period 4 September 2018 until 26 June 2019 the Respondent took reasonable steps to support the Claimant to return to work on the shift and working pattern which she wanted sufficient to discharge and section 20(3) EqA duty incumbent upon them (3.15 of the List of Issues).

594. The Respondent was still seeking to identify options of making the reasonable adjustment contended for, regarding the shift pattern, in another school suitable to the Claimant up until 26th June 2019 (3.21 of the List of Issues).

595. In the period 4 September 2018 until 26 June 2019 the Claimant was not fit to return to work which medical unfitness was the reason for her not returning during that period (3.17 & 3.27 of the List of Issues).

596. The cause of the Claimant's absence for the period 4 September 2018 until 26 June 2019 was her health. The evidence presented was insufficient to support a finding in fact that her state of health was caused or principally caused by any failure, in the period, to make any of the reasonable adjustments contended for.

597. In the period her absence was not caused by any failure to make either of the reasonable adjustments contended for by the Claimant (3.18 & 3.27 of the List of Issues).

598. Let it be assumed that the Respondents continued to apply the PCP identified by the Claimant beyond 14 August 2016, which the Tribunal has not found established in fact;-

(a) the Respondent's actions from 4 September 2018 until 26 June 2019 were such as to comply with any duty, said to arise under section 20 of the EqA, to make a reasonable adjustment regarding the shift pattern

(b) in the period 13 September 2018 up to and including the Effective Date of Termination of her Employment, (6 September 2019) neither the respondent's decision not to, nor their failure to reclassify (extend) the Claimant's contractual sick pay entitlement, constituted a failure in any section 20(3) EqA incumbent upon them (3.22 of the List of Issues).

599. The Scottish Public Pensions Agency (SPPA) wrote to the Respondent by letter dated 2 September 2019 regarding the Claimant confirming "*On the medical evidence available and following the advice of the scheme's medical adviser, we are satisfied that Mrs Kerr may be retired on ill-health grounds*" (page 307).

600. By letter dated 20 November 2019 the Respondent wrote to the Claimant and confirmed that her employment was being brought to an end on the grounds of ill-health retirement with her last day of employment being 6 September 2019 (page 308).

601. The letter from the Respondent dated 20 November 2019 advised the Claimant of the right to appeal against her dismissal on the grounds of ill-health retirement (page 308).

602. The Claimant did not appeal against the decision to dismiss her on the grounds of ill-health retirement.

603. In order for the Claimant's application for ill-health retirement to have been approved by the SPPA, the Trustees required to be satisfied upon relevant medical advice, that the Claimant would never be fit to return to work regardless of any adjustments that might be made for her.

The Reserved Preliminary Issue of Jurisdiction (Time Bar)

604. By an Opposed Application of 9th November 2021, the claimant's then instructed professional representative's, upon a review of the pleadings, sought and was granted leave to lodge Further and Better Particulars of Claim recasting the complaints of section 20 and section 21 EqA Discrimination.

605. The claimant's recast pleadings are produced at pages 89 to 93 of the Joint Bundle and the respondent's adjusted response, lodged and intimated on 17th November 2021, at pages 97-111.

606. The recast Particulars of Claim comprise 12 numbered paragraphs; and give notice of offer to prove 2 complaints of alleged section 21(e) EqA Discrimination, constituted by averred failure on the part of the respondents to comply with a duty, said to arise in terms of section 20 of the Act, to avoid

disadvantage to non-disabled persons including the claimant, and arising from the application of a PCP.

607. The first instance of disadvantage upon which the claimant relies is said to be occasioned by a requirement, in the period, from on or about 16 August 2017 up to in or about 13 February 2018, imposed by the Head Teacher Mrs Heidi Reid, that the claimant work a shift pattern, by which is meant any shift pattern other than that which she had been permitted to work in the period 14th August 2016 up until "June/August 2017" [sic 16 August 2017], on which latter date the Head Teacher first changed the shift pattern.

608. The adjustment which the claimant contends the respondent was under a duty to make, in order to avoid the disadvantage in terms of section 20(3) of the EqA, as specified at paragraph 8(i) and 9 of the recast pleadings (page 92 of the Bundle) is to have allowed the claimant to continue, in that period, to work the pre-existing shift pattern worked by her ("her preferred shift pattern"), that being a pattern in terms of which she worked; on a Wednesday, Thursday, Friday in week 1 with the weekend off, and then worked Monday and Tuesday in week 2 being thereafter off on Wednesday, Thursday, Friday, followed by the non working weekend of Saturday, Sunday and then remained off on Monday and Tuesday of week 3, before recommencing her working cycle on the Wednesday of week 3.

609. The claimant's preferred shift pattern saw her working for 3 days followed by a weekend break then for 2 days followed by a 5 day break and a non working weekend, before commencing her next working cycle.

610. The following is a matter of agreement between the parties (recorded and confirmed at paragraph 3.9 of the Agreed List of Issues):-

> *"It is agreed that for the period February 2018 up to and including June 2018 the working pattern that the claimant contends is a reasonable adjustment was in place and that it was in place for the*

period that the claimant's temporary reduction in hours was in place (until 29th June 2018)".

611. At paragraph 9, lines 13 and 14 of the recast pleadings (J-92) the claimant asserts that in order to comply with the duty the respondent required to put the claimant's preferred shift pattern in place *"(without any qualification in time or trial)*" that is to say on a permanent basis.

612. Under reference to the terms reflected in section 123(2)(4)(b) of the EqA, the claimant gives notice of an offer to prove that the Breach of Duty (failure to make the adjustment) continued up until the 26th of June 2019, on which date she opted to seek ill health retirement, and asserting that that was the date by which the respondents might reasonably have been expected to have made the adjustment.

The PCP and Substantial Disadvantage relied upon

613. At paragraph 8 of the recast Particulars of Claim (J-91) the claimant identifies and specifies:-

(a) the alleged PCP relied upon viz – "*The PCP in* [sic is] *the requirement to work the specific shift pattern expected of the claimant/a teacher."* And further that the claimant relies upon a hypothetical comparator; and,

(b) the substantial disadvantage relied upon viz:- "*The substantial disadvantage is the increased risk of her being unable to perform her contractual duties on account of ill health arising from the PCP, and by extension, the increased risk of her being dismissed or otherwise having her employment terminated on grounds of non performance/capability."*

614. The second alleged discriminatory failure to comply with the asserted duty is dealt with at paragraph 10 of the recast Particulars. It is said to be constituted by the respondent's failure to grant the claimant's request for reclassification of her contractual sick pay entitlement, made by her Trade Union representative on her behalf on 3rd September 2018 (page 266 of the Joint Bundle). It is contended that doing so would amount to a reasonable adjustment in terms of section 20(3) of the EqA under and in terms of paragraphs 6.20 and or 6.36 of the respondent's Sickness Policy set out in (Part 2) section 6 of SNCT Handbook of Conditions of Service – (page 113 of the Bundle.)

615. The claimant asserts that the respondent communicated no decision in respect of that requested adjustment prior to making reference to it in the course of evidence at the Open Preliminary Hearing on time bar which took place on 3rd October 2019, that is to say at any point before the date of her ill health retirement.

