EMPLOYMENT TRIBUNALS

Claimant: Ms K Skeavington

Respondent: The Senad Group Limited

Heard: Via Cloud Video Platform in the Midlands (East) Region

On: 23, 24, 25, 26, 27 and 30 May and, in chambers, on 31 May 2022 and 17 June 2022

Before: Employment Judge Ayre, sitting with members
Ms J Hallam
Mr A Greenland

Representatives:
Claimant: Mr R O'Dair, counsel
Respondent: Ms T Hand, counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. The respondent discriminated against the claimant contrary to section 15 of the Equality Act 2010 by:

    a. Inviting her to a probationary review meeting; and
    b. Dismissing her.

2. The claim for disability related harassment fails and is dismissed.

3. The claim for automatic unfair dismissal fails and is dismissed.

4. The claim for detriment contrary to section 44 of the Employment Rights Act 1996 fails and is dismissed.

5. The claim for unlawful deduction from wages succeeds.

By a majority, the Tribunal finds that:

6. The respondent failed to make a reasonable adjustment for the claimant by not allowing her to work from home during her notice period.

REASONS

Background

1. The claimant was employed by the respondent as a teacher from 20 April 2020 to 26 July 2020.

2. The claimant has two long term medical conditions: Behçet's disease, also known as Behçet's syndrome, and bi-polar disorder.

3. In a claim form presented to the Tribunal on 25 November 2020 following a period of Early Conciliation that started on 12 September 2020 and ended on 26 October 2020, the claimant brought complaints of disability discrimination, automatic unfair dismissal under section 100 of the Employment Rights Act 1996 ("**the ERA**"), detriment contrary to section 44 of the ERA and for unlawful deduction from wages. The respondent defends the claim.

4. There have been three Preliminary Hearings for case management purposes in this claim. The first took place before Employment Judge Britton on 22 February 2021. At that hearing the claims were identified as being the following

    a. Automatic unfair dismissal under section 100 (d) of the ERA;
    b. Detriment contrary to section 44(d) of the ERA;
    c. Failure to make reasonable adjustments contrary to sections 20-22 of the Equality Act 2010 ("**the EQA**");
    d. Discrimination arising from disability contrary to section 15 of the EQA; and
    e. Harassment contrary to section 26 of the EQA.

5. Case Management Orders were made for the provision of a disability impact statement and disclosure of medical evidence as the respondent had not, at that stage, conceded that the claimant was disabled.

6. The second Preliminary Hearing took place on 21 May 2021, also before Employment Judge Britton. Prior to that hearing the respondent admitted that the claimant was disabled by reason of Behçet's disease but not in relation to bi-polar disorder. The claimant was ordered to provide a second disability impact statement setting out the impact of the bi-polar disorder on her. The notes of that Preliminary Hearing record that the issues were agreed to be those summarised at the previous hearing.

7. The respondent subsequently admitted that the claimant was also disabled by reason of bi-polar disorder.

8. The third Preliminary Hearing took place on 31 January 2022 before Employment Judge V Butler. A list of issues, agreed by the parties, was appended to the note of that Preliminary Hearing. It is that list of issues which was before the Tribunal at the start of the Final Hearing of the claim on 23 May 2022.

9. Mr O'Dair represented the claimant at all of the Preliminary Hearings. The respondent was represented at all of the Preliminary Hearings by Ms B McDermott, solicitor, who instructed Ms Hand to represent the respondent at the Final Hearing.

The Proceedings

10. The hearing took place via Cloud Video Platform at the request of the claimant due to her health conditions. We heard evidence from the claimant and, on behalf of the respondent, from Amanda Grant, the Head Teacher of Maple View School, and Victoria Finn, the respondent's Human Resources Director.

11. At the start of the hearing the claimant's representative indicated that the claimant had also served a second witness statement dealing with the question of remedy. Ms Hand indicated that the respondent did not, in principle, object to the introduction of the statement, but she suggested that a split remedy and liability hearing would be preferable. In the event it was not possible for us to deal with remedy during the course of this hearing.

12. There was an agreed bundle of documents which ran originally to 481 pages. At the start of the hearing the parties applied to add an additional document to the bundle, namely the reference provided to the respondent by the claimant's former employer. This document was added by agreement to the end of the bundle.

13. The respondent also applied to introduce an email chain between the claimant's trade union representative and Ms Finn between 30 June and 3 July 2020. Mr O'Dair told the Tribunal that he had not seen the email exchange. He was therefore given time to consider it and to make representations as to whether he objected to it being introduced into evidence. Having considered it he told the Tribunal that he had no objection to it being introduced and it was therefore added to the bundle at the start of the second day of the proceedings.

Reasonable adjustments

14. At the beginning of the hearing we discussed what adjustments needed to be made to accommodate the claimant's health conditions. Mr O'Dair told the Tribunal that one of the impacts of the claimant's disabilities was that the claimant became fatigued, particularly in the afternoon. He asked that she be allowed to give her evidence in the mornings only, and the respondent did not object to this.

15. It was therefore agreed that the claimant would give her witness evidence in the morning only and that we would take regular breaks.

We asked the claimant to let us know if at any point she wanted an additional break or became too fatigued to continue with her evidence. We also agreed that the hearing would start early, at 9.30 am, on the days that the claimant was giving evidence so that she was freshest. We gave the claimant the option of starting the hearing at 9.30 or 10 am and she chose 9.30.

16. There was some discussion about whether to interpose the respondent's witnesses on the afternoons during the hearing. The respondent initially objected to this on the grounds that to do so would 'disrupt the narrative' of the respondent's case. The Tribunal listed to what both of the representatives had to say on the issue. Ms Hand confirmed that both of the respondent's witnesses were intending to be present throughout the hearing.

17. It was the unanimous decision of the Tribunal that the respondent's witnesses should be interposed on the afternoons of the hearing. We were concerned not to lose any of the hearing time and could see no prejudice to either party in proceeding in this manner.

18. The claimant therefore gave her evidence in the morning, and the respondent in the afternoon. As witnesses could not discuss the case whilst in the middle of their evidence, we gave the advocates time when the witnesses had finished their evidence to take instructions from the witnesses, and to put any further questions to the other party's witnesses once they had done so.

Events on day four of the hearing

19. At the start of the fourth day of the hearing, which was the third day upon which the claimant was giving evidence, the claimant became distressed. She told the Tribunal that she was exhausted and was struggling with her health. Mr O'Dair asked that, as the claimant was a vulnerable witness, Ms Hand curtail her cross examination to the bare minimum.

20. Ms Hand told the Tribunal that she had already cut down on her cross examination. It was, she said, the claimant who had chosen to bring her claim, which included complaints of reasonable adjustments, relying on four separate PCPs, a harassment claim, a discrimination arising from disability claim, and several other complaints. The claimant would have known that she would be subject to cross examination. The respondent is a school for vulnerable and disabled children. A finding that it had discriminated against the claimant because of her disability and that it had failed to socially distance would be very damaging for the respondent. The stakes in this case are very high and the respondent should be entitled to explore the claimant's case. The claimant was, she said, giving lengthy and irrelevant answers.

21. We adjourned the hearing and gave Mr O'Dair permission to speak to the claimant about how best to manage her evidence and cross examination in light of her medical condition.

22. After the adjournment Mr O'Dair told the Tribunal that the claimant could not continue with her evidence. He explained that she has suffered from feeling very isolated during her evidence, and interpreted the 'witness warning' that she should not discuss the case or her evidence until she concluded her evidence as meaning that she could not discuss her feelings about the case with her counsellor.

23. Mr O'Dair asked for the claimant to be given permission to seek urgent counselling support and talk to her counsellor about the case. He indicated that the claimant was 'reluctantly content' for the hearing to continue in her absence and suggested that we continue with the respondent's evidence. He also suggested that he agree a time scale for cross examination lasting no longer than a long morning and referred to College of Advocates' guidance that limited and focused cross examination is appropriate if it is necessary to enable a disabled person to have access to justice.

24. Ms Hand indicated that she had no objection to the claimant seeking counselling support or to her being absent during the respondent's evidence. She said that she was more than happy to justify every line of cross examination and pointed out that there was no medical evidence before the Tribunal. She was concerned that there may be a deliberate attempt to curtail cross examination, and that there was a big risk to the respondent if cross examination could not proceed.

25. Mr O'Dair replied that he was willing to look again at the list of issues to see if any could be withdrawn. He also objected in the strongest of terms to the suggestion that there was a deliberate attempt to curtail cross examination.

26. After adjourning to consider the position, it was the unanimous decision of the Tribunal that:

    a. The claimant be given permission to discuss the case, to take medical advice and get counselling support from a counsellor, a doctor, nurse or other medical professional subject to a duty of confidentiality;

    b. The hearing should be adjourned to give the claimant time to take medical advice;

    c. The parties' representatives should review the list of issues, but that any changes to it should only be made on the basis of an assessment of the merits of the claims having heard some of the evidence, and not because of the claimant's health – the claimant should not feel under any pressure to withdraw claims so as to shorten the length of her evidence; and

    d. The advocates should attend at 3pm to give the Tribunal an update.

27. Upon reconvening, Mr O'Dair told the Tribunal that the claimant had managed to secure medical advice and an appointment with her counsellor and hoped to be able to resume tomorrow. Her strong

preference is to get the case done, and in particular for her evidence to be concluded before the weekend. She also needs to know how much longer she will be giving evidence. Mr O'Dair therefore asked that the claimant continue her evidence at 9.30 am on the 5th day of the hearing, and that further cross examination be limited to 3.5 hours.

28. Ms Hand objected in the strongest possible terms to her cross examination being limited. She referred to the Presidential Guidance on dealing with vulnerable witnesses which, she says, makes clear that vulnerability in a witness needs to be identified at the earliest possible stage, ideally at case management stage, so that directions and orders can be made. At case management stage all the Tribunal was told was that the claimant required regular breaks, which was nothing out of the ordinary.

29. On the working day before the final hearing, Ms Hand said, the claimant's representatives had told the respondent's representatives that the claimant could only give evidence during the mornings. It was the responsibility of the claimant's legal team to prepare her for cross examination and to assess whether any adjustments were required. The claimant's answers are lengthy, and she requires clarification of the questions. The case is, Ms Hand submits, very important to the respondent and she has to be able to put the respondent's case to the claimant. If the tribunal are of the view that additional measures should be taken, there should be an adjournment of the hearing.

30. Having adjourned and considered carefully the representations made by both parties, together with the Equal Treatment Bench Book and the Advocate's Gateway Toolkit 1, it was the unanimous decision of the Tribunal that the hearing should proceed on day 5 with further cross examination of the claimant limited to 3.5 hours. The Tribunal then heard the remaining respondent's witness' evidence and submissions. Judgment was reserved.

31. In reaching this decision we took account of the interests of both parties, and the duty of the Tribunal to ensure that vulnerable witnesses are able to participate in hearings and have access to justice. The Equal Treatment Benchbook makes clear that judges can impose reasonable time limits on cross examination and (at paragraph 156) that the duration of cross examination must not exceed what a vulnerable witness can reasonably cope with. Adjournments and postponements should be avoided if possible with vulnerable witnesses.

32. Cross examination of the claimant is of course only part of the case, and no restrictions have been placed on the evidence of the respondent's witnesses or on submissions.

The issues / applications to amend the claim and response

33. When discussing the issues at the start of the hearing, the claimant's representative indicated that the claimant wished to pursue a complaint of direct disability discrimination. He said that direct discrimination had

been pleaded in the claim form, and that it was due to his oversight that it had not been referred to during any of the three Preliminary Hearings or included in the list of issues agreed at the last Preliminary Hearing. The claimant alleges that her dismissal and the dismissal of her appeal were acts of direct discrimination, and she relies upon a hypothetical comparator.

34. Ms Hand objected to the claimant being allowed to pursue a complaint of direct discrimination. It had been referred to but not properly pleaded in the claim form, and the claimant had the opportunity at previous Preliminary Hearings to correct that position. The respondent had not come prepared to deal with a direct discrimination claim and would, she said, be prejudiced if the claimant were allowed to pursue it.

35. The Tribunal adjourned to consider the position. It was the unanimous decision of the Tribunal that the claimant should not be allowed to pursue the complaint of direct discrimination. To do so would make a mockery of the case management process which is designed to identify the issues in the claim so that both parties can prepare for the Final Hearing knowing the case that they have to meet. There have been three case management Preliminary Hearings in this case, and Mr O'Dair has represented the claimant at all three of them.

36. Ms Hand subsequently told the Tribunal that the respondent wished to argue, in relation to the claim of discrimination arising from disability, that the respondent's actions were a proportionate means of achieving a legitimate aim. The legitimate aim relied upon was providing a high standard of teaching and support to students.

37. Ms Hand acknowledged that this defence had not been pleaded previously. It had, she said, 'got lost' in the litigation as the respondent had originally intended to apply for further particulars of the discrimination claims, following which they would have sought to amend the response to rely on the defence. At one of the Preliminary Hearings however it had been decided that further particulars were not required.

38. Mr O'Dair objected to the application to amend. In his submission 'what is sauce for the goose is sauce for the gander', and it would not be fair for the claimant to be prevented from pursuing a complaint of direct discrimination, which was contained in the claim form, but the respondent allowed to amend the claim at this late stage to include a defence which was not pleaded. The respondent's solicitor was present at all of the Preliminary Hearings.

39. We adjourned to consider the respondent's application to amend. Having considered the representations of both parties, it was the unanimous decision of the Tribunal that the respondent should not be allowed to amend the claim. Having regard to the ***Selkent*** factors, the nature of the amendment was a substantial one. It could not be said to be a relabeling, but rather it raised new questions of law and potentially of fact. The application to amend was made at a late stage in the proceedings, when the respondent had been legally represented

throughout. The balance of prejudice favoured not allowing the amendment.

Disclosure of Medical information

40. Mr O'Dair indicated at the start of the hearing that the claimant had concerns about her personal information contained within the medical notes being published. In response to a direct question as to whether he wished to make an application under Rule 50 of Schedule 1 to the Employment Tribunals (Consitution & Rules of Procedure) Regulations 2013 ("**the Rules**") Mr O'Dair said that he did not wish to make such an application at this stage, but was not ruling out the possibility of making one at a later stage.

41. At the end of the hearing, after submissions had been made by both parties, Mr O'Dair raised the issue again and asked that the claimant's medical records be 'deposited with the respondent's solicitor'. Mr O'Dair was reminded of the provisions of Rule 50 and asked what application he wished to make. Mr O'Dair told the Tribunal that he would take instructions from his client, and that if any further application was required, he would make it in writing.

Remedy evidence

42. At the start of the second day of the hearing the Tribunal was provided with a second version of the claimant's witness statement, including page numbers of the documents referred to. After some discussion it was agreed that we would work to the original version of the statement with the page numbers handwritten on.

43. The parties told the Tribunal at the start of the second day of the hearing that there was no agreed remedy bundle but that they each had their remedy documents ready to send to the other party. The parties were ordered to send their remedy documents to the other party by 7pm on 24 May 2022, and the claimant was ordered to prepare a remedy bundle and send hard and pdf copies to the Tribunal, together with hard copies of the claimant's remedy statement, to arrive on 26 May 2022.

The Issues

44. The following issues were identified at the start of the hearing as being the ones that the Tribunal would have to determine.

Discrimination arising from disability (Equality Act 2010 section 15)

45. 11.1 Did the respondent treat the claimant unfavourably by:

a. Forming the view that the claimant was raising problems rather than completing tasks;
b. Subjecting the claimant to the probation review process;
c. Making exaggerated allegations of poor performance;
d. Dismissing the claimant; and

e. Dismissing the claimant's appeal?

46. Did the following things arise in consequence of the claimant's disability:

a. The claimant's requirement for pupils to socially distance;
b. The claimant writing to the respondent's CEO;
c. The claimant's absence from work from 8 June onwards;
d. The claimant's refusal to have a face to face meeting on 15 June 2020; and
e. The perceived performance problems?

47. Was the unfavourable treatment because of any of those things?

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

48. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

a. Requiring staff, including the claimant, to interact in a way which breached social distancing rules?

b. Allowing staff to interact in ways which breached social distancing rules?

c. Requiring those on probation to adhere to the school's high performance standards?

d. Allowing children to attend school without socially distancing from staff?

49. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

a. They exposed the claimant to a higher degree of risk of Covid 19 and of serious illness / harm should she contract Covid, thereby making her anxious;

b. It was not possible for the claimant to comply with high performance standards, leading to her dismissal;

50. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

51. What steps could have been taken to avoid the disadvantage? The claimant suggests:

a. Requiring staff to comply with strict social distancing;
b. Extending the claimant's probationary period rather than dismissing her;
c. Providing the claimant with strict social distancing from both pupils and staff; and/or
d. Allowing her to work from home.

52. Was it reasonable for the respondent to have to take those steps and when?

53. Did the respondent fail to take those steps?

Harassment related to disability (Equality Act 2010 section 26)

54. Did the respondent make reference to / disclose to colleagues at a meeting on 5th May 2020 the claimant's "serious mental health problems"?

55. If so, was that unwanted conduct?

56. Did it relate to disability?

57. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

58. If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect?

Automatic unfair dismissal (section 100 Employment Rights Act 1996)

59. Was the reason or principal reason for dismissal that:

    a. Being an employee at a place where there was no health and safety representative or safety committee the claimant brought to her employer's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety; and / or

    b. In circumstances of danger which the employee reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert, she refused to return to her place of work between 8 June 2020 and 26 July 2020.

Detriment claim (section 44 Employment Rights Act 1996)

60. Did the respondent do the following things:

    a. Subject the claimant to a disciplinary process;
    b. Her colleagues giving false and misleading evidence against her;
    c. Dismiss the claimant; and
    d. Dismiss the claimant's appeal?

61. By doing so, did it subject the claimant to detriment?

62. If so, was it done on the ground that:

    a. Being an employee at a place where there was no health and safety representative or safety committee the claimant brought to her employer's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety; and / or

    b. In circumstances of danger which the employee reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert, she refused to return to her place of work between 8 June 2020 and 26 July 2020.

Unauthorised deduction from wages

63. Did the respondent make unauthorised deductions from the claimant's wages by paying her statutory sick pay rather than full pay for the period from 18 June to 26 July 2020?

Findings of Fact

64. We make the following findings of fact unanimously, except where we have indicated otherwise below.

65. The claimant was employed by the respondent as an SEN Specialist Teacher at Maple View School from 20th April 2020 until 26th July 2020.

66. Maple View is a small specialist school for pupils that have complex needs including Autism Spectrum Disorder ("**ASD**"), moderate to severe learning difficulties and disabilities. It is located in Derby and there is a residential children's home next to the school.

67. The school is part of the Senad Group Limited. It can accommodate up to 16 pupils. It opened on 1 June 2020 with three pupils and has a high staff to pupil ratio due to the special needs of the students.

68. The claimant applied for the position of SEN Specialist Teacher at the school in January 2020 and was interviewed by the Head Teacher of Maple View, Amanda Grant, on 10th January 2020. She was offered the position, with an initial start date of September 2020.

69. Ms Grant was appointed Head Teacher of Maple View and was tasked with setting up the school to open early in 2020. She recruited three teachers to work at the school, as well as several teaching assistants. The claimant was therefore one of three teachers recruited at around the same time. The other two were initially recruited to start work sooner, and the claimant was offered the role with a start date in September 2020. The reason for this was that the claimant would not have a class to teach until September, so was not needed in school before then.

70. At the time she applied for the role at Maple View the claimant was working at Rosehill School. The Head Teacher of that school provided a reference for the claimant in which she wrote that the claimant had "*started to develop good relationships with families and the children in her class… is keen to work alongside other professionals…to develop knowledge and skills regarding planning, autism awareness, speech and language and occupational therapy / sensory regulation…has attended all training offered…shows a keen interest in developing her knowledge"*

71. This reference, and in particular the use of the words 'started to develop', 'is keen to', 'develop knowledge and skills' and 'keen interest in developing her knowledge' caused Ms Grant to believe that the claimant would require support in order to fully develop in the role. Ms Grant was however willing to provide that support and the claimant was offered the role at Maple View.

72. The claimant told the respondent that Rosehill School was willing to release her early, and that she would not need to work her full notice period. The claimant also told Ms Grant that she had been released early from a previous contract working at an ASD specific school. The respondent agreed that the claimant's start date could be brought forward. The claimant would not be allocated her own class until September, but the claimant was keen to be part of Maple View School from the very beginning, and Ms Grant thought that an earlier start would give her time to address some of the concerns that she had identified from the reference, and for the claimant to develop her skills and plan for her class in September.

73. The claimant was employed on a contract of employment which she signed on 25th March 2020. The contract stated that the claimant's main place of work was Maple View School, Mackworth, Derby, and included a 6 month probationary period. The contract stated that the respondent "*reserves the right to extend probation (without notice) or terminate your employment, with one month's notice, at any time during this probationary period in the event that your conduct or performance appear unsatisfactory".*

74. On 19 January the claimant completed a Health Questionnaire in which she disclosed that she had two disabilities, Behçet's syndrome and Bipolar Disorder ("**BPD"**) Type 2. She wrote that both of her conditions were well managed and that Occupational Health had previously signed her off as "*fine to work in all teaching roles.*" She also ticked boxes to say that she was either currently suffering from or had in the past suffered from back / neck problems, depression / anxiety and 'stress reaction'.

75. In response to a specific question on the form about identifying reasonable adjustments, the claimant commented that she had not had any time off recently with BPD, and was reducing her medication for BPD due to the stability of the condition. She also wrote that the only adjustment foreseen for her Behçet's was a three-monthly eye check.

76. In light of the comments in the Health Questionnaire the respondent decided that it was not necessary to refer the claimant to occupational health. Ms Grant and Ms Finn (the respondent's Human Resources Director) discussed the questionnaire and decided that as Ms Grant had experience of supporting teachers with their health needs, she would do the same with the claimant and that no referral to occupational health was necessary.

77. On 23rd March 2020 the Prime Minister announced that the country was going into national lockdown and new restrictions came into force limiting individuals' ability to leave their homes at all. The claimant lives alone and has no living family. The claimant was initially told that she had to shield because she was clinically vulnerable due to her Behçet's. She did not however receive a shielding letter, and was subsequently told that she was not in the highest risk of 'clinically extremely vulnerable' but was in the category below that, namely the 'clinically vulnerable' group, and should work from home if possible, or failing that adhere to social distancing at work.

78. On 23 March the claimant sent an email to Victoria Finn, the respondent's HR Director, explaining that she had received advice to work from home, and had started to do this with Rosehill School. Ms Finn replied the following week explaining that she had made Amanda Grant aware of the position and that Ms Grant would have a lot of training, induction and other work that the claimant could do from home. Ms Finn also asked if the claimant had a 'shielding' letter. The claimant explained that she had not received a shielding letter and, in an email sent to Ms Finn and copied to Ms Grant, thanked Ms Finn for keeping her condition private. She also said "*it's something that I keep to myself, as it has never affected my work.*"

79. The claimant started work for the respondent on 20 April 2020. She worked from home until 11th May 2020. During that time she had an induction at home and was given on-line learning to do. On 26 April Amanda Grant asked the claimant to plan 2 or 3 weeks of baselining maths lessons for students, using the school's Maths Calculation Policy. She told the claimant that she could use any resources she wanted, and to contact her if she had any questions.

80. The following day the claimant emailed Ms Grant to say that she had recently found out that an online friend who had Behçet's disease had died of Covid. The claimant was very upset by this, as the friend was just two years older than the claimant and had been going out to work during the pandemic. She described it as being an 'awful shock'.

81. Ms Grant had emailed all of the school's staff on the 19 April asking them to let her know how they felt about being on site over the next few weeks, as the school was due to open on 1 June. On 20 April the claimant wrote to Ms Grant that her risk level was too high to come into contact with others and that she needed to be totally away from anyone. She sent another email the following day in which she referred to being high risk, and 'incredibly worried about' her risk level. She also explained that she had no support if she fell ill, and thanked Ms Grant for her support in working from home.

82. The respondent offered to have a work laptop delivered to the claimant's home. The claimant said that, as long as she did not come into contact with anyone, she was willing to come and pick the laptop up from outside the building, as she could add the journey on to a shopping trip. Ms Grant offered the claimant a tour of the school as well, but the claimant initially declined due to concerns about Covid risk.

83. On 27 April Ms Grant sent an email to the three teachers at the school, including the claimant, suggesting that they try to be together in school from the week beginning May 11th in preparation for the children's arrival. She said that she would discuss with the claimant how they could do that safely for her.