616. At paragraph 11 of the recast Particulars of Claim the claimant avers that the duty to reclassify the claimant's sick pay entitlement arose in or about November of 2018 [sic on 3rd September 2018] and, again in reliance upon section 123(4)(b), subsisted until the termination of the claimant's employment on 6 September 2019 (the effective date of termination of employment) that, in the claimant's assertion, being the date by which the respondent would have reasonably been expected to reclassify the sick pay entitlement.

617. By email correspondence dated 11th November 2021 the respondent's representative sought specification from the claimant's representative of the PCP being relied upon in respect of the alleged failure in duty to reclassify the claimant's sick pay entitlement.

618. By letter dated 17th November 2021 (page 95 of the bundle) the claimant's representative wrote to the respondent's representative confirming that the PCP and substantive disadvantage relied upon in respect of that second

alleged failure was the same as that specified at paragraph 8 of the recast Particulars namely "*The PCP is the requirement to work the specific shift pattern expected of the claimant a teacher …..", and "the substantial disadvantage is the increased risk of her being unable to perform her contractual duties …… etc"*

619. The above specified and relied upon PCP and asserted substantial disadvantage are reflected at paragraphs 1 and 2 respectively of the updated "Agreed List of Issues requiring Investigation and Determination by the Tribunal at Final Hearing", which was received and were recorded respectively by the Tribunal at the outset of the Hearing.

620. On the first day of Hearing and prior to the commencement of the evidential inquiry, the Tribunal expressly sought and received from parties' representatives confirmation that the above were respectively the PCP and the substantial disadvantage relied upon in respect of both alleged breaches of section 20 EqA (3) Duty.

621. Parties' representatives also confirmed their mutual understanding and agreement that, in relation to the issue of adjustment of shift pattern, no issue arose in respect of the period prior to 16th August 2017 the claimant, offering to prove that the duty to adjust the PCP such that the claimant would be permanently required to work only what had become, by that date, her preferred shift pattern, first arose only as 16th August 2017.

622. The alleged failure in duty to make an adjustment to the identified PCP falls to be regarded as an "*omission of the respondent consisting of a failure to make an adjustment in terms of section 20 of the Equality Act 2010*" – Judgment of the EAT paragraph 31.

623. On the claimant's pleaded analysis and objectively viewed from the perspective of the claimant, the PCP complained of as applied to the claimant and insofar as it related to a requirement to work a (any) shift pattern other

than that preferred by the claimant, first came into being and was introduced and applied to the claimant, on the 16th of August 2017.

624. The 16th August 2017 was the date upon which the respondent's Head Teacher decided to apply, communicated that decision to the claimant, and gave effect to, the introduction of that requirement.

625. The respondent's Head Teacher decided to, and communicated and applied her decision, to change the PCP on 16th August 2017, having first listened to the claimant and having clearly understood the claimant's strongly expressed preference that the shift pattern that she was required to work not be changed but rather, that it remain that which had become, and as at 16th August 2017 was, her "preferred shift pattern".

626. For the purposes of section 123(3)(b) of the EqA, the relevant start date of the statutory limitation period for presentation of the complaint of breach of section 20 duty relating to shift pattern, was the 16th of August 2017.

627. The 16 of August 2017 was the date upon which the respondent required the claimant to work a shift pattern other than her preferred shift pattern which requirement the claimant asserts constituted the First Application to her of the PCP upon which she founds.

628. The 16 August 2017 was also the date upon which the respondent, having introduced the PCP and having considered the claimant's communicated position that they do so, also positively decided not to make an adjustment to it for the claimant by re-instating her preferred shift pattern.

629. With respect to the alleged failure in section 20 EqA duty, insofar as it is said to relate to failure to reclassify the claimant's contractual sick pay entitlement, upon the claimant's pleaded analysis and objectively viewed from the perspective of the claimant, the PCP identified as relied upon and as being the same PCP relied upon in relation to the failure to adjust shift pattern, was

introduced and applied for the first time to, amongst others, the claimant on the 16th of August 2017.

630. Upon; the Findings in Fact which the Tribunal has made, on the claimant's pleaded analysis and, viewed objectively from the perspective of the claimant, the relied upon PCP ceased to be applied to the claimant on 13th February 2018 or, in the alternative, the "omission of the respondent consisting of a failure to make an adjustment of restoring the Claimant's preferred shift pattern ceased, on 13th February 2018.

631. The 13th February 2018 was the date upon which the respondent removed the requirement that the claimant work a different shift pattern and restored to her, her preferred shift pattern, albeit on a temporary basis.

632. Let it be assumed that in order to comply with the EqA section 20(3) duty the respondent required to restore the claimant's preferred shift pattern *"(without any qualifications in time or trial)"* (page 99 line 13 of the claimant's recast claim (- p99 of the bundle), which the Tribunal has not found established in fact, the "*omission of the respondent consisting of a failure to make an adjustment*" would have ceased on 4th September 2018, that being the date upon which the respondent's Manager, informed the claimant that her preferred shift pattern would not be altered in the future.

633. Let it be assumed that the Tribunal had held that the respondent's failure to reclassify the claimant's contractual sick pay entitlement was a step such as was reasonable in the circumstances to have to take to avoid any disadvantage at which the claimant was placed by the PCP identified as relied upon, which it has not so found, upon the Findings in Fact which the Tribunal has made, the relevant start date for the purposes of section 123(3) of the EqA, being the date upon which the statutory limitation period began to run for presentation complaint of breach of section 20(3) relating to failure to reclassify (extend) the claimant's sick pay entitlement, was the 30th of September 2018, at the latest.

634. The 30 September 2018, at the latest, was the date upon which, the relied upon PCP having been applied and upon her consideration of the Claimant's request, Shelagh McLean, the respondent's authorised Manager, positively decided not to make the adjustment to reclassify the claimant's sick pay entitlement and, at the latest, was the date by which at a meeting in the latter part of September 2018, she had communicated that decision to the claimant's Trade Union representative, Pauline Stewart, in response to Pauline Stewart's written request dated 3rd September 2018 (page 266) of the Bundle that she consider doing so.

635. The claimant first engaged with ACAS early conciliation on the 26th September 2018 and an ACAS Early Conciliation Certificate was issued on 26th October 2018 (page 7 of the Bundle).

636. The statutory limitation period during which the claimant had Title to present, of right, a complaint of section 21 Discrimination insofar as relating to failure to adjust her shift pattern let it be assumed the putting in place of the adjustment, albeit not at the time on an expressly declared permanent basis, did not prevent the adjustment satisfying the section 20(3) duty, expired on the 12th of May 2018.

637. Let it be assumed that the adjustment of shift pattern had to be made and communicated to the claimant on a permanent basis in order to comply with the section 20(3) duty, which the Tribunal has not found established in fact, the primary limitation period during which the claimant would have had Title, of right, to present a complaint of section 21 Discrimination in respect of failure to vary shift patterns, as extended by the operation of the Early Conciliation Regulations, would have expired on the 3rd of January 2019.

638. The claimant having first engaged with early conciliation on the 26th of September 2018 being a date after expiry of the initial 3 month, minus 1 day, the limitation period, when measured from 13th February 2018, was not engaged by the Early Conciliation Regulations such as to extend the time period in respect of failure to adjust her shift pattern.

639. The date upon which the primary statutory limitation period, as extended by the operation of the Early Conciliation Regulations and, during which the claimant had Title, of right to present her complaint of section 21 EqA Discrimination insofar as the same related to failure to reclassify her contractual sick pay, expired on the 30th of January 2019.

The Claimant's State of Knowledge and State of Health (Findings in Fact continued)

640. The conduct of the respondent of which the claimant complains in relation to failure to adjust her shift pattern extended over a period from the 16th of August 2017 up to the 13th of February 2018, on which latter date the respondents decided to, communicated their decision to do so to the claimant and restored to her her prior (preferred) shift pattern.

641. Let it be assumed that the PCP was still being applied to the claimant as at 13th February 2018 and, further, that the adjustment did not require to be declared "permanent" to fulfil the duty, which latter fact the Tribunal has found established, the 13th of February 2018 is the date upon which the respondent made the "reasonable adjustment" (took such steps as it was reasonable to take to fulfil the section 20(3) EqA duty (contended for by the claimant).

642. The 13th of February 2018 is the date on which the end of the relevant period in terms of and for the purposes of section 123(3)(a) of the EqA, occurred.

643. The 13th of February 2018 was the date upon which the statutory limitation period in respect of presenting complaints of section (20) and section 21(3) EqA Discrimination began to run.

644. The primary limitation period in relation to alleged failure to adjust shift pattern was not impacted by the Early Conciliation Regulations as the claimant first engaged with early conciliation on the 26th of October 2018, a date after the expiry of the initial limitation period.

645. The statutory limitation period before which the claimant could have, of right, presented an initiating Application to the Employment Tribunal in respect of failure to adjust shift pattern expired, in terms of section 123(1)(a) of the EqA, expired on the 12th of May 2018.

646. The conduct of the Respondent of which the Claimant complains (their omission consisting of a failure to reclassify (extend) her shift pattern extended over a period from 3 September 2018 to 30 September 2018.

647. The 30th September 2018, at the latest, was the date by which the respondent having given consideration to the possibility of reclassifying (extending) the claimant's contractual sick pay entitlement and having given consideration to requests and arguments advanced on the claimant's behalf by her Trade Union representative, took a positive decision not to reclassify (extend) the sick pay allowance, and at the latest, was the date by which they had communicated that decision to the claimant's Trade Union representative, and gave effect to that decision.

648. The 30th September 2018, at the latest, was the date upon which there ended a period, for the purposes of section 123(3)(a) of the EqA, in respect of any previously continuing conduct (failure to regrade the claimant's sick pay entitlement).

649. The 30th September 2018, at the latest, was the date, in terms of section 123(3)(b) of the 2010 Act upon which the respondent positively decided not to reclassify (extend) the claimant's contractual sick pay entitlement.

650. The 30th September 2018, at the latest, was the date upon which the statutory limitation period during which the claimant, of right, could have presented a complaint of section 20(21)(3) Discrimination, in relation to failure to adjust her contractual sick pay allowance, began to run.

651. The claimant first engaged with early conciliation on a date which fell within the initial limitation period.

652. The initial limitation period, as extended by the operation of the Early Conciliation Regulations, and in relation to a complaint of failure to adjust her contractual sick pay entitlement, expired, in terms of section 123(1)(a) of the 2010 Act expired on 29th January 2019.

653. The ongoing situation or continuing state of affairs of which the claimant complained and which, on the claimant's assertion commenced with the variation of her shift pattern on 16th August 2017, ceased on 13th February 2018 on which date her preferred shift pattern was restored and never subsequently varied or removed.

654. As at 3rd September 2018, the date upon which the claimant's Trade Union representative requested that her contractual sick pay be adjusted, the previously continuing state of affairs, relating to the removal of her preferred shift pattern, had ceased some 7 months earlier.

655. The two failures in section 20(3) EqA duty complained of, were two unconnected specific acts which although each individually measured from the first date of omission each extended over two separate respective periods, were separated in time and succession such that they did not fall to be viewed as a single act extending across the intervening 7 months which elapsed between the cessation of the "ongoing situation relating to the failure to adjust the shift pattern, on the one hand, and the commencement of the ongoing situation in relation to the alleged failure to adjust the contractual sick pay, on the other.

656. The claimant first presented her complaints to the Employment Tribunal on the 14th of May 2019.

657. The claimant first presented her complaint of failure to make adjustments to her shift pattern one year and two days after the expiry of the primary limitation period.

5 658. The claimant first presented her complaint of failure to reclassify (extend) her contractual sick pay allowance 3½ months after expiry of the initial limitation period.

The Claimant's State of Knowledge

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659. The claimant had the benefit of Trade Union representation and access to Trade Union advice in the whole period from the date upon which the first alleged failure is said to have occurred on the part of the respondents, namely 16th August 2017, up to and including the Effective Date of
15 Termination of her Employment 6th September 2019.

660. The claimant separately had the benefit of Trade Union instructed professional legal representation up to and including in or about November/December 2018.

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661. The claimant had available to her throughout, the assistance of her husband who ultimately assisted her in May of 2019 to draw and submit her form ET1.

662. On 22nd/23rd November 2018 the claimant's then legal advisors reported that
25 the respondent having agreed the proposals made by them on the claimant's behalf (to reinstate her preferred shift pattern), her law agents would not be proceeding to submit an application to the Employment Tribunal.

663. In the same communication they reiterated their previously given advice that,
30 in their assessment, the deadline for submitting a claim (the prescriptive period) would end on 23rd November 2018.

664. The claimant remained fit for work and at work working under her restored preferred shift pattern in the period 19th February 2018 until August 2018. In

that period she performed her teaching duties and lodged and continued to engage actively with her Trade Union and legal representatives in relation to her grievance, and in relation to what she considered to be the respondent's breach of their section 20(3) EqA duty. In May of 2018.

665. As at the date of communication from her then legal advisors, 21/22 November 2018, the claimant considered that her legal advisors had exceeded their authority in agreeing matters with the respondent.

666. Throughout the entirety of the period from the start of time running in respect of her potential complaints up to and including the expiry of that time period and thereafter up to and including the 14th of May 2019 the date upon which she first presented her initiating Application, the claimant knew and in the circumstances ought reasonably to have known:-

(a) of the existence of her potential right of action,

(b) of the existence of the Employment Tribunal,

(c) of her right to raise proceedings with the Employment Tribunal,

(d) of the existence of a statutory limitation period within which, of right, she could and should raise her claims,

(e) of the date upon which those time limits, in the opinion of her legal advisors, would expire

(f) of the fact that the time limits for presentation of her complaints had expired, and

(g) of the fact that thereafter she had no automatic right to have her complaints considered by the Tribunal, though late.

667. The ground upon which the claimant contends that it would be just and equitable for the Tribunal to conclude that her complaints presented, respectively some 12 and 3.5 months late, were presented within such other period as was just and equitable, is the state of her physical and mental health in that period.

668. Reference is made to the earlier Findings in Fact relating to the medical evidence produced and relied upon by the claimant.

669. From the date upon which the claimant asserts the respondent commenced failing in its duty to make adjustments, up to 22nd September 2017, the claimant was fit to work and was working under the adjusted shift pattern of which she complains.

670. In the period 22nd September 2017 up to and including the 24th of January 2018 the claimant was certified not fit to work by reason of Parkinson's Disease.

671. In January and February 2018, the claimant felt well enough to return to work and was keen to do so provided it could be on her preferred shift pattern which position is evidenced and supported in the review reports of her Consultant Neurologist Dr Lassak at pages 366 and 368 of the bundle.