84. The claimant and Ms Grant had regular conversations during this period, including about the claimant's concerns about coming onto site. Ms Grant suggested that the claimant come to visit the school on a bank holiday weekend when it was anticipated that there would be very few people, if anyone, on site. The claimant agreed.

85. The claimant came in to school and was on site for approximately 3 hours. Her visit started with a meeting in Ms Grant's office, which is more than 4 metres long and 12 square metres in size. It was therefore large enough for the claimant and Ms Grant to socially distance. The claimant was then shown around the school, including the classroom that she had been allocated and where she would be able to work by herself. This enabled the claimant to see the size of her classroom and the public areas, so that she could reassure herself about social distancing.

86. Ms Grant also showed the claimant the outside area, and, with the claimant's agreement, the residential care side of the building where the students would live. They did meet members of the care team at one point and moved aside to let them pass.

87. At the end of the visit the claimant indicated to Ms Grant that she was happy with the social distancing and working arrangements in place.

88. Ms Grant also has serious health conditions. At the start of the pandemic, she was classed as clinically extremely vulnerable and told to shield. She chose not to, but she continued to be very careful, and told the claimant that.

89. The claimant's evidence was that she felt under pressure to come into the school on 11th May and begin working on site. Ms Grant's evidence was that the claimant wanted to come into school and was happy to do so.

90. We accept that the claimant indicated to Ms Grant that she was prepared to come into school. The majority of the Tribunal preferred Ms Grant's evidence on this issue and found that the claimant told Ms Grant that she wanted to come in rather than stay working at home. The minority view, held by Mr Greenland, was that, in light of the email

correspondence at the time, the claimant had not indicated that she wanted to come into school, but rather that she felt under pressure to do so.

91. The claimant worked on site at the school from 11 May 2020 to 5 June 2020, a period of three weeks. The school opened to the first children on 1 June, when three children began attending. Most of the claimant's time was spent working in her own classroom, although she also attended morning meetings, planning meetings and on site training.

92. The respondent had in place a generic Covid risk assessment called the Senad Shield. The risk assessment was sent to all staff at Maple View on 1 June. It included detailed provisions setting out how the school would operate to keep students, staff and visitors safe, with its focus being on protecting children in school.

93. On 21 May the claimant attended First Aid training on site. Amanda Grant sent an email to the claimant on 19 May telling her that she was booked on the First Aid training later that week. The claimant asked if the training was "hands on" because she was concerned about her health and specifically the Covid risk of hands on training. Ms Grant sought to reassure the claimant by telling her that the training was "*very carefully managed socially – distanced, hence the very small group sizes*".

94. The claimant attended the training on 21 May. There was a small group of four people and the training was socially distanced. Gloves and wipes were available and were used by the claimant and others during the training session. The claimant felt anxious and uncomfortable during the training session and described the trainer as being 'very understanding'.

95. At one point during the training day the claimant became upset and left the training room in tears. She told us in evidence that this was because her stress levels were so high as a result of her concerns about safety. There was however before us a witness statement provided on 28 July 2020 by Carly Cherriman, Head of Care and Registered Manager at the school. In that statement Ms Cherriman wrote that after the claimant left the training room "*when asked by a colleague if she was ok, I overheard her telling the colleague that this was due to her witnessing someone having quite a significant seizure in the past that she felt had been quite traumatising, the training had led her to have a "flashback" of this and she felt overwhelmed so left the room to collect herself. Once again, she did not raise concern about the methods in which the training was being administered."*

96. Ms Cherriman held a senior and responsible role at the respondent, and we have no reason to doubt the truth of her statement. She had nothing to gain by presenting a false picture of the incident. On balance we prefer her evidence to that of the claimant. We accept that the claimant was genuinely concerned about Covid risk at the time, but we find that the reason she left the training was not due to her anxiety about Covid risk.

97. On 2nd and 3rd June, the claimant attended Non-Abusive Psychological and Physical Intervention ("**NAPPI**") training. This training covers control and restraint and involved close contact with others. The claimant had previously sustained an injury in another school, and put this down in part to not having received NAPPI training.

98. Ms Grant sent an email to the claimant and a colleague on 18 May 2020 telling them that the NAPPI training would be provided on 2nd and 3rd June. The claimant replied asking whether she was on the course for one or two days and raised no concerns about attending. We find that the claimant did not give any indication at the time that she did not want to attend the training due to concerns for her health and safety. The claimant had previously been injured at work and wanted to do the training to keep herself and students safe, as she knew that she could only restrain children in line with the training.

99. There were only three people, including the claimant, on the NAPPI training. During the first day the claimant became visibly anxious about the practical element of the training and spoke to the trainer about it. The trainer told her that if she did not feel comfortable, she could come back on a later date for the practical. The claimant said she was fine to continue. The following day she apologised to the trainer for having been so anxious and explained that she hadn't been so close to people since the start of lockdown but had overcome her anxiety and was happy to continue.

100. At the end of the training the trainer asked those attending if they were happy with the risk assessments in place and if anything could be done better. The claimant said that she felt very comfortable but was anxious about being around people. She did not raise any concerns about social distancing.

101. The school had a clear policy that all staff should socially distance from each other, although not from the students. On 28 May 2020 Ms Grant sent an email to staff reminding them of the importance of adhering to the guidance on Covid safe working. She referred to one of their sister schools having been closed down as a result of Covid, and she wanted to avoid that happening at Maple View. In the email she wrote that:

"*We must have thorough cleaning, handwashing and hygiene procedures…*
A further precaution would be to change your clothes on arrival and before leaving, but this is optional…
Maintain a 2m distance from other staff members.
Be conscious of the amount of close contact you have with the children and wash accordingly.
Always wipe down surfaces and equipment after use."

102. The claimant suggested that Ms Grant was making light of the requirement to socially distance and joking about it. Whilst we accept that was the claimant's genuine perception, having heard Ms Grant's

evidence we find that she did take social distancing seriously and did not joke about it. On occasion she would remind staff of the need to stay 2 metres apart by calling out the word 'alligator' or 'crocodile', being reptiles which are 2 metres long. She did this to remind people to socially distance without being too critical or heavy handed.

103. We accept that Ms Grant took social distancing seriously and required all of her staff to socially distance from each other. This included in meetings and in the staff room, where only two members of staff were allowed at any one time. There were notices up around the school reminding staff of the need to comply with Covid safety rules, including a notice on the door of the staffroom restricting entry to two people at any one time.

104. The claimant attended morning briefings during the three weeks that she was in school, along with other members of staff. The claimant decided to attend these meetings and tried her best to maintain social distancing during them. She told the Tribunal that she preferred to stand in an open doorway where there was greatest ventilation, and would sometimes walk through the classroom in which the briefings were held to reach the door to the outside, open that door and stand in the doorway during the meeting.

105. There was no evidence before us to suggest that the claimant objected to attending the morning briefings at the time. The claimant also chose to eat her lunch in the school canteen where she was provided with a free school meal and where she could socially distance. She could have eaten a packed lunch in her own classroom by herself, but chose not to.

106. The claimant also attended planning and other meetings with colleagues. Some of her colleagues told Ms Grant that the claimant did not always adhere to social distancing and would stand or sit too close to them, and lean over them or their work.

107. Ms Grant began to have some concerns about the claimant's performance and her behaviour. The maths task that the claimant had been asked to complete whilst working from home was not done well or in a timely manner, despite considerable support provided to the claimant in relation to the task.

108. On 18 May 2020 Ms Grant sent an email to Andrea Rowland in the respondent's HR team, in which she wrote : "*…Just so that you are aware, for if this becomes an issue further down the line, I am finding Kat Skeavington very challenging, as are a few other members of the team. I intend to have a 'conversation' with her this week, but I am already thinking at the back of my mind, 'that's what probation is for'….*".

109. Ms Grant did not, however, have a formal conversation with the claimant that week. She was in regular communication with the claimant and was trying to support her to improve. Her style was to try and be positive and constructive, and the claimant did not interpret the

comments and interventions as meaning that she needed to improve her performance.

110. The claimant did however accept, in her evidence to the Tribunal that, whilst she was working at the school she was not 'giving the best version of herself'.

111. On 31 May the claimant sent an email to Ms Grant in which she wrote:

"*I've had an email offer from my union to become School Representative. I know we're only small but it's something I wanted to do for a while and not had the opportunity.*
I just wanted to check if you mind me taking up the role please…"

112. Ms Grant replied "*that's absolutely fine with me*". The claimant said in evidence to the Tribunal that the reason she did this was so that she had a voice to speak up. There was however no evidence before us to suggest that the claimant had not been listened to up to this point. We find that this email demonstrates that the claimant felt able to speak up and make suggestions to Ms Grant. The claimant also ended the email with the words "*Very Excited for tomorrow. Kindest regards. Kat*" suggesting that she was looking forward to the school opening to students the following day.

113. On 1 June, the first day that the school opened to children, the claimant and Ms Grant met to carry out an individual risk assessment for the claimant. The meeting lasted approximately 30 minutes. The claimant was given a form entitled "Risk Assessment checklist – Covid-19 and Vulnerable Staff Groups" which was the same form that had been completed for Ms Grant because of her health conditions. The claimant was asked to complete the first section of the form setting out details of her health conditions and any relevant medical advice received in relation to Covid 19.

114. Ms Grant and the claimant then completed the rest of the form together. They discussed the questions on the form and Ms Grant wrote down the responses to the questions. The form records that the claimant was "*freely moving around site and interacting with the team and children",* that there was a discussion about PPE, and that the claimant declined the offer of higher quality masks and gloves.

115. At the end of the form it is recorded that: "*Kat remains nervous due to conflicting guidance from her clinic. She has been on site for 3 weeks, without children present (apart from transition visits) and has moved around site and interacted with the team confidently. She has stated that she is happy to work with the children even though they may come closer than 2 metres*".

116. At the end of the meeting Ms Grant read the form out to the claimant and gave her the opportunity to comment on it. The claimant asked Ms Grant to change the word 'misleading' to 'conflicting' and this change was made.

117. The claimant suggested in her evidence to the Tribunal that she could not be full in her responses to the questions asked during the risk assessment because she was rushed. We not accept her evidence on this issue. We find that the claimant had sufficient time during the meeting to discuss measures that needed to be put in place to reduce her Covid risk and that she did not ask for additional time to discuss the risk assessment.

118. Both Ms Grant and the claimant signed the form at the end of the meeting and agreed that there would be a review of the risk assessment in two weeks' time on 15 June. There was a conflict of evidence as to whether the claimant was given a copy of the risk assessment at the end of the meeting. On balance, we find that the claimant was given a copy of the risk assessment at the end of the meeting. That was in accordance with Ms Grant's normal practice, and there was no reason why she would have departed from that practice in the claimant's case.

119. The respondent took Covid safety seriously and was keeping its processes under review. On 1 June Ms Grant sent all staff at Maple View school a copy of the updated Senad Shield and asked them to let her know if there were any issues in the updated document that affected their practice, so that they could discuss and / or adapt accordingly.

120. In the first week that the school was open the claimant took the lead in teaching horticulture and cooking classes to the three children who were in school. The claimant had attended a meeting on 22 May 2020 at which there was a discussion about horticulture and cooking classes. During the discussion the claimant indicated that she was willing to lead these classes. There was no evidence before us that the claimant had given any indication at the time that she would prefer not to lead the classes due to concerns about Covid risk.

121. The claimant did not perform well during these lessons. She failed to plan the cooking lesson properly, resulting in children having to wait for 30 minutes whilst the other children completed the task. The lesson lacked structure and as a result one of the children had an incident afterwards due to his increased anxiety levels. The same student was not allowed to participate in the horticulture lesson which upset him and confused the staff.

122. The claimant tried to ensure social distancing during the lesson, which Ms Grant considered not to be appropriate. The school's policy was not to require the children to socially distance because of their learning difficulties. The claimant appeared to misunderstand the children's individual needs, learning styles and communication styles. This caused Ms Grant to have concerns about the claimant's ability to communicate and work effectively with the children.

123. The claimant alleged that during a morning briefing on 5 June Ms Grant criticised her in front of other members of staff. Ms Grant's evidence was that under no circumstances would she ever criticise a member of staff in an open forum. She accepted that she may give

general feedback without identifying the individual and acknowledged that this could cause an individual member of staff to feel criticised. She recalled commenting that social distancing during a cookery lesson (led by the claimant) was not in line with the respondent's practice or the needs of the children, but could not recall the date that comment was made. Other staff were in the room during the cookery lesson and no one was identified by name.

124. One of the allegations made by the claimant and included in the list of issues was that Ms Grant had harassed her on 5th May by disclosing to colleagues that the claimant had "serious mental health problems". The claimant accepted during her evidence that the reference to 5th May should in fact be a reference to the 5th June, and that the comment about the claimant's mental health had been made during a meeting at which only the claimant and Ms Grant were present. We find that Ms Grant did not discuss the claimant's mental health at any of the morning briefings with other members of staff.

125. On the morning of 5 June, Ms Grant asked to meet with the claimant privately in her office. During the meeting Ms Grant told the claimant that she had some concerns about her performance. In particular she discussed:

a. The maths task that the claimant had been asked to complete, which had been over complicated and not delivered in time;
b. Similar feedback in relation to an Evidence For Learning project that the claimant had asked to be involved in;
c. The cooking session that the claimant had delivered the previous day, which was not well managed;
d. Focusing on problems rather than outcomes; and
e. Talking too much and the impact of that on children and staff.

126. Ms Grant also told the claimant that a number of steps would be taken to support her and help her to improve her performance, including:

a. The appointment of a senior teacher as a mentor;
b. The claimant to spend more time developing her relationship with the children;
c. The claimant would continue to deliver horticulture and cooking lessons but with careful planning.

127. The claimant broke down in tears during the meeting and became very distressed. Ms Grant told the claimant that she was concerned about the claimant's emotional well-being and mental health, and it was agreed that the claimant would be referred to occupational health. Ms Grant's reference to the claimant's mental health was made, we find, out of genuine concern for the claimant and with a view to supporting her.

128. After the meeting Ms Grant sent an email to the claimant summarising how it was proposed that they would move forward. She also updated HR on the conversation.

129. As the claimant had been so upset during the meeting Ms Grant offered the claimant the options of staying in her classroom, going for a walk to compose herself or going home. The claimant initially returned to her classroom but then chose to go home so that she could contact the Employee Assistance Programme in private. The claimant never returned to work in the school after 5th June.

130. The claimant gave evidence to the Tribunal that the criticisms that Ms Grant made of her performance were 'unreasonable' although she did accept that she was not presenting her 'best self' at the time. We find that the comments made by Ms Grant during that meeting were not unreasonable. They were made with a view to helping the claimant to improve her performance and understand whether she was suitable for the role.

131. Over the weekend the claimant developed a retinal migraine which was potentially very serious for the claimant due to her Behçet's syndrome. On Monday 8th June she sent a text to Ms Grant at 7.11 am in which she explained that she had an issue with her eye and vision and had an appointment at eye casualty that morning. Later that morning she sent a further text explaining that she was not well enough to come into work that day and was also unable to drive because her pupils had been dilated. Ms Grant replied saying that this was not a problem, that the claimant should get her eye sorted and come back to work when she felt better.

132. On 9th June at 2pm Ms Grant sent a text to the claimant asking her how she was. The claimant replied that evening that she was not feeling much better, had spoken to her GP and the GP had suggested some medication which she was going to try. Ms Grant replied "*No problem Kat. Just wanted to check in with you. Take care."*

133. The claimant texted again on the morning of 10th June to say that she was still not feeling well enough to be at work. Ms Grant replied "is your eye feeling any better?". The claimant did not reply to this text. Ms Grant texted again the following day to ask how the claimant's eye was and the claimant replied that she had spoken to her GP again, been given a diagnosis and a fit note, and that she would send the fit note in by email.

134. On 11th June the claimant sent in a fit note from her GP which covered the two month period from 10 June to 9 August 2020. In the note, the GP commented that the claimant may be fit for work with workplace adaptions and that she:

"*Has been classified as higher risk of covid 19 due to her Behçet's. As such, the government advice is she can go out to work (if she cannot work from home) and for things like getting food or exercising. But she should try to stay at home as much as possible.*

It's very important she follow the general advice on social distancing, including staying at least 2 metres (3 steps) away from anyone she does not live with. The stress of being unable to perform adequate

social distancing at work is having a deleterious effect on her health resulting in new onset retinal migraine."

135. The GP also commented that the claimant's Behçet's disease and her mental health were well managed.

136. On 11 June Amanda Grant sent an email to the claimant asking her to get in touch and asking how she was. In the email Mrs Grant wrote "*you haven't been in touch, and didn't respond to my messages, asking how you were?"*

137. The claimant replied the same day and wrote: "*Please excuse my lack of reply, but I was still feeling unwell*". She explained that she had seen her GP who had asked her whether she was socially distancing at work or working from home, and that she had told the GP that this was "*not really possible working with our children, as I had found out last* week". She also said that she had told her GP "*I was previously in a room by myself and had worked at home, so these issues were not encountered before last week".* She asked for a copy of the risk assessment that had been carried out for her.

138. There is no mention in that email of the claimant's colleagues not social distancing or that the claimant believed that general working practices were not safe for her. She only referred to working with the children as causing an issue for her.

139. On 12 June Ms Grant sent the claimant a copy of the risk assessment and suggested meeting in person on the following Monday, if the claimant was well enough, to discuss how she could do the role going forward.

140. The claimant replied on 14 June that she could not attend a meeting because, on her GP's advice, she could not be present on site until the risk assessment was amended to ensure that she was strictly 2 metres away from anyone or could work from home. The email to Ms Grant was sent at 20.11 on the evening of 14 June.

141. Amanda Grant replied to the claimant 10 minutes after receiving the email saying that she was disappointed as the respondent could conduct a meeting with 2 metre social distancing, but that she would speak to Andrea in HR the following day "*about how we can best support you and get back to you."*

142. At exactly the same time as she sent the email to Ms Grant, 20.11 on Sunday 14 June, the claimant sent an email to Richard Atkinson, the respondent's Chief Executive Officer. In this email the claimant said that she had raised with Amanda Grant her concerns that in planning for the wider opening of the school, the risk assessment of her circumstances placed her in serious and imminent danger if she returned to the workplace, and that the response from the Head Teacher had not addressed those issues.

143. The claimant also wrote that: "*I remain willing and available for work but am unable to return to the workplace until my employer has*

discharged their legal obligation to conduct, so far as reasonably practicable, a risk assessment, ***specifically one that takes into account my "higher risk/vulnerable" status, due to medical condition*** *to identify the hazards which may arise from a contagious disease such as the COVID-19 pandemic, identify the steps which could be taken to eliminate or reduce the risk of contracting COVID-19 to an acceptable level. Unfortunately, the employer's risk assessment has not addressed these issues and, critically, my circumstances, nor does it demonstrate the actions which will be taken by the employer to mitigate the risk to me.*

I reserve my right to report these matters to the HSE and to Ofsted, as I believe that in the context of COVID-19, failure to address concerns which may result in the transmission of the virus is a matter of public interest."

144. The claimant had, by that stage, taken advice from her trade union, and continued to do so throughout the rest of her employment with the respondent.

145. The email that the claimant sent to Mr Atkinson gives the impression firstly that the risk assessment had not addressed the claimant's vulnerability, and secondly that Ms Grant had not addressed the issues about the claimant's vulnerability or her concerns about the risk assessment. Neither of those things were true and this email was in our view both incorrect and misleading.

146. We find that the risk assessment was completed on 1 June with a view to assessing the claimant's vulnerability and what steps could be taken to protect her and reduce the risk to her. The risk assessment was specifically headed "Vulnerable Staff Groups" and referred to her particular health condition.

147. We also find that it was misleading to say that Ms Grant had not addressed the claimant's concerns about the risk assessment or that the claimant was in serious and imminent danger in the workplace. The first time she indicated she was unhappy with the risk assessment or the arrangements put in place to protect her against Covid was in an email sent to Ms Grant at 20.11 on 14 June – the same time as the email to Mr Atkinson. The claimant did not give Ms Grant time to respond to her concerns before escalating the matter to Mr Atkinson.

148. Mr Atkinson replied to the claimant on 15 June thanking her for her email andseeking to reassure her that the respondent was working closely with Public Health England to keep children and staff safe. He also wrote:

"*I understand a risk assessment is in place for you, and if this needs reviewing, I will request the local HR Officer for Maple View School ensures this happens. As you infer, it's important these are kept up-to-date, jointly produced and fit for purpose, as both Ofsted and the HSE would expect.*

I trust you will be able to work through this with your Head Teacher, with closer HR support as needed, and you will find this helpful in addressing your concerns."

149. The claimant's position was that she wanted Ms Grant to produce the risk assessment, whereas the view of both Ms Grant and Mr Atkinson was that it should be done together, so that the claimant's input could be better taken into account. This was an entirely reasonable approach for the respondent to take.

150. Victoria Finn forwarded the email exchange between the claimant and Mr Atkinson to Amanda Grant and Andrea Rowland in HR. Ms Finn and Ms Grant then discussed the situation over the telephone.

151. On 16 June Victoria Finn sent an email to Amanda Grant suggesting that the claimant be invited to a formal probation review where dismissal could be an outcome, with the reasons for the review being:

- Failure to follow direction and work towards improving performance, but instead going off absent which the respondent considered not to be genuine;
- Failure to follow the GP note and engage in updated risk assessment; and
- Sending an email directly to the CEO undermining the work of the head teacher resulting in the head teacher losing trust and confidence in the claimant, having concerns about her integrity, and making the working relationship untenable.

152. Ms Grant agreed with the approach suggested by Ms Finn. She attempted to contact the claimant by telephone on 18th June but the claimant did not answer her telephone. Ms Grant was concerned for the claimant's welfare as she had not heard from her since 14 June, and contacted the claimant's emergency contact to check that she was OK.

153. On 18 June Andrea Rowland in HR wrote to the claimant inviting her to a formal probation review meeting. The letter explained that the respondent had some concerns with the claimant's conduct and performance and that the issues to be discussed at the meeting were:

- Failure to follow direction and work towards improving performance, but instead going off absent from the date of the performance discussion on 5 June;
- Failure to follow the GP note and engage in amended duties, an updated risk assessment or any meaningful discussion to facilitate a return to work;
- Sending an email directly to the CEO undermining the work of the head teacher resulting in the head teacher losing trust and confidence in the claimant, having concerns about her integrity; and
- Lack of contact in the week commencing 15 June.

154. The claimant was told that the meeting would take place socially distanced. She was warned that a possible outcome could be dismissal, and advised of her right to representation. She was also invited to provide written submissions if she felt unable to attend the meeting in person.

155. On 22 June the claimant's trade union representative Darren Northcott wrote to the respondent asking for copies of policies and written evidence used to assess the claimant's conduct and performance, including any witness statements. He also asked for a postponement of the hearing on 24 June to give him and the claimant a reasonable opportunity to review and consider the information he'd requested. Mr Northcott also asked that the respondent refrain from trying to contact the claimant's emergency contact.

156. Andrea Rowland replied sending relevant information to Mr Northcott. She also offered to move the meeting to a virtual meeting and repeated the offer for the claimant to submit written representations. She explained that the emergency contact was contacted because the claimant had not been in touch with the respondent or responded to any calls for 5 days, and the respondent wanted to check nothing serious had happened.

157. Mr Northcott replied to Ms Rowland's email asking that the meeting be postponed to 30 June or 1 July so that he could accompany the claimant at the meeting. He also suggested that the meeting take place at the respondent's offices in Derby to maintain confidentiality. The reason given for the proposed change of venue was to protect the claimant's confidentiality, and there was no mention of concerns about being able to conduct a socially distanced meeting at the school. He did not take Ms Rowland up on her offer of a virtual meeting.

158. Ms Rowland refused to postpone the hearing and Mr Northcott sent in detailed written submissions on behalf of the claimant. There was, in our view, no good reason for not postponing the hearing.

159. The probationary review meeting went ahead on 24th June in the absence of the claimant. Ms Grant conducted the meeting and considered the written representations made by Mr Northcott on behalf of the claimant. She concluded that the claimant's actions "*in such a short period of employment are wholly inappropriate and do not demonstrate to me any ability to work within line management structures or perform the high teaching standards I expect and I am sorry this has proved to be the case.*

Your trade union representative has alleged that the probation review has been triggered in response to the health and safety concerns that you have raised. The above information makes it clear that this is not the case. Your probation period has not been confirmed because of poor performance and the lack of a proactive, helpful response to the concerns raised about your performance. It is not in any way related to the health and safety concerns…."