672. The Occupational Health Report and Opinion of 15th January 2018 indicates:-

(a) that "*a return to work will take place once the issue of perceived work stress*" (the restoration of her preferred shift pattern) "*takes place*" and further and,

(b) notwithstanding her Parkinson's Disease, that with the contended for adjustment and pre-existing adjustments and support in place the medical expectation was that the claimant "*will continue to be fit to undertake her role of teaching for the foreseeable future*".

673. The Report of the claimant's GP Dr Lin 16th February 2018 (J-375) confirms that by the 19th of December 2018 the claimant's mood had improved. She had ceased her antidepressants and was keen to get back to work but preferably on her pre-existing (preferred) work schedule.

674. The respondent restored the claimant's preferred work schedule (made the contended for adjustment in compliance with the section 20(3) EqA on the 13th of February 2018. The statutory limitation period began to run on that date, in respect of the alleged failure to adjust her shift pattern.

675. The claimant returned to work on the 21st of February 2018 to her restored preferred shift pattern. She was fit to work and did work without sickness absence until the end of the summer term and thereafter during the summer vacation up to the start of the new academic year in August 2018, a period of 6 months, that is during the entirety of and for three months after the expiry of the statutory limitation period.

676. Following her return to work, in February 2018 the claimant lodged a substantial written grievance which related to the change which had been the earlier variation of her shift pattern in the period 16th August 17 to 13th February 18.

677. The claimant remained fit for work and at work working under her restored preferred shift pattern in the period 19th February 2018 until August 2018. In that period she performed her teaching duties and continued to engage actively with her Trade Union and legal representatives in relation to her grievance and what she considered to be the respondent's breach of their section 20(3) EqA duty.

678. In May of 2018, the claimant's grievance initiated in February 2018 was upheld insofar as it related to the claimant's working pattern having been altered without due process. The claimant did not appeal against that

determination her preferred working pattern having been restored to her prior to her raising the grievance.

679. In April of 2018 the claimant's GP in her report dated 17th April 2018 confirmed that "*Janet has a diagnosis of Parkinson's Disease but does not feel she is having any issues with this currently as this is controlled with the attached list of medications.*"

680. In April of 2018 the claimant felt sufficiently recovered to proactively cease her course of cognitive behavioural therapy. Fife Health and Social Care Partnership wrote to the claimant's GP on 30th April 2018 confirming the same (J-377).

681. In her report of 17th May 2018 relating to her face to face consultation with the claimant of 11th May the claimant's GP stated:-

> *"Mrs Kerr continues to work at the local primary school and does a job share for this. She remains very active and involved in the Young Parkinson's Group, does cycling, yoga and regular exercise which have all been beneficial in regards to her Parkinson's. She tells me that she doesn't sleep very well due to pain and the last few days have been more difficult. She eats and drinks with no difficulty. Bowels are regular. No urinary problems."*

682. On 12th May 2018 the primary limitation period expired in relation to a potential complaint of failure to adjust the claimant's shift pattern.

683. On 13th August 2018 the claimant was certified as unfit to work for reason of "*anxiety and low mood due to work situation*".

684. On 26th September 2018, notwithstanding her certification as not fit to work, the claimant engaged the early conciliation process with ACAS.

685. In the period December 2017 up to and including 13th August 2018, a period which includes the entirety of the statutory limitation period and a further 3 months thereafter the claimant continued to suffer from Parkinson's Disease. In that period she also had periods of anxiety and variable mood.

686. In the period December 2017 up to and including 13th August 2018 the state of the claimant's physical and mental health did not prevent her from advancing and presenting an initiating Application to the Employment Tribunal in relation to what she considered to be the respondent's failure to make adjustment to her shift pattern.

687. In the period December 2017 up to and including 12th August 2018 had the claimant decided to do so she could have presented her complaint in respect of failure to adjust her shift pattern.

688. In the circumstances presented including in particular the support and assistance available to her, from her husband who ultimately assisted her in the submission of her claim form, from her Trade Union, and, until the 23rd of November 2018 from her professional legal advisors, she could have progressed and presented her complaint and, in the circumstances ought reasonably to have done so.

689. Let it be assumed that the Tribunal had found a breach of section 20(3) EqA duty in relation to the claimant's shift pattern to have been established on its merits, which the Tribunal has not, it would not have been just and equitable in the circumstances to extend time for presentation of a complaint in that regard for a period of one year to 14th of May 2019.

690. The statutory limitation period began to run, in terms of section 123(1)(a) EqA, in relation to the complaint of failure to extend (reclassify the claimant's sick pay entitlement, on 30th September 2018 at the latest.

691. On 26th October ACAS issued an Early Conciliation Certificate enabling the claimant to raise proceedings. The claimant's law agents were engaged in

discussion with the respondents. On the claimant's instructions took no steps to raise proceedings.

692. On 21st/22nd November the claimant's law agents advised her that they having confirmed with the respondents that the claimant's preferred shift pattern which had been restored to her since February of 2018 would now be available to her on a permanent basis that they would not be raising proceedings on her behalf in the Employment Tribunal. Following that intimation the claimant took no steps to raise her claim(s) until 14th May 2019 in the following year.

693. In the period 13th August 2018 up to and including her early retirement on 6th September 2019 the claimant remained certified as unfit to work variously on the grounds of anxiety and low mood due to work situation and of Parkinson's.

694. The statutory limitation period in respect of the alleged failure to reclassify (extend) the claimant's sick pay allowance began to run on 30th September 2018, at the latest.

695. The claimant engaged with early conciliation on 26th September 2018 that is on a date potentially falling within the initial limitation period and which thus potentially engaged an extension of the limitation period in terms of the operation of the Early Conciliation Regulations.

696. The limitation period, extended by the operation of the Early Conciliation Regulations, in respect of a potential complaint of failure to reclassify sick pay allowance, expired on the 3rd of January 2019 or, in the alternative let it be assumed it was extended by the application of the Early Conciliation Regulations on 29th January 2019 at the latest. Thereafter the claimant took no steps to present her initiating Application to the Employment Tribunal until the 14th of May 2019, that is some 3/3.5 months later.

697. In the period 13th August 2018 to the Effective Date of Termination of her Employment (ill health retirement) on 6th September 2019 the claimant remained certified as unfit to work.