160. Ms Grant set out in the letter her conclusions on each of the four issues that had been contained in the letter inviting the claimant to the meeting. She commented in the letter that the first indication the claimant had given to her that she wanted to revisit the risk assessment or socially distance from the children was when she sent in her GP note "*Prior to this you had actively volunteered to work with the children, even though, and as stated in your Risk Assessment dated 1st June, that it was unlikely that the children would maintain social distance from you. We had several conversations, almost daily, where I told you that you didn't have to work with the children and that working from home was still an option for you."*

161. In relation to the claimant's alleged lack of contact in the week beginning 15th June, Mr Northcott had in his written submissions said that the claimant had been working from home that week. Ms Grant concluded that "*I was not aware that you had continued to work from home. I have not agreed this, or asked you to do this, nor have I seen any evidence of this.*"

162. The claimant was given one month's notice of termination of her employment, to end on 26th July 2020, and informed of her right of appeal. The claimant was not permitted to work from home during her notice period because by this time the respondent no longer had any trust in the claimant or in her ability to work effectively from home given the concerns about her performance and communication.

163. The letter of dismissal stated that the respondent wanted the claimant to work her notice period if she was medically able to do so, under a revised risk assessment which would not include home working, and that if the claimant was not able to work the respondent needed Fit Notes from her GP in order for statutory sick pay to be paid.

164. There was no evidence before us to suggest that after the letter was sent any attempt was made by the respondent to carry out a revised risk assessment for the claimant, to provide her with work to do, or even to contact her about working during her notice period. We accept the claimant's evidence that she remained ready and willing to work from home during her notice period, but she was not provided with any work to do by the respondent.

165. On 3rd July 2020 the claimant's trade union representative appealed against the decision to dismiss the claimant. In the appeal he raised concerns about the process that had been followed in dismissing the claimant and wrote that concerns about the claimant's performance had only begun to be articulated after the claimant had raised her own concerns about her health and safety. He also complained that the claimant had not been paid her full salary for June, and commented that the claimant "*has remained willing and available for work and has worked throughout the period from 15 June…"* attached to the appeal was a statement provided by the claimant. In her statement the claimant wrote that she did not feel she could raise the issue of social distancing not being implemented in the school "*without fear of potentially adverse consequences.*"

166. Victoria Finn dealt with the appeal on the respondent's behalf, despite having been involved in advising on the potential dismissal of the claimant.

167. Ms Finn asked Andrea Rowland to take statements from a number of the claimant's colleagues, specifically Carly Cherriman, Heard of Care and Registered Manager at Maple View School, Andrea Burnett, senior teacher at Maple View School, Mica Morrison, teaching assistant, a"Holly", and Nicola Wheatley, teaching assistant.

168. Carly Cherriman wrote in her statement that Ms Grant had been "*nothing other than supportive, understanding and professional"* towards the claimant and that the claimant had not raised any concerns with her (Ms Cherriman) about Covid safety. To the contrary, she said that she had had to remind the claimant that only two members of staff were allowed in the staff room at a time.

169. In her statement, Andrea Burnett commented on the maths task that the claimant had been asked to complete. She described the task as a simple one, that should not have taken long to complete, but the claimant had failed to finish it in four weeks. Mica Morrison said that no pressure had been put on any member of staff to be in school, that social distancing was observed and that there were signs on doors stating how many people were allowed in the room.

170. Nicola Wheatley wrote that the claimant "*only seemed concerned with distancing and isolating when it suited her"*, that the claimant had not objected to leading the cooking and horticulture classes but seemed happy to be doing so, and that the management of the school were very approachable.

171. On 30th July Victoria Finn wrote to the claimant inviting her to an appeal hearing on 13th August. The statements that had been obtained by Ms Finn during her investigation into the issues raised in the appeal were not mentioned or sent to the claimant in advance of the appeal hearing.

172. The appeal hearing took place on 13th August and the claimant was accompanied at that hearing by Darren Northcott. The meeting lasted approximately 3 hours. At the start of the hearing the claimant was asked what outcome she was looking for. She and her representative said that they would like the dismissal to be reversed, but that the claimant was unsure about returning to work at Maple View. They said she would however think seriously about working in another of the respondent's schools.

173. During the appeal hearing the claimant was asked why she had written straight to the CEO on 14 June and had not given Ms Grant the opportunity to respond. The claimant replied that Ms Grant "*wouldn't confirm the update to the risk assessment and that social distancing would be followed."* This is not true. On 12 June Ms Grant sent an email to the claimant reminding her that the risk assessment needed to

be reviewed and suggesting they meet the following Monday to review it.

174. Ms Finn also asked the claimant why she had written in her statement that she was worried about raising concerns about social distancing 'in case of adverse consequences'. The claimant replied that when she did raise concerns her performance was criticised – clearly suggesting that she had raised concerns about social distancing before the performance concerns were raised and that the reason performance concerns were raised was because she had complained about social distancing.

175. We find that was also not true, and that the claimant misrepresented the position to Ms Finn during the appeal hearing. During the short period that the claimant worked in the school she was in regular contact with Ms Grant. At no point during this period did she express concerns to her about a lack of social distancing in the school. On the contrary, during the discussion on 1 June about the individual risk assessment for the claimant, she told Ms Grant that she was happy to work with the children, knowing that they would not be socially distancing.

176. The first time the claimant raised concerns about social distancing or about the risk assessment was after Ms Grant discussed her concerns about the claimant's performance with her on 5 June. The claimant's raising of concerns was, at least in part, a response to Ms Grant raising performance concerns, which the claimant found very distressing.

177. One of the issues raised by the claimant in her appeal was that when she had attended NAPPI training it was not socially distanced. She told Ms Finn during the appeal that "*she did not feel comfortable and was very scared and made this* known". After the appeal hearing Ms Finn contacted Rebecca Harrison who had provided the training and asked her for her recollection of events. Ms Harrison sent an email to Ms Finn in which she wrote:

"*There was only her and 2 others in the group so social distancing was kept during the theory…*

She did become anxious about the practical but didn't say anything….I had a chat with her and said if she didn't feel comfortable she could come back at a later date…She said she was fine…The following day when she came back on level 2 she actually apologised for being so anxious and that she had gotten over her anxiety…After both sessions I asked if everyone was happy with the risk assessments in place and if we could do anything better and she actual said no she felt very comfortable it was just she was anxious about being around people When she had been on her own for a while…"

178. The claimant's versions of events at the NAPPI training was very different to that provided by Rebecca Harrison. This caused us to have further concerns about the credibility of the claimant as a witness.

We prefer Rebecca Harrison's account of the NAPPI training to that of the claimant. Ms Harrison had no reason not to tell the truth.

179. The claimant did not attend the school during her notice period, and she made no contact with Ms Grant or any of the teaching staff at school. She did not tell Ms Grant or indeed any other member of staff what work she was doing at home.

180. On 13th August the claimant returned her IT equipment and brought to the appeal hearing the work that she said she had carried out during her notice period. The work had not been submitted prior to the end of the school term or indeed at any time before the appeal hearing. The claimant said that during this period she had read and annotated 25 documents that Ms Grant had sent her by email on 3rd June and engaged in online learning. There was no discussion between the claimant and Ms Grant about what work she should do during this period.

181. On 2nd September Ms Finn wrote to the claimant setting out in some details her conclusions on the appeal. In summary, Ms Finn concluded that:

- The probation review process could have been handled better and an investigation report may have been useful, although was unlikely to have changed the outcome;
- The date of the probation review meeting and possibly the venue could have been rearranged;
- She did not believe that the claimant had worked from home from 15th June and the work she had submitted was not of any value to the school's pupils;
- Social distancing had not been raised as a concern in May or early June;
- Covid 19 safety measures were in place in the school;
- Colleagues described the claimant as invading their personal space and not observing social distancing;
- The claimant had provided a '*highly inaccurate account"* about the alleged lack of social distancing in the school which caused Ms Finn to believe that the claimant had "*at best exaggerated your concerns, and at worst fabricated them, due to having taken umbrage at the performance review concerns related to you on 5th June*";
- It was the claimant's choice to stop working from home and to work in school;
- The risk assessment had been carried out in a careful and methodical way and was robust;
- The email to the CEO contained inaccurate information;
- The claimant had presented inaccurate information and made misleading comments during the appeal process; and
- The claimant had volunteered for a number of tasks outside her classroom and only said there were problems attending work after the performance concerns were raised with her.

182. Despite concluding that the claimant had not done any meaningful work during her notice period, Ms Finn agreed that she would be paid for 15th 16th and 17th June at her normal rate of pay as a gesture of goodwill. The claimant was paid SSP for the rest of her notice period, up to 26 July 2020.

183. Most of the points raised by the claimant in support of her appeal were not upheld, and Ms Finn decided not to overturn the decision to dismiss her. She did consider transferring the claimant to another of the respondent's schools, but given the breakdown in the working relationship and her conclusion that the claimant had not been honest during the appeal process, concluded that this was not appropriate.

184. The respondent did not want the claimant to work from home during her notice period because it was not confident that she would produce anything meaningful on her own without supervision. No further discussions took place with the claimant about reviewing the risk assessment to enable her to come back into school to work on site during her notice period.

The Law

Burden of proof

185. Section 136(2) of the Equality Act 2010 sets out the burden of proof in discrimination claims, with the key provision being the following:

> "*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision…"*

186. There is, in discrimination cases, a two stage burden of proof (see ***Igen Ltd (formerly Leeds Careers Guidance and others v Wong [2005] ICR 931*** and ***Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205***) which is generally more favourable to claimants, in recognition of the fact that discrimination is often covert and rarely admitted to. In **Igen v Wong** the Court of Appeal endorsed guidelines set down by the EAT in ***Barton v Investec***, and which we have considered when reaching our decision.

187. In the first stage, the claimant has to prove facts from which the tribunal could decide that discrimination has taken place. If the claimant does this, then the second stage of the burden of proof comes into play and the respondent must prove, on the balance of probabilities, that there was a non-discriminatory reason for the treatment. This two stage burden applies to all of the types of discrimination complaint made by the claimant.

188. In ***Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913*** the Court of Appeal held that "*there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the respondent's act was a discriminatory one) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage."*

189. The Supreme Court has more recently confirmed, in ***Royal Mail Group Ltd v Efobi [2021] ICR 1263****,* that a claimant is required to establish a prima facie case of discrimination in order to satisfy stage one of the burden of proof provisions in section 136 of the Equality Act. So, a claimant must prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination.

190. In ***Glasgow City Council v Zafar [1998] ICR 120***, Lorde Browne-Wilkinson recognised that discriminators ' do not in general advertise their prejudices: indeed they may not even be aware of them'.

191. The Tribunal has the power to draw inferences of discrimination where appropriate. Inferences must be based on clear findings of fact, and can be drawn not just from the details of the claimant's evidence but also from the full factual background to the case.

192. It is not sufficient for a claimant merely to say 'I was badly treated' or 'I was treated differently'. There must be some link to the protected characteristic or something from which a Tribunal could draw an inference. In ***Madarassy v Nomura International plc [2007] ICR 867*** Lord Justice Mummery commented that: "*the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

193. In ***Deman v Commission for Equality and Human Rights and others [2010] EWCA Civ 1276***, Lord Justice Sedley adopted the approach set out in ***Madarassy v Nomura*** that 'something more' than a mere finding of less favourable treatment is required before the burden of proof shifts from the claimant to the respondent. He made clear, however that the 'something more' that is needed to shift the burden need not be a great deal. Examples of behaviour that has shifted the burden of proof include a non-response or evasive answer to a statutory questionnaire, or a false explanation for less favourable treatment.

194. Unreasonable behaviour is not, in itself, evidence of discrimination (***Bahl v The Law Society [2004] IRLR 799***) although, in the absence of an alternative explanation, could support an inference

of discrimination (***Anya v University of Oxford & anor [2001] ICR 847***).

195. In harassment cases the shifting burden of proof rules will apply in particular where the conduct complained of is not obviously discriminatory, and the Tribunal has to consider whether the reason for the conduct is related to the protected characteristic relied upon by the claimant – in this case her disability.