5 698. On 15th November 2018 in his report to the claimant's General Practitioner dated 15th November 2018 the claimant's Consultant Neurologist stated that the claimant presented as having had a difficult time recently due to stress mainly related to issues at work. But went on to record:-

10 "*She told me that she has now started to see a counsellor which is very effective and she has her Union involved for support*" (J-387) and:-

"*She is quite active and involved in the Young Parkinson's Group.*
15 *She continues to cycle and told me that she recently did a marathon on roller blades for charity. She reported that during the summer when her stress levels were increased she was not able to exercise as much as before but more recently she has increased her exercise levels again and she notices a positive benefit from this.*", and
20 further:-

"*We could potentially increase the dose of the Ropinirol further if this were necessary but at the moment she feels relatively well and with an increase in her exercise levels she feels generally improved.*"

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699. In her report to the claimant's General Practitioner dated 1st April 2019 and relating to her face to face examination of the claimant at the clinic on 26th of March 2019 the Parkinson's nurse specialist while noting that the claimant's Parkinson's continued to progress recorded the claimant as presenting with
30 "… *no issues at present with her mood, although she did have a lot of work stresses previously.*"

700. In the Occupational Health Report of 8th May 2019 the Occupational Health practitioner expressed the opinion, in relation to any likely date of return to

work "*I do not foresee a return to work due to the progressive symptoms related to Parkinson's and the impact these have on Janet on a day to day basis.*" Further that "*due to both the physical and emotional symptoms related to Parkinson's, it is my opinion Janet would be unable to carry out her contractual duties.*"

701. In her further medical evidence report of 20th May 2019 which had been requested by the Occupational Health practitioner, the claimant's General Practitioner stated that as at 20th May 2019:-

> "*Due to the impact on her mood and cognition she finds it difficult to concentrate and is very tired … it is my opinion that Janet would struggle significantly with a return to work and remaining in employment.*"

702. On 14th May 2019 the claimant, with the assistance of her husband, completed her initiating Application and presented it to the Employment Tribunal.

703. The claimant asserted in evidence before the Tribunal that she herself did not know that the respondents had refused the request, made on her behalf through her Trade Union representative Pauline Stewart, to reclassify (extend) her sick pay allowance until after she had first presented her initiating Application.

704. The Tribunal has found in fact that the respondent took that decision and communicated it to the claimant's Trade Union representative by the 30th of September 2018 at the latest.

705. It was not necessary for the Tribunal to disbelieve the claimant in order to believe, and to accept the evidence of Shelagh McLean, which it did.

706. The decision to refuse the request having been communicated by the respondent to the claimant's Trade Union representative, whom she had

instructed to progress the matter on her behalf (as at 30th September 2018 at the latest), the respondents were reasonably entitled to proceed on the basis that that decision would be communicated, without unreasonable delay, by the Trade Union representative to the claimant. Shelagh McLean's doing so constituted communication of the decision.

707. As at 30th September 2018 the claimant ought reasonably to have known that the respondent had positively decided not to reclassify (extend) her contractual sick pay allowance.

708. In the period 4th September 2018 to 3rd January 2019 and in the period 4th January 2019 to 14th May 2019 the claimant, although certified not fit for work had periods where her mood symptoms improved.

709. In or about October 2018 she had periods where she felt relatively well and, with an increase in her exercise levels felt generally improved. She had periods during which she had no issues with her mood.

710. Across the 4 months September 18 to January 2019, there were periods during which the claimant could have presented her complaint in respect of the respondent's alleged failure to reclassify her sick pay allowance including in the period from February 2019 up to 14th May 2019.

711. In February of 2019 the respondents reduced the claimant's sick pay to nil. In terms of the Judgment of the EAT (J-82) and let it be assumed absent the identification of a positive decision date in respect of the alleged failure, (in terms of section 123(3)(b)) that reduction of sick pay to nil would probably fall to be regarded as the section 123(4)(a) deemed date.

712. The Tribunal considered and found in fact that in those periods the claimant's state of physical and mental health would not have prevented her from presenting her complaint to the Employment Tribunal.

713. The delay in the raising of proceedings did have an impact upon the cogency of both the oral and documentary evidence presented and relied upon. The evidence of the respondent's witnesses Heidi Reid and Shelagh McLean was criticised by the claimant's representative in submission. He criticised much of the evidence of Shelagh McLean as vague and lacking in specification. He criticised her inability to recall and identify, in the course of oral evidence, precise dates in relation to her communication of her refusal decision to the claimant's Trade Union representative and of subsequent communications in relation to the request.

714. In relation to the witness Heidi Reid, he criticised her evidence as to the monitoring/review process of the impact of the shift pattern during its trial period and her inability to confirm precise dates of observation and detail. The witness Heidi Reid's position in evidence was that she had made detailed notes of that process including dates and of what she observed but, having left the school to take up another appointment, on returning after the passage of so much time, try to source those notes, that she had been unable to find them believing that so long after the event they had been cleared out of the places where she had previously stored them.

715. The claimant had the benefit of Trade Union advice throughout the period and of professional advice throughout the period in relation to alleged failure to adjust shift pattern and of professional advice for the first half of the limitation period in respect of alleged failure to extend contractual sick pay.

716. There was no suggestion in the claimant's evidence that at any point in the process she was unaware of or had been misinformed as to her rights and applicable time limits.

717. The Tribunal unanimously considered, in all the circumstances of the case, that the claimant did not act promptly in delaying the raising of her claim for a period of one year beyond the expiry of the relevant time limit in relation to adjustment of her shift pattern and for 3 months and 1 week in relation to extension of contractual sick pay entitlement.

718. The respondent having agreed what they understood to be a resolution of matters and having put in place (including permanently in place) the claimant's requested adjustment in relation to shift pattern and the applicable limitation periods, statutory time limits having expired the respondents were reasonably entitled to assume that proceedings would not be raised against them and to proceed accordingly in relation to the historical factual matrix.

Consideration and Disposal (Analysis and Decision) and the Applicable Law

719. The updated Agreed List of Issues, jointly submitted by parties representatives at the outset of the Hearing included a number of sub-issues of disputed fact. While those functioned as a useful aide memoire for parties' representatives, and for the Tribunal, in the exercise of eliciting evidence, the principal issues of fact and law the merits of which required to be determined by the Tribunal at Hearing was whether the respondent had discriminated against the claimant in terms of section 21(2) of the EqA, by reason of failure to comply with a duty to make reasonable adjustments said to arise in terms of section 20(3) of the Act,

    (a) through their application to, amongst others, the claimant of a Provision, Criterion or Practice ("PCP") specified as founded upon by the claimant and being "*the requirement to work the specific shift pattern expected of the claimant/a teacher*", and,

    (b) as evidenced by their omission, consisting of a failure to make the adjustments of;

        (i) restoring to her preferred shift pattern "*(without any qualifications in time or trial)*" in the period from 16th August 2017, the date upon which the respondent having varied the claimant's shift pattern from that which she preferred and took a positive decision, after consideration of the

claimant's request, not to restore her preferred shift pattern, up to and including 26th June 2019; the date upon which the claimant opted to seek ill health retirement; and by,

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(ii) their omission, consisting of their failure to reclassify (extend) the claimant's contractual sick pay entitlement in the period from 4th September 2018 to the effective date of termination of the claimant's employment, by reason of her being granted ill health retirement, on 6th September 2019.

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720. The claimant relied upon a hypothetical comparator namely a teacher who was not a disabled person by reasons of Parkinson's Disease.

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721. It was a matter of confirmation by and on behalf of the claimant, and agreement between the parties binding upon the Tribunal for the purposes of the Hearing, that the PCP relied upon, and the substantial disadvantage at which it was asserted the claimant was put by its application to her, were the same in respect of each of the alleged instances of failure of section 20(3) EqA duty.

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722. The substantial disadvantage given notice of as founded upon by the claimant in relation to each instance (paragraph 8 of the claimant's pleaded case, (J-91) was:-

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"*The substantial disadvantage is the increased risk of her being unable to perform her contractual duties of employment on account of ill health arising from the PCP, and by extension the increased risk of her being dismissed or otherwise having her employment terminated on grounds of non-performance/capability.*"

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The Applicable Law

723. The relevant applicable statutory and case law was not in dispute between the parties and is rehearsed in the submissions of parties representatives which are fully recorded above and to which reference is made. It is accordingly not reiterated here. The Tribunal accepted the construction of section 123 EqA set out in the Judgment of the EAT and likewise accepted and sought to apply the principles and approach set out in the case authorities to which both representatives referred it.