Reasonable adjustments

196. Section 20 of the Equality Act 2010 states as follows:-

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

(2) The duty comprises the following three requirements.

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

197. Section 21 of the Equality Act 2010 provides that:-

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

(2) A discriminates against a disabled person if A fails to comply with a duty to make reasonable adjustments…"

198. The importance of a methodical approach to reasonable adjustments complaints was emphasised by the EAT in ***Environment Agency v Rowan [2008] ICR 218*** and in ***Royal Bank of Scotland v Ashton [2011] ICR 632***, both approved by the Court of Appeal in ***Newham Sixth Form College v Sanders [2014] EWCA Civ 734***.

199. Part 3 of Schedule 8 to the Equality Act 2010 ("Work: Reasonable Adjustments") provides, at paragraph 20 ("Lack of knowledge of disability, etc") that:

"(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know…that an interested disabled person has a disability and is likely to be placed at the disadvantage…"

200. Assuming that the claimant is a disabled person, the following are the key components which must be considered in every case:

a. What is the provision, criterion or practice ("PCP"), physical feature of premises, or missing auxiliary aid or service relied upon?

b. How does that PCP/ physical feature/missing auxiliary aid put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

c. Can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant was a disabled person and likely to be at that disadvantage?

d. Has the respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage?

e. Is the claim brought within time?

201. Paragraph 6.28 of the Equality and Human Right's Commission Code of Practice on Employment (2011)("**the EHRC Code**") sets out factors which it is reasonable to take into account when considering the reasonableness of an adjustment. These include:-

a. The extent to which it is likely that the adjustment will be effective;

b. The financial and other costs of making the adjustment;

c. The extent of any disruption caused;

d. The extent of the employer's financial resources;

e. The availability of financial or other assistance such as Access to Work; and

f. The type and size of the employer.

202. There is no limit on the type of adjustments that may be required. An important consideration is the extent to which the step will prevent the disadvantage. A failure to consider whether a particular adjustment would or could have removed the disadvantage amounts to an error of law (***Romec Ltd v Rudham [2007] All ER(D***).)

203. It is almost always a good idea for the respondent to consult the claimant about what adjustments might be appropriate. A failure to consult the claimant makes it more likely that the employer might fail in its duty to make reasonable adjustments.

Discrimination arising from disability

204. Section 15 of the Equality Act 2010 states that:

"*(1) A person (A) discriminates against a disabled person (B) if –*

(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

205. In a claim under section 15, no comparator is required, and the claimant is merely required to show that she has suffered unfavourable treatment and that the reason for that treatment was something arising because of her disability.

206. In ***Secretary of State for Justice and another v Dunn EAT 0234/16*** the then president of the EAT, Mrs Justice Simler, identified four elements that must be made out for a claimant to succeed in a complaint under section 15:

a. There must be unfavourable treatment;
b. There must be something that arises in consequence of the claimant's disability;
c. The unfavourable treatment must be because of (ie caused by) the something that arises in consequence of the disability; and
d. The respondent must be unable to show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

207. The EAT also held in that case that motive is irrelevant, and that the 'something arising from disability' need not be the sole reason, but it must be a significant or at least more than trivial reason.

208. The EHRC Code states that the consequences of a disability include 'anything which is the result, effect or outcome of a disabled person's disability (para 5.9). Examples given include the inability to walk unaided or to use certain work equipment and having to follow a restricted diet.

209. In ***T-Systems Ltd v Lewis EAT 0042/15*** the EAT considered the words 'something arising in consequence of the disability' and commented that the 'something' must be part of the employer's reason for the unfavourable treatment. The key question is whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, consciously or unconsciously, to a significant extent.

210. The EAT held, in the case of ***Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305*** that there is a two step test for a claim under section 15 to succeed. The first is that the

Tribunal must ask itself what is the consequence, result or outcome of the disability. The second is to consider why it was that the employer treated the claimant in the way that it did, and whether it was because of that 'something' arising from disability.

Harassment related to disability

211. Under section 26 of the Equality Act 2010:

"(*1) A person (A) harasses another (B) if –*

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

(4) *In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account*

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

212. In deciding whether the claimant has been harassed contrary to section 26 of the Equality Act, the Tribunal must consider three questions:

a. Was the conduct complained of unwanted:
b. Was it related to disability; and
c. Did it have the purpose or effect set out in section 26(1)(b).

Richmond Pharmacology v Dhaliwal [2009] ICR 724.

213. The two stage burden of proof set out in section 136 Equality Act (see below) applies equally to claims of harassment. It is for the claimant to establish facts from which the Tribunal could conclude that harassment had taken place.

214. ***In Hartley v Foreign and Commonwealth Office Services [2016] ICR D17*** the EAT held that the words 'related to' have a wide meaning, and that conduct which cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it. The Tribunal should evaluate the evidence in the round, recognising that witnesses will not readily accept that behaviour was related to a protected characteristic. The context in which unwanted conduct takes place is an important factor in deciding whether it is related to a protected characteristic (***Warby v Wunda Group plc EAT 0434/11***).

Automatic Unfair dismissal

215. In a case of automatic unfair dismissal in which the claimant does not have the two years' continuous service required for an ordinary unfair dismissal claim, the burden of showing that the reason for dismissal is an automatically unfair one lies on the claimant – ***Maund v Penwith District Council [1984] ICR 143***. The burden is, however, not a high one, and the Tribunal may draw inferences as to the real reason for the dismissal. Once the employee has produced some evidence in support of her case, the burden falls on the employer to establish that the reason for the dismissal was not the automatically unfair reason (***Marshall v Game Retail Ltd EAT 0276/13***).

216. ***In Kuzel v Roche Products Ltd [2008] ICR 799*** the Court of Appeal rejected the argument that, if a Tribunal rejects the employer's reason for dismissal, it is bound to find that the real reason for dismissal was that put forward by the employee. It may be open to the Tribunal, having considered all of the evidence, to find that the real reason for dismissal was neither the one put forward by the claimant nor that suggested by the respondent.

217. Section 100 of the Employment Rights Act 1996 states as follows:

"(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that - ….

(c) being an employee at a place where –

(i) There was no such representative or safety committee, or
(ii) There was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

He brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work…"

218. The test for "belief" is both a subjective and an objective one, namely whether the claimant subjectively believed that there were circumstances of danger which were serious and imminent, and whether that belief was objectively reasonable. Safety measures implemented by the respondent can be taken into account in determining whether the belief was objectively reasonable.

Detriment claim (section 44 of the Employment Rights Act)

219. Section 44 of the Employment Rights Act provided, at the time of the claimant's employment by the respondent, that:

"*(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that –*

…(c) being an employee at a place where – …

(iii) There was no such representative or safety committee, or
(iv) There was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

He brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work…"

220. The scope of the protection granted by section 44 was subsequently changed by the Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021 SI 2021/618, but those changes only came into force on 31 May 2021 and were not in force at the time the claimant was employed by the respondent.

Unlawful deduction from wages

221. Section 13 of the Employment Rights Act 1996 states that:

"*(1) An employer shall not make a deduction from wages of a worker employed by him unless –*

(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) The worker has previously signified in writing his agreement or consent to the making of the deduction…

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions) the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

222. Section 23 of the Employment Rights Act 1996 gives workers the right to bring complaints of unlawful deduction from wages to the Employment Tribunal.

Submissions

223. We are grateful for the detailed written and oral submission made by the parties. We have considered these in full and set out below a brief summary of the submissions.

Claimant

224. Mr O'Dair submitted that a huge amount in this claim would turn on the Tribunal's findings on credibility as the parties have presented cases which are 'diametrically opposed on the facts'. This was, in essence, a 'reason why' case and the Tribunal would therefore need to make wide ranging findings of fact and draw inferences.

225. The claimant cannot. Mr O'Dair submits, be assumed to be lacking in credibility because of her illness, nor could it be assumed that she was evasive or unhelpful because her replies to cross examination questions were at times lengthy or lacking in focus. Rather, she was recalling with painful accuracy deeply troubling events.

226. He urged the Tribunal to treat the statements produced at the appeal stage with caution because none of those who provided statements had been called as a witness, and the statements were produced to support the respondent's position.

227. Ms Grant had, in Mr O'Dair's submission, colluded with Ms Finn to produce a particular outcome to the probationary review. There was no documentary evidence to support Ms Grant's assertions in evidence that she had repeatedly offered to allow the claimant to work from home. Instead, the evidence showed that she had refused to allow the claimant to work from home during her notice period.

228. In relation to Ms Finn's evidence that the claimant was lying in the appeal, Mr O'Dair argues that she cannot genuinely have believed this.

229. Mr O'Dair also submitted that the 'rank procedural unfairness' of the probation review and appeal is relevant in a discrimination case which is unlikely to be capable of direct proof, and which is likely to turn on the drawing of inferences. The Tribunal should, he says, infer discrimination from all of the procedural unfairness in the dismissal and the appeal.

230. The crucial question in relation to the section 15 claim and the detriment claim was Ms Grant's state of mind when she learned of the letter to the CEO, and Ms Grant was, he submits, angry because the claimant had gone over her head.

231. In relation to the claim for unpaid wages, Mr O'Dair submitted that the law was well established and straight forward. The claimant just had to show that she was ready, willing and able to work. The evidence showed that she was ready and willing to work and had in fact worked, as evidenced by the documents she handed in at the appeal hearing.

232. The respondent's case is that the claimant could have worked from home if she had wanted to, so why was she not allowed to work from home after 11 June?

233. Mr O'Dair accepted in his submissions that the respondent did not impose a PCP of requiring staff to breach social distancing rules. Rather, there was a practice of working in breach of the social distancing rules.

234. This placed the claimant at a disadvantage because she was at higher risk of catching Covid 19, which made her anxious. The respondent knew that the claimant was at a disadvantage and yet staff were careless in their attitude to social distancing.

235. The claimant's primary case, Mr O'Dair said, was that the claimant was not underperforming. If, however, the Tribunal were to find that she was underperforming, then it should find that her disabilities made it harder for her than for others to comply with the school's performance standards. She was hindered in her performance by her severe disabilities.

Respondent

236. Ms Hand submitted that the respondent took social distancing very seriously and did not allow staff to breach social distancing with each other.

237. On the question of whether the respondent had applied PCPs, she referred us to the judgment of Mrs Justice Simler in ***Ishola v Transport for London [2020] EWCA Civ 112*** that 'practice' "*connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again…"*

238. A mistake in social distancing that occurs once cannot, in Ms Hand's submission, amount to a PCP. In any event, the claimant was not put at a disadvantage by mistakes in social distancing because she was not social distancing herself. Nor was she put at a disadvantage by working with children without social distancing because she had agreed to work with them knowing that they may come within two metres of her.

239. Ms Hand argues that the respondent did not know that the claimant was experiencing any anxiety around any lack of social

distancing because she did not raise it and was in fact participating in it.

240. In Ms Hand's submission it would not have a reasonable adjustment to extend probation, social distancing from staff was already in place and the claimant did not need to socially distance from children. Ms Grant had made it clear to the claimant that she could work from home, and had offered her a mentor. It would not have been reasonable, given the needs and understanding of the children to require them to socially distance.

241. In relation to the claim under section 15 of the EQA, Ms Hand referred us to ***T-System Ltd v Lewis UKEAT/0042/15*** in which the EAT held that in an assessment of whether something is 'unfavourable' there must be a measurement against 'an objective sense of that which is adverse as compared to that which is beneficial'. She also submitted that the treatment complained of under the section 15 claim was not because of something arising in consequence of the claimant's disability – there was a break in the causal link between the treatment and the things arising in consequence of the claimant's disability.

242. On the question of whether the claimant had been automatically unfairly dismissed Ms Hand submitted that there was a health and safety representative at the claimant's place of work and that therefore sections 44(1)(c) and 100(1)(c) of the ERA were not made out. The claimant cannot, she says, have reasonably believed that she was at risk of harm from the lack of social distancing because she was not socially distancing herself.

243. Ms Hand also argues, in relation to sections 44(1A)(a) and 100(d) of the ERA that the claimant did not reasonably believe there were circumstances of danger which were serious and imminent, as the advice she had received was that she could attend work provided there was social distancing, and chose to do so. She referred to the case of ***Smith v Cognita Schoolsl Ltd ET/1600884/21*** in which it was held that a teacher did not reasonably believe there was serious and imminent danger because all government guidance had been followed by the school.

244. The claimant's failure to socially distance is, she says, highly relevant here. The claimant could not have considered there to be a serious and imminent danger because she was willing to expose herself to Covid by working with children in school and chose not to take up the offer of PPE.

245. Ms Hand also submits that the claimant could reasonably have been expected to avert the danger and that she did not refuse to return to the workplace because of the perceived danger.

246. On the question of the alleged unlawful deduction from the claimant's wages, Ms Hand argues that the claimant did not do any meaningful work during her notice period, stopped making contact with Ms Grant, and did not seek permission to work from home. She had been told not to work from home, failed to engage with a revised risk

assessment and was covered by a Fit Note. The respondent was, therefore, entitled to pay her statutory sick pay only in line with its policy.

Conclusions

247. We have reached the following conclusions having considered carefully the evidence before us, the legal principles summarised above, and the oral and written submissions of the parties. Our conclusions on many issues were reached unanimously. Where we reached conclusions by majority we have said so below and set out the reasons for the different conclusions.

Discrimination arising from disability (section 15 Equality Act 2010)

248. The first question we have considered is whether the claimant was treated unfavourably as alleged.

249. The claimant alleges that the respondent formed the view that the claimant was raising problems rather than completing tasks. We find that the claimant was told on 5 June that she found problems in her work rather than completing tasks. This was in the context of the claimant not completing tasks that had been allocated to her. That was the view of Ms Grant, her line manager.

250. We therefore find that the respondent did form the view that the claimant was raising problems rather than completing tasks. That view was formed with good reason based upon the claimant's performance whilst employed by the respondent, as the claimant did not complete some tasks that she was given. It was a negative view of the claimant's performance at work which put the claimant at a disadvantage and can properly be categorised as adverse rather than beneficial. It was therefore unfavourable treatment.

251. We also accept that the claimant was subject to the probation review process. A probationary review process in itself is not necessarily unfavourable treatment, but in these circumstances, it was unfavourable because it resulted in the claimant's dismissal. The probationary review was arranged because of concerns about the claimant's performance and conduct and was brought forward with a view to dismissing the claimant.

252. We find on the evidence before us that the respondent did not exaggerate allegations of poor performance at all but had genuine concerns about the claimant's performance. There was contemporaneous evidence before us of the claimant not completing work that had been assigned to her when she was working from home, and there was also evidence that the lessons she taught when in school had not met the specific needs of each child. We accept that Ms Grant had a genuine view that the claimant was not performing at the required standard. We had some concerns that the statements provided to the appeal could have been exaggerated as they were provided after the claimant had been dismissed and with a view to

supporting the school's position. We find however that the respondent did not make exaggerated allegations of poor performance.

253. It was admitted by the respondent that dismissing the claimant and rejecting her appeal was unfavourable treatment as they resulted in the claimant losing her job with the respondent.

254. We therefore find that the respondent treated the claimant unfavourably by forming the view that the claimant was raising problems rather than completing tasks (albeit that that view was entirely justified), by subjecting the claimant to the probation review process, and by dismissing the claimant and rejecting her appeal.

255. We have then considered whether the following things arose in consequence of the claimant's disability:

a. The claimant's requirement for pupils to socially distance;
b. The claimant writing to the respondent's CEO;
c. The claimant's absence from work from 8 June onwards;
d. The claimant's refusal to have a face to face meeting on 15 June 2020; and
e. The perceived performance problems.

256. We accept that the claimant's requirement for pupils to socially distance during the two lessons that she taught in the first week of June 2020 did arise in consequence of her disability. It was because of her concerns about catching Covid and the possible consequence for her if she did catch Covid, that the claimant wanted the students to socially distance during lessons. The claimant had these concerns as a direct consequence of having Behçet's syndrome which placed her at higher risk of serious illness from Covid.

257. The Tribunal was split on the question of whether the claimant's writing to the respondent's CEO arose in consequence of her disability. The majority of the Tribunal were of the view that there was insufficient causal link between the claimant's disability and her email to the CEO for it to be said that writing to the CEO arose in consequence of the disability. Any employee can write to the CEO of an organisation, not just disabled employees. The majority found that the claimant wrote to the CEO not because of her disability, but because she did not want to engage any more with Ms Grant because Ms Grant had raised concerns about the claimant's performance, and she wanted to escalate matters.

258. The minority view, held by Mr Greenland, is that the claimant's letter to the CEO did arise in consequence of her disability. Her disability made her more anxious and vulnerable to Covid, and that was why she wrote to the CEO.

259. The Tribunal finds unanimously that the claimant's absence from work from 8 June onwards did arise in consequence of her disability. Initially her absence was due to a retinal migraine, which was linked to her Behçet's syndrome. Her subsequent absence following her recovery from migraine was also, on balance, related to her disability.

The claimant was clearly anxious and stressed as a result of her vulnerability to Covid and did not want to return to working in the school. There were other factors at play, as she did not want to face up to being performance managed and clearly did not want to engage with Ms Grant either in relation to the risk assessment or in relation to her performance. On balance however we find that her absence did arise in consequence of her disability.

260. We also find unanimously that the claimant's refusal to have a face-to-face meeting on 15 June 2020 arose in consequence of her disability. The main reason that she did not want to have a face-to-face meeting was because of her concerns about her health, although that was not the only reason, as she also did not want to engage with Ms Grant.

261. The majority of the Tribunal found that the claimant's behaviour from 14 June onwards became 'tactical'. She raised concerns about health and safety because she did not want to have to deal with concerns about her performance. Mr Greenland held a different view. His view was that the claimant was not behaving in a way that was 'tactical' but rather she genuinely did not want to attend a meeting on site and was not given the opportunity to attend the meeting remotely.

262. We find unanimously that the perceived performance problems did not arise in consequence of the claimant's disability. It is not clear to us how other people's perceptions, which are inherently subjective can be something arising from the claimant's disability. In any event there was no suggestion even by the claimant that her performance was linked in any way to her disability. The claimant in evidence admitted that she had not given the best version of herself whilst working for the respondent, but she did not suggest that this was linked in any way to her disability, either during the course of her employment or during the Tribunal hearing.

263. We have then gone on to consider whether the unfavourable treatment that we have found above, was because of the things that we have found arose in consequence of the claimant's disability, namely:

a. The claimant's requirement for pupils to socially distance;
b. Her absence from work from 8 June onwards; and
c. Her refusal to have a face to face meeting on 15 June 2020.

264. We have reminded ourselves that the 'something arising' in consequence of the disability does not have to be the only reason for the unfavourable treatment, and that the key question is whether the something arising operated on the mind of the alleged discriminator, consciously or unconsciously, to a significant extent.

265. We find that forming the view that the claimant was raising problems rather than completing tasks was not because of something arising in consequence of the claimant's disability. There was no

suggestion, even by the claimant, that her performance was affected by her disability. We accept Ms Grant's evidence and find that her view of the claimant's performance was genuinely held based on her personal experience of working with the claimant.

266. Ms Grant is clearly an experienced teacher who knew from the reference provided before the claimant started work that the claimant was still developing in her career. She also knew about the claimant's health and put in place steps to support her. It was the claimant who was reluctant to face up to issues with her performance. There was no evidence of her having engaged with the mentor that Ms Grant suggested for her, nor any evidence that the claimant's failure to engage with the suggested mentor was because of her disability.

267. The view that the claimant was raising problems rather than completing tasks was not formed because of the claimant's requirement for pupils to socially distance, or because of her absence from work from 8 June onwards or her refusal to have a face-to-face meeting on 15 June. That view was formed before any of those things occurred and was a result of matters such as the claimant not completing the maths task that she was given whilst working from home.

268. We do find however that the probation review process was instigated in part because of the claimant's absence from work from 8 June onwards. The claimant's requirement that the pupils socially distance during the two classes she taught was however not part of the reasoning why the respondent engaged the probation review process. It is not mentioned in the letter inviting her to the meeting and was just one of a number of concerns about the claimant's performance. Most of the concerns about the way in which the claimant conducted the cooking and horticulture lessons were not linked to social distancing. Rather they related to the fact that the claimant had not planned the lessons well, had left children waiting, had not communicated with the children or met their needs and the lessons had not been successful.

269. In addition, many of the concerns about the claimant's performance related to her planning, her ability to meet the needs of the children and her ability to produce materials. They did not relate to the claimant's attempts to socially distance the children during those two lessons.

270. The claimant's absence from work from 8 June onwards did contribute towards the respondent's decision to call a probation review meeting. Her absence is specifically mentioned in the email from Ms Finn to Ms Grant in which Ms Finn suggests that the respondent does not believe that the claimant's absence is genuine, and it is also mentioned in the letter inviting the claimant to the probation review meeting.

271. It was clearly therefore in the minds of Ms Finn and Ms Grant when they called the claimant to the probation review meeting and appeared to have a significant influence on them.

272. We find by majority that the claimant's refusal to have a face-to-face meeting on 15 June 2020 did not have a more than trivial impact on the decision to call her to a probationary review meeting. It was much wider than that – it was the tone and manner of the emails that the claimant sent, the lack of co-operation and the refusal to engage in the risk assessment process other than to criticise the respondent for measures that had been put in place with her agreement just a few days earlier, and which were scheduled for review.

273. The minority view held by Mr Greenland is that the refusal to have a face-to-face meeting was a factor in deciding to call the probationary review meeting which was significant. It was part of the breakdown in the relationship between the claimant and the respondent.

274. The majority of the Tribunal found that by sending the emails that she did on 14 June, the claimant was opting out of the risk assessment process. Both Amanda Grant and Richard Atkinson took the view that the risk assessment required the involvement of both parties, and the co-operation of the claimant, which did not appear to be forthcoming. The minority view, held by Mr Greenland, was that the claimant was not opting out of the risk assessment process, but was putting the onus on the respondent to propose amendments in the light of the fit note.

275. There was some inconsistency in the claimant's position. When the claimant was invited to attend a probationary review meeting her trade union representative indicated that she would attend an in-person meeting, provided that it was held at a different location. The claimant didn't want to engage with the risk assessment and come back to work because she would then have to engage with the performance management process.

276. Turning now to the dismissal of the claimant, we find on balance that the dismissal was because of the things arising in consequence of the claimant's disability.

277. The dismissal letter clearly refers to the claimant raising issues about wanting to socially distance from the children, when she had previously volunteered to work with the children knowing that the children were unlikely to socially distance. It also refers to the claimant's absence from work from 8 June as being one of the reasons the claimant was invited to the probation review meeting.

278. Ms Grant referred in the dismissal letter to having invited the claimant into a meeting on 15th June, and to the claimant not having given Ms Grant the opportunity at a meeting to address any concerns that the claimant had.

279. It is clear from the above that the requirement for pupils to socially distance, the claimant's absence from work from 8 June onwards and her refusal to have a face to face meeting on 15 June were in the mind of Ms Grant when she took the decision to dismiss the claimant, and that they did have a more than trivial impact on the decision to dismiss.

280. We accept that neither Ms Grant nor Ms Finn intentionally discriminated against the claimant but have reminded ourselves that motivation is not the key question here. Rather it is what was consciously or subconsciously in the mind of Ms Grant when she made the decision to dismiss, and it is clear that matters arising in consequence of the claimant's disability were in her mind.

281. For these reasons we find that the decision to dismiss was unfavourable treatment because of matters arising in consequence of disability. The respondent did not plead the justification defence in this case.

282. In relation to the appeal, we all had some concerns about the way in which the appeal was handled. There was delay in arranging the appeal hearing, and the claimant was not given notice of or sent the evidence that had been gathered in advance of the appeal hearing. She was therefore not able to comment on it at the appeal.

283. Having said that and having considered the appeal outcome letter and the evidence of Ms Finn, we are satisfied on the evidence before us that the claimant's requirement for pupils to socially distance, the claimant's absence from 8 June onwards and the claimant's refusal to have a face to face meeting on 15 June 2020 were not part of Ms Finn's decision. Ms Finn was clearly concerned that the claimant had not been honest in her dealings with the respondent and could not be trusted and that her performance was poor. Those were, in our view, the main reasons for her conclusions at the appeal stage.

284. The dismissal of the claimant's appeal was therefore not because of something arising in consequence of the claimant's disability.

Reasonable adjustments

285. The claimant initially relied upon four alleged PCPs in support of her claim that the respondent failed to comply with its duty to make reasonable adjustments, and we have considered each of these in turn.