724. On consideration of the submission of parties' representatives and on the Findings in Fact which it has made the Tribunal unanimously considered and determined:-

(a) That the requirement applied by the identified and founded upon PCP applied by the respondent, being the requirement to work the specific shift pattern expected of the claimant/a teacher, was the requirement to work 35 hours per week on a full time basis.

(b) That on 15th August 2016, the respondent ceased to apply that PCP to the claimant, they having granted on that date the claimant's request to reduce her working pattern (the total weekly hours to be worked by her) to 50% Full Time Equivalent ("FTE").

(c) That although that disapplication to the claimant of the PCP through their putting in place the agreed adjustment to the claimant's working pattern (reduction of her hours to 50% FTE) was, at that time put in place on a temporary basis for 23 months subject to the consideration and granting of a further request on the expiry of that period, at no time thereafter was the claimant required to work full time 35 hours per week, and, that the PCP was not reapplied to the claimant at any time after the 15 August 2016.

(d) There was no specific shift pattern expected and required of teachers who were working part time.

(e) Rather, part time shift patterns varied from school to school, and within schools, depending on a number of factors and on the balancing of those factors including amongst others; the requirements of the school, the needs of the teacher, the needs of pupils and the availability of matching job share.

(f) Following the reduction in her hours to part time and the identification of an available job share partner, the claimant and her job share partner were allocated a shift pattern which the claimant worked for and in the following 12 months and which she subsequently identified, at the point at which the Head Teacher discussed a proposed variation to it in August of 2017, as being her preferred shift pattern.

(g) On 16th August 2017, the respondent decided to change and did change the claimant's shift pattern restoring her preferred shift pattern to her only on the 13th of February 2018 some 6 months later.

725. In the claimant's representative's submission the imposition of any variation to the claimant's preferred shift pattern constituted an application of the PCP identified to the claimant which application put her at a substantial disadvantage.

726. The respondent's representative while putting aside for her immediate purposes, the question of whether or not the particular shift pattern applied by the respondents for a subsequent period, put the claimant at a substantial disadvantage and thus might constitute less favourable treatment for the purposes of the complaint of Direct Discrimination, reminded the Tribunal:-

(a) that no such complaint of Direct Discrimination was presented before it but rather, the complaint pled was one of failure in a section 20(3) EqA duty to make a reasonable adjustment,

5 (b) that such a duty, in order to arise, must be shown to arise by reason of the application to, amongst others, the claimant of the identified PCP relied upon; and

(c) that the identified PCP had ceased to be applied to the
10 claimant in the period 16th August 17 to 13th February 18, and had never been applied to the claimant after the first of those dates.

727. The respondent's representative invited the Tribunal to dispose of the whole
15 of the claims on the above ground alone.

728. While the Tribunal had considerable sympathy with that preliminary submission, in the event, and let it be assumed that the PCP fell to be interpreted as including a requirement to work any shift pattern other than the
20 claimant's preferred shift pattern, the Tribunal having held on the evidence that no breach of section 20(3) EqA duty occurred in the period 16th August 2017 to 13th February 2018, or thereafter in the period from 13th February 2018, on which date the respondents restored to the claimant her preferred shift pattern, to 26th June 2019, it was not necessary to dispose of the claims
25 on the basis of that point of relevancy (constructions of the PCP) respectively contended for by parties' representatives.)

729. The Tribunal rejected the contention advanced on behalf of the claimant that on the evidence she had established that what she came to regard as her
30 preferred shift pattern was the only shift pattern which could support her sufficiently so as to avoid the disadvantage founded upon, that is of an

"*increased risk of her being unable to perform her contractual duties of employment on account of ill health arising from the PCP, and by extension of the increased risk of her being dismissed or otherwise having her employment terminated on grounds of non-performance/capability*".

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730. While the above was the contention advanced by the claimant in evidence and on her behalf in submission, the Tribunal considered that it could not be satisfied on rational and objective grounds on the evidence presented including the medical evidence recorded in its Findings in Fact;-

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(a) that that was the case,

(b) nor that the claimant had established that her subsequent period of absence in all health grounds, which commenced on

15 22nd of September 2017 and extended until 21 February 2018, was caused principally by the fact that she had been required to work on a varied shift pattern for a period of 5 weeks.

(c) Nor, again, that the claimant's subsequent period of absence

20 which commenced on 13th of August 2018, by which time she had been performing her contractual teaching duties under her restored preferred shift pattern for a period of 6 months, was principally caused by the fact that the restoration of her preferred shift pattern had not yet been declared to be on a

25 permanent (that is to say never to be varied in the future) basis.

731. The claimant returned to work on 21st February 2018. She was never required to work any working pattern other than her preferred working pattern

30 (50% FTE) at a point after 15 August 2016. Other than in the 5 week period from 16th August 2017 up to the 21st of September 2017 the claimant did not work and was not required by the respondent to work any shift pattern other than her preferred shift pattern.

732. On the submissions presented and on the Findings in Fact which it has made, the Tribunal held that across the first year of its operation what came to be identified by the claimant as her preferred shift pattern did have an adverse impact upon pupils learning in the class. In this regard the Tribunal accepted as truthful and reasonably founded in observation, the evidence of the Head Teacher, and further accepted as genuine and properly founded, her expressed professional opinion that that adverse impact was occurring.

733. The Tribunal found that it was reasonable, while seeking to put in place an adjustment as would support the claimant sufficiently to avoid the founded upon disadvantage, to also seek to address the needs of the school and the educational interests of the children. The Tribunal found that the alternative shift pattern which the respondent required the claimant to work albeit on a trial basis only in the 5 week period 16th August 2017 to 29th September 2017, was a shift pattern which also supported the claimant with regards to providing her with days between her working days which she could utilise for rest or on "catching up" and, that the alternative shift pattern introduced on a trial basis also had the potential to lessen the adverse impact upon pupils and learning which was associated with the claimant's preferred shift pattern.

734. As is reflected in the Findings in Fact which it has made, the Tribunal unanimously considered that the alternative shift pattern which the respondent required the claimant to work in the 5 week period 16th August to 21st September 2017 provided broadly equivalent support to the claimant in the context of her disability including spreading more evenly the number of rest (non working) days between teaching sessions such that, when taken together with its potential to lessen the adverse impact upon pupils and learning which was associated with the claimant's preferred shift pattern, its putting in place, albeit on a trial basis, was, in the circumstances, such a step as was reasonable to take to avoid the specified disadvantage relied upon.

735. The Tribunal held that in putting it in place on 16th August 2017 and in requiring the claimant to work under it on a trial basis in the 5 week period up

to 21st September 2017 the respondents did not breach their section 20(3) EqA duty.

736. The Tribunal rejected the contention advanced by the claimant's representative, let it be assumed that the EqA section 20(3) duty could only be fulfilled by requiring the claimant to work only ever her preferred shift pattern, that separately and in addition, in order to comply with the duty it was necessary that the respondent declare that the putting in place/restoration of the declared shift pattern be on a permanent basis. In the Tribunal's consideration no such requirement falls to be read into the terms of section 20(3) nor did it consider that the evidence presented supported such a finding. The reality of the situation was that following the start of her period of absence on 29th September 2017 and separately following her return to work, on her restored preferred shift pattern, on 21st February 2018, the claimant was never required to, and did not, work any shift pattern other than her preferred pattern. The fact that during those periods the shift pattern had not been declared to be permanent or was subject to a trial and was to be reviewed at some future date, did not operate to prevent the putting in place of an adjustment amounting to compliance with the duty.

Failure to Reclassify (Extend) Sick Pay

737. The Tribunal recognised that quite separately from the discretion provided to the respondent in their Sickness Absence Policy at paragraphs 6.20 and 6.36, the reclassification (extension) of sick pay allowance was an adjustment of a type which has the potential to be embraced by a section 20(3) EqA duty.

738. In the course of submissions parties' representatives referred the Tribunal to the Judgment of the Court of Appeal in **O'Hanlon v Commissioners for Her Majesty's Revenue and Customs** [2007] EWCA Civ 283 including the passages per Hooper LJ at paragraph 67:-

"*Discussion: is the claim for enhanced sick pay ever sustainable?*

67. In our view, it will be a very rare case indeed where the adjustment said to be applicable here, that is merely giving higher sick pay than would be payable to a non-disabled person who in general does not suffer the same disability related absences, would be considered necessary as a reasonable adjustment. We do not believe that the legislation has perceived this as an appropriate adjustment, although we do not rule out the possibility that it could be in exceptional circumstances. We say this for two reasons in particular.

68. First, the implications of this argument are that Tribunals would have to use up the management function of the employer, deciding whether employers were financially able to meet the costs of modifying their policies by making these enhanced payments. Of course we recognise that Tribunals will often have to have regard to financial factors and the financial standing of the employer, and indeed section 18B(1) requires that they should. But there is a very significant difference between doing that with regard to a single claim, turning on its own facts, where the cost is perforce relatively limited, and a claim which if successful will inevitably apply to many others and will have very significant financial as well as policy implications for the employer. On what basis can the Tribunal decide whether the claims of the disabled to receive more generous sick pay should override other demands of the business which are difficult to compare and which perforce the Tribunal will know precious little about?. The Tribunals would be entering into a form of wage fixing for the disabled sick.

69. Second, as the Tribunal pointed out, the purpose of this legislation is to assist the disabled to obtain employment and to integrate them into the workforce. All the examples given in section 18B(3) are of this nature. True, they are stated to be examples of reasonable adjustments only and are not to be taken as exhaustive of what might be reasonable in any particular case, but none of them suggest that it will ever be necessary simply to put more money into the wage packet of the disabled. The act is designed to recognise the dignity of the disabled and to require modifications which will enable them to play a full part in the world of work, important and laudable aims. It is not to treat them as objects of charity

which, as the Tribunal pointed out, may in fact sometimes and for some people tend to act as a positive disincentive to return to work."

739. And per Sedley LJ at paragraph 97:-

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"While the test is not the same as for substantial disadvantage, it is unsurprising to find that what constitutes a substantial disadvantage also constitutes less favourable treatment …"

10 740. The Tribunal respectfully agreed with the above articulation of the law, while also noting that the pleaded PCP relied upon in the instant case was not the application by the respondents to the claimant of their Sick Pay and Allowance Policy, but rather the requirement that the claimant work the specific shift pattern expected of the "claimant/a teacher".

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741. As submitted in relation to the first alleged failure in duty, the respondent's representative invited the Tribunal to dispose of the second complaint on the grounds that the PCP identified as relied upon had not been applied to the claimant since the 16th of August 2016. In the alternative, even upon the
20 claimant's representative's contended for construction of the PCP as relating to any variation of the claimant's shift pattern, she submitted, as the Tribunal has found in fact, that the shift pattern had already been restored to the claimant (on 13th February 2018) for a period in excess of 6 months before the date upon which the respondent contends the duty to extend sick pay first
25 arose, namely "4th September 2018" being the date upon when the claimant's Trade Union representative made the request on her behalf. Thus she submitted, no question of the relied upon PCP giving rise to the alleged disadvantage in the period founded up (4th September 18 to 6th September) arose. The Tribunal accepted that submission, let it be assumed that the
30 claimant's representative's construction of the PCP relied upon was to be preferred.

742. For completeness sake the Tribunal considered whether and makes clear that, let it be assumed that it had been satisfied that a relevant PCP in terms

of section 20(3) EqA had been being applied by the respondent to the claimant as at the date on which the claimant asserts the duty arose namely 4th September 2018, that it would have unanimously concluded that extending the claimant's sick pay would not, in circumstances, amounted to or have been required as a reasonable adjustment.

743. In this regard the Tribunal respectfully agreed with the articulation of the law set out in **O'Hanlon**. The Tribunal had no difficulty in concluding that a disabled person such as the claimant would be placed at a disadvantage, in comparison with a person absent from work due to sickness who was not so disabled, by the application of a sick pay allowance of 12 months full pay and 6 months half pay in a rolling 12 month period. Under reference to Hooper LJ at paragraphs 67 to 69 the Tribunal concluded that the circumstances presented on the evidence in the current case, did not place it into the "very rare" category of case where the adjustment of merely giving higher sick pay than would be payable to a non-disabled person, who in general does not suffer from the same disability related absences, would be considered necessary as a reasonable adjustment.

744. As the Tribunal has found in fact, at the time when the claimant sought the adjustment made and the respondent considered and declined the request, the requested adjustment was not required to facilitate the claimant's return to work. While the Tribunal accepted that doing so may have allowed the claimant to remain absent from work for a longer period the Tribunal unanimously considered that neither the claimant's own evidence nor the medical evidence presented were sufficient to allow it to conclude, on rational and objective grounds, that the extension of the claimant's sick pay, as at the time the request was made and refused, or at any point between that time and the Effective Date of Termination of her Employment would have made it easier for the claimant to return to work, or would have removed the identified disadvantage relied upon.

745. The particular ground upon which the claimant's representative's contended extension of sick pay would be a reasonable adjustment was the offer to

prove that the respondent's historic variation of the claimant's preferred shift pattern, and post its restoration on 13th February 2018, the respondent's failure to declare the restoration permanent, was the cause of the claimant's absence from work in the period from which the duty first arose, that is from 4th September 2018, up to and including the Effective Date of Termination of her Employment. That ground is one which the Tribunal has not held was established in fact on the evidence before it.

746. For the above reasons the Tribunal concluded that the extension of the claimant's sick pay was not, in the circumstances, a reasonable adjustment within the terms of section 20(3) of the 2010 Act and that the respondent's refusal in September 2018 and continued failure to so extend or reclassify the claimant's sick pay beyond that date, did not constitute a breach of a failure of any section 20(3) duty incumbent upon them.

747. The Tribunal unanimously held that the claimant had not established either instance of alleged section 21(2) Discrimination, on their merits, and, that each of the claims fell to be dismissed on that ground.