286. The first alleged PCP was requiring staff, including the claimant, to interact in a way which breached social distancing rules. Mr O'Dair accepted in his submissions that the respondent did not impose this PCP, and withdrew this allegation.

287. The second alleged PCP was allowing staff to interact in ways which breached social distancing rules. We find that the respondent did not allow staff to interact with each other in a way which breached social distancing. Rather its clear policy was that staff should socially distance, and all reasonable steps were taken to enforce that by putting signs up, limiting the number of people in the staff room, and by Ms Grant calling out 'crocodile' or 'alligator' if she saw staff coming too close to each other. When training was arranged it was socially distanced training. Meetings were also socially distanced. Although there were occasions when individual members of staff, including the

claimant, did not follow the rules, this was in breach of the respondent's rules and was not condoned or tolerated by the respondent.

288. We therefore find that the respondent did not have a PCP of allowing staff to interact in ways which breached social distancing rules.

289. The third PCP relied upon was requiring those on probation to adhere to the school's high performance standards. We have no hesitation in finding that the respondent did apply this PCP. There was nothing untoward in that. Most employers require employees to adhere to high performance standards during probationary periods – that is the very purpose of probation.

290. The fourth and final PCP was allowing children to attend school without socially distancing from staff. We find that the respondent did apply this PCP. All of the evidence before us indicated that due to the nature of the disabilities that the children attending the school had, and given their needs, social distancing was not required.

291. The next question we have addressed is whether the PCPs applied by the respondent put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

a. They exposed the claimant to a higher degree of risk of Covid 19 and of serious illness / harm should she contract Covid, thereby making her anxious; and

b. It was not possible for the claimant to comply with high performance standards, leading to her dismissal.

292. We find, on balance, that the fourth PCP applied by the respondent did put the claimant at a substantial disadvantage by exposing her to a higher degree of risk of Covid 19 and making her anxious. It was clear that the claimant was particularly anxious about catching Covid as she was clinically vulnerable due to her disability. She had also experienced the loss of a friend who had the same condition as her and who died after contracting Covid.

293. We do not find however that the third PCP placed the claimant at a substantial disadvantage in comparison with someone without her disability. There was no evidence whatsoever to suggest that the claimant's poor performance was as a result of or linked in any way to her disability, or that someone without the claimant's disability would have performed differently.

294. On the question of knowledge of the disadvantage, we find that the respondent did, at the time of the alleged failure to make reasonable adjustments, know that the claimant was likely to be placed at a disadvantage by working with children who were allowed to attend school without socially distancing from staff. The claimant had made it clear in the second week of June that she did not want to come in to school due to fear of catching Covid.

295. Turning now to the steps that the claimant suggests should have been taken to avoid the disadvantage, our findings are as follows:

296. Requiring staff to comply with strict social distancing. We find that the respondent did everything that it could reasonably have been expected to do to require staff to comply with social distancing, save in relation to the children. The claimant was provided with her own classroom and meetings were conducted socially distanced. The claimant was allowed to work from home if she wanted to. It is difficult to see what more the respondent could have done whilst the claimant was in school. A risk assessment was carried out and the claimant agreed with the arrangements in place for her. Requiring staff to socially distance from each other would not have removed the disadvantage caused to the claimant by the fourth PCP.

297. Extending the claimant's probationary period rather than dismissing her. The third PCP (high performance standards) did not place the claimant at a substantial disadvantage in comparison with someone without her disability, and the respondent was therefore not under any obligation to take steps to avoid any disadvantage. There was no evidence before us to suggest that extending the probationary period would have removed the disadvantage caused by the fourth PCP. In any event, due to the breakdown in the relationship, the fact that the respondent had lost trust in the claimant and believed she had exaggerated or fabricated her concerns, extending the probationary period would not have been a reasonable step to take.

298. Providing the claimant with strict social distancing from both pupils and staff. The respondent took reasonable steps to implement social distancing amongst staff. It was not practicable with pupils, but the claimant was not required to work with pupils. The claimant had told Ms Grant that she was happy to work with the children, knowing that they may come closer to than 2 metres. In these circumstances and given the special needs of the children attending the school, it was not reasonable to require children to socially distance also given their needs.

299. Allowing the claimant to work from home. The respondent did allow the claimant to work from home until she agreed not to and said that she wanted to come into school. In relation to the period from 8 June onwards, the majority view was that the respondent did fail to make a reasonable adjustment by not allowing the claimant to work from home. The claimant had clearly articulated concerns about social distancing by that time and her GP had written that she should socially distance at work only if she could not work from home. She said she did not want to come in for a meeting on 15 June with Ms Grant.

300. Ms Grant's evidence was that the claimant could have worked from home and did not need to be in school as her class of students was not

due to start at the school until September. It therefore would have been possible to allow the claimant to work from home during her notice period. Doing so would have removed the disadvantage of exposing the claimant to Covid risk and the anxiety of catching Covid.

301. The minority view, held by the Employment Judge, was that allowing the claimant to work from home from 8 June onwards would not have been a reasonable adjustment. The respondent had lost confidence in the claimant by that stage, her performance was poor, and it could not trust her. Additional resources would have been required to make it happen and it would have placed an unreasonable burden on the respondent. The claimant's own GP said that she could work from school socially distanced. The disadvantage could have been removed in other ways, by the claimant working in her own classroom in the school and not coming into contact with children.

302. We therefore find that the respondent failed to make a reasonable adjustment by not allowing the claimant to work from home during her notice period. The other claims that the respondent failed to make reasonable adjustments fail and are dismissed.

Harassment

303. The allegation of harassment was that the respondent made reference to and/ or disclosed to colleagues at a meeting on 5th May 2020 the claimant's "serious mental health problems".

304. We find on the evidence before us that this did not happen as alleged by the claimant. We accept Ms Grant's evidence on this issue, which the claimant also appeared to accept during the course of her evidence to the Tribunal. Ms Grant did not make reference to the claimant's mental health or disclose details of the claimant's "serious mental health problems" to colleagues at a meeting on 5th May.

305. Concerns about the claimant's health were expressed by Ms Grant during a private meeting with the claimant on 5th May after the claimant became very distressed during that meeting. The claimant had been open with Ms Grant about her BPD and about her anxieties related to Covid. Ms Grant was therefore aware that the claimant had mental health concerns. The comments were made in the context of a discussion about whether to refer the claimant to occupational health. They were entirely appropriate in the context of a private conversation between a manager and a member of staff.

306. Even if we take the allegation of harassment as being the comments that Ms Grant made during the private meeting she had with the claimant on 5th May, those comments were made out of concern for the claimant and with a view to supporting her. They were not made with the purpose of violating the claimant's dignity or creating an intimidating hostile, degrading, humiliating or offensive environment for the claimant. Nor was it reasonable for them to have that effect, taking into account the claimant's perception and the other circumstances of the case. We accept that the claimant became distressed during that

meeting, but that was because performance concerns were being raised by Ms Grant.

307. The claim for harassment therefore fails and is dismissed.

Automatic unfair dismissal (section 100 Employment Rights Act 1996)

308. The key question in relation to this claim is whether the reason or principal reason for the claimant's dismissal was one of the proscribed reasons set out in sections 100(c) or (d) of the ERA. In deciding this question, we have considered what was in the mind of Ms Grant at the time she made the decision to dismiss.

309. We find that the principal reason the claimant was dismissed was because of a breakdown in the working relationship and in trust and confidence. Ms Grant was, in our view, someone who took health and safety seriously and who was happy for issues about health and safety to be raised. She spent time with the claimant showing her round the school to try and alleviate her concerns and carried out an individual risk assessment with her. When the claimant asked if she could become the local trade union representative, Ms Grant encouraged her. She did not dismiss the claimant because she raised health and safety concerns, or because she refused to return to her place of work in accordance with section 100(d) of the ERA.

310. We also find, in the alternative, that the claimant does not fall within the provisions of section 100(c) or (d). Whilst there was no health and safety representative present in the school, and the claimant did bring concerns about the risk assessment to the attention of the CEO, the way she did so was not reasonable. Specifically, she did not use reasonable means to bring health and safety concerns to the attention of the CEO because of:

a. The timing of the complaint to the CEO – at exactly the same time as the email to Ms Grant;
b. the misrepresentations in the email to the CEO; and
c. the fact that the claimant did not give Amanda Grant the opportunity to respond before complaining about her, despite knowing that Ms Grant wanted to review the risk assessment with her.

311. In relation to section 100(d) we have considered whether the claimant, in circumstances of danger which she reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert, refused to return to her place of work between 8 June 2020 and 26 July 2020.

312. We accept that the claimant genuinely believed that she was at risk of serious harm and death from Covid, and that it was reasonable for her to hold that belief. She was a vulnerable person and had lost an online friend with Behcet's to Covid. She was understandably very anxious. The only thing that changed however from 5 June when she had been happily going into school and interacting with staff and children knowing that she may not have to socially distance from the

children, to the following week when she refused to go in, was that her under performance had been addressed.

313. The claimant could in our view reasonably have been expected to avert the danger by reviewing the risk assessment with Ms Grant, by working in her own classroom by herself when in school and/ or by asking to work at home.

314. We find on balance that the reason the claimant raised health and safety concerns was because performance concerns had been raised with her. Ms Grant raised her performance concerns before the claimant started raising concerns about the risk assessment and saying that she did not want to return to the school.

315. The claim for automatic unfair dismissal therefore fails and is dismissed.

Detriment claim (section 44 Employment Rights Act 1996)

316. The claimant relies on four alleged detriments. Firstly, that the respondent subjected her to a disciplinary process. We find that the claimant was not subjected to a disciplinary process, but rather she was subjected to a probation review process.

317. The second detriment relied upon was that the claimant's colleagues gave false and misleading evidence against her. We find on the evidence before us that they did not. Rather they gave their opinions on her performance based upon their experience of working with the claimant, who admitted that she had not performed at her best whilst working for the respondent. Her colleagues had nothing to gain from giving 'false and misleading evidence' against the claimant. We therefore find that the respondent did not subject the claimant to the second detriment.

318. The third and fourth alleged detriments were dismissing the claimant and dismissing her appeal. We have no hesitation in finding that they were detriments that the respondent subjected the claimant to, as they were unwanted and resulted in the claimant losing her job against her will.

319. We have therefore considered whether the third and fourth detriments were done on one or both of the proscribed grounds, namely that:

a. Being an employee at a place where there was no health and safety representative or safety committee the claimant brought to her employer's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety; and / or

b. In circumstances of danger which the employee reasonably believed to be serious and imminent and which she could not

reasonably have been expected to avert, she refused to return to her place of work between 8 June 2020 and 26 July 2020.

320. For the reasons set out above in relation to the claim under section 100 of the ERA, we find that the claimant was not dismissed on either of the proscribed grounds. In relation to the appeal, we find that the reasons the appeal was not upheld were that Ms Finn believed, with good reason, that the claimant had not been honest with the respondent and had misled it, and that the claimant's performance as a teacher was poor. The appeal was not dismissed because of either of the proscribed reasons relied upon.

321. The claim under section 44 of the ERA therefore fails and is dismissed.

Unauthorised deduction from wages

322. The question we have considered here is whether the respondent made unauthorised deductions from the claimant's wages by paying her statutory sick pay rather than full pay for the period from 18 June to 26 July 2020.

323. The claimant was, we find, available for work during this period and she had told the respondent as much. There is an implied obligation on an employer to provide an employee with work, and no evidence before us of the respondent having taken any steps to discharge this obligation, either by providing her with work to do at home, or by asking her to come back into school.

324. No steps were taken by the respondent to review the risk assessment or to follow up on the letter of dismissal. It was in our view incumbent on the employer to follow up, rather than to leave the claimant sitting at home during her notice period without paying her.

325. The claimant was entitled to be paid her normal salary during her notice period as she was available and willing to work during that period, albeit from home. The Fit Note did not say that she was unfit to work at all, but rather that she was fit to work from home or at the school with social distancing.

326. We therefore find that the respondent made an unlawful deduction from the claimant's wages for the period from 18 June to 26 July by failing to pay her normal salary during that period. The amount of the unlawful deduction is the difference between what the claimant received by way of SSP and her normal salary.

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Employment Judge Ayre

Case No: 2604240/2020

14 July 2022

JUDGMENT SENT TO THE PARTIES ON

22 July 2022

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FOR THE TRIBUNAL OFFICE