Discussion and Disposal – Time Bar

748. The unanimous determination of the Tribunal was that neither of the complaints of alleged failure in section 20(3) EqA duty was established on its merits and the claims have been dismissed on that ground. In circumstances where the EAT remitted the case for hearing by another Tribunal but under reservation, on a Proof Before Answer basis, of the Preliminary Issue of Jurisdiction (Time Bar) at a Final Hearing, it is, notwithstanding the dismissal of the claims on their merits, appropriate that the Tribunal make clear what would have been its decision on the issue of Jurisdiction had it held one or both of the complaints to be otherwise established.

749. Both representatives referred the Tribunal to and relied upon the authorities of **Robertson v Bexley Community Centre** [2003] IRLR 434 CA (paragraph 25) and **British Coal Corporation v Keeble and others** [1997] IRLR 336,

EAT. In considering the reserved issue the Tribunal found it helpful to remind itself of the principles articulated in those cases and in other authorities relevant to the exercise of its discretionary power:-

(a) "*25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds, there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. It is of a piece with those general propositions that an Appeal Tribunal may not allow an appeal against a Tribunal's refusal to consider an application out of time in the exercise of its discretion merely because the Appeal Tribunal, if it were deciding the issue at first instance, would have formed a different view. As I have already indicated, such an Appeal should only succeed where the Appeal Tribunal can identify an error of law or principle, making the decision of the Tribunal below plainly wrong in this respect.*" **Robertson v Bexley Community Centre** [2003] IRLR 434 CA (paragraph 25):

(b) "*While a Tribunal is not bound to apply the provisions of section 33 of the English Limitation Act 1980 and while the Tribunal has a wide discretion, factors which are almost always relevant to consider when exercising any discretion whether to extend time are:-*

(i) *the length of and reason for the delay*

(ii) *the extent to which the cogency of evidence is likely to be affected by the delay*

(iii) *whether the delay has prejudiced the respondent*

(iv) *the extent to which the party sued had cooperated with any requests for information*

5 (v) *the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action*

(vi) *the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action. –* ***British*** 10 ***Coal Corporation v Keeble and others*** *[1977] IRLR 336, EAT*

(c) *The exercise of the Tribunal's wide discretion involves a multifactorial approach. No single factor is determinative –* 15 ***Rathakrishnan v Pizza Express (Restaurants) Limited*** *[2016] IRLR 278 EAT*

(d) *An extension of time will not automatically be granted simply because it results in no prejudice to a respondent in terms of a* 20 *fair trial. If a claim is brought out of time it is for the claimant to show that it is just and equitable for the extension to be granted. This is a multifactoral assessment, where no single factor is determinative –* ***Lindsay v London School of Economics and Political Science*** *[2014] IRLR 218 CA*

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(e) *When deciding whether or not it is just and equitable to extend time for presentation of a discrimination complaint the merits of the complaint are part of the exercise of balancing the prejudice likely to be suffered by the respective parties should*

*time not be extended – **Bahous v Pizza Express Restaurant** [2012] EqLR 4 EAT*

(f) *In determining whether there was "an act extending over a period" the focus should be on whether the employer was responsible for an ongoing situation or state of affairs; **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96 CA.*

750. Although the Tribunal gave consideration to the same, it did not find that the two failures complained of were, in relation to each other, "conduct extending over a period" for the purposes of section 123(3) of the EqA. Upon consideration of the evidence presented the Tribunal considered that it did not support a Finding in Fact of sufficient connection such as to constitute a single course of conduct extending over a continuous period.

751. With the contended for exception of the claimant's actual, as opposed to deemed knowledge of the respondent's decision to not adjust her contractual sick pay allowance, no issue of the state of the claimant's knowledge about, the existence of her rights, their infringement, her entitlement to raise proceedings before the Employment Tribunal, or of the existence and application of relevant time limits, arose or was founded upon. As the Tribunal has found in fact the claimant was fully knowledgeable of her rights and in addition had the benefit of Trade Union advice and support and the home support of her husband throughout. She additionally was in receipt of professional legal advice in relation to the complaint of failure to adjust her shift pattern.

752. The sole reason upon which it was contended that it would be just and equitable to allow the claimant's complaints to be received though late was the state of her physical and mental health across the relevant periods of time.

753. While accepting that the claimant was suffering from Parkinson's Disease throughout the relevant period and, not doubting that at times in that period she also suffered from low mood, anxiety and stress, as the Tribunal has also found, not only upon the claimant's own evidence but upon the written medical evidence placed before it, there were periods of time within and across not only the initial limitation period but the whole of the period of subsequent delay, in which the claimant was not prevented from presenting her complaints because of the state of her physical or mental health. Although of itself not determinative of the "just and equitable" issue, the Tribunal considered that to be a material factor to be weighed in the multifactorial assessment.

754. On the Findings in Fact made the delays were in the Tribunal's consideration substantial, in the case of the complaint relating to the shift pattern (1 year) and significant in relation to the complaint of failure to reclassify sick pay (in excess of 3 months).

755. The Tribunal also found that although not ultimately operating to prevent a fair Hearing, the delays did in fact affect the cogency of relevant evidence presented by 2 witnesses.

756. While it was not necessary that the Tribunal reject as incredible the claimant's evidence to the effect that she herself only became aware of the refusal of her sick pay request after she had raised her claims, in order to accept as credible and reliable the evidence of the respondent's witness that she had communicated the decision to the claimant's Trade Union representative, the Tribunal considered that the claimant's evidence in that regard did not establish a failure on the part of the respondent to cooperate with a request for information.

757. The claimant had instructed her Trade Union representative to communicate her request for reclassification of her contractual sick pay entitlement and the Tribunal considered, in those circumstances, that the respondents were entitled to communicate their refusal of the same (their decision) to the

claimant via the same Trade Union representative. The Tribunal further found in fact that the respondents had done so holding that the claimant ought reasonably to have known of the decision, in those circumstances.

758. In light of the above findings the Tribunal concluded that the claimant had not acted with promptness in the raising of her proceedings there having been a number of occasions, both during the initial limitation periods and after their expiry on which the claimant's state of physical and mental health was such that she could, had she determined to, and reasonably should, have presented her complaints, but did not.

759. The Preliminary Issue of Time Bar having been reserved for determination on a Proof Before Answer basis the Tribunal in considering whether to exercise its discretion has the benefit of knowing that it has determined that the complaints would not have succeeded on their merits.

760. While none of the above factors are of themselves determinative, when considered together in a multifactoral assessment including a consideration of the balance of prejudice accruing respectively to parties were the time to be extended on the one hand or not extended on the other, the Tribunal unanimously concluded in the circumstances presented and on the Findings in Fact that it has made, that it would not be just and equitable to extend time for the presentation of the complaints, respectively by 1 year and by approximately 3 months to the date of their first presentation on 14th May 2019.

761. The Tribunal unanimously concluded that the claimant lacked Title to Present and the Tribunal lacked Jurisdiction to Consider, both in terms of section 123(1)(a) and 123(1)(b), either of her complaints of alleged section 20(3) EqA Breach of Duty and section 21(2) Discrimination.

762. Had the Tribunal found that either of the complaints to be otherwise established on their merits, which it has not, the Tribunal would have

nevertheless concluded that the claims were time barred and would have dismissed them for want of Jurisdiction.

5 **Employment Judge: J G d'Inverno**
Date of Judgment: 27 May 2022
Date sent to parties: 30 May 2022

10 **I confirm that this is my Judgment in the case of Kerr v Fife Council and that I have signed the Judgment by electronic signature.**