



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Molina-Bautista

**Respondent:** Governing Body of Kingsbury High School

**Heard at:** Watford (in public via video) **On:** 3<sup>rd</sup> February 2023

**Before:** Employment Judge Howden-Evans

## Representation

Claimant: In person

Respondent: Miss King, Counsel

# RESERVED JUDGMENT

The Claimant's claims of direct disability discrimination, disability related harassment, failure to make reasonable adjustments, unfair dismissal and victimization have no reasonable prospect of success and it is just to strike out these claims.

# REASONS

1. At the outset, I wish to record that I have tremendous sympathy for the Claimant who has experienced serious illness, turning her plans and her life upside down. In recent years she has undergone operations and invasive treatment, which are hard to bear during normal circumstances, but doubly challenging against the backdrop of the pandemic. I commend her for her resilience and positive spirit, which shone through, throughout the hearing. My sympathy for the Claimant has made this a difficult decision. However, an employment judge has the ability to strike out claims that have no prospect of succeeding and here I am exercising this power in an effort to save both parties the time, expense and anxiety involved in litigating claims that will fail.
2. In case number 3305366 / 2021 the Claimant alleges:
  - 2.1. direct disability discrimination
  - 2.2. disability related harassment; and
  - 2.3. a failure to make reasonable adjustments.

3. In case number 330950 / 2022 she alleges:
  - 3.1. unfair dismissal; and
  - 3.2. victimisation.
4. Parties accept the Claimant has a disability (as defined in s6 Equality Act 2010) by reason of her having had cancer.
5. This hearing was listed to consider whether the Claimant's claims should be struck out (if it was found that they have no reasonable prospects of success) alternatively to consider whether the Claimant should be ordered to pay a deposit (if it was found that her claims have little reasonable prospects of success).
6. At a case management hearing on 27<sup>th</sup> September 2022, Judge Frazer had agreed a List of Issues with the parties, that agreed the allegations being relied upon by the Claimant are as follows:
  - 6.1. In the direct disability discrimination claim:
    - i. Between August 2020 and 13th November 2020, the Respondent unreasonably delayed investigations into the Claimant's fitness to return to work
    - ii. Mrs Bellot made comments such as 'I forgot to press the send button' and 'I found the response on the draft tray'.
    - iii. At the meeting that took place on 13th November 2020 Mr Moore made the following comments:
      - a. That it had been the Claimant's choice to live in Spain.
      - b. He was not interested in the fact that the Claimant had returned to Spain to undertake radiotherapy for cancer.
      - c. He was not prepared to change the paper-based approach taken by the finance department of the School.
  - 6.2. In the disability related harassment claim:

At the meeting that took place on 13th November 2020 Mr Moore made the following comments:

    - a. That it had been the Claimant's choice to live in Spain.
    - b. He was not interested in the fact that the Claimant had returned to Spain to undertake radiotherapy for cancer.
    - c. He was not prepared to change the paper-based approach taken by the finance department of the School.
    - d. Mr Moore was aggressive in his tone.
  - 6.3. In the failure to make reasonable adjustments claim, the Respondent is said to have a requirement for employees to perform their work either in person at the school or remotely from the UK. The Claimant asserts it would have been a reasonable adjustment for the Respondent to agree she could work remotely from Spain.

- 6.4. In the unfair dismissal claim, the Claimant was asserting the decision to dismiss her on grounds of capability (long-term absence of 2 years 8 months) was unfair.
- 6.5. In the victimisation claim, the Claimant asserts her dismissal was because she had brought tribunal proceedings.
7. At this preliminary hearing, I had a bundle of documents of 799 pages. I was fortunate to have received the bundle ahead of the hearing and had spent 6 hours reading the documents ahead of the day of the hearing. Miss King had prepared written submissions; the Claimant gave oral submissions, addressing each paragraph of Miss King's submissions. At the end of the 1-day hearing, there was insufficient time for me to consider my decision, hence this reserved judgment.
8. The following facts are agreed between the parties:
9. The Claimant commenced employment with the Respondent, a secondary school with circa 2,000 pupils based in the London Borough of Brent, in September 1999 and has performed several roles for the school. She was continuously employed by the Respondent until her dismissal on 25<sup>th</sup> April 2022.
10. Since 2015 the Claimant has worked as a Finance Officer for the Respondent. In September 2018 she requested a 1-year sabbatical – she intended to live in Spain for the academic year 2019/20. The Respondent agreed to her sabbatical. In Spring 2019 the Claimant was looking forward to her sabbatical and sold her UK home.
11. On 2<sup>nd</sup> July 2019, weeks away from her departure for Spain, the Claimant received the devastating news that she had advanced breast cancer. The Respondent agreed the sabbatical could be cancelled and instead the Claimant commenced sick leave in July 2019. The Claimant underwent surgery on 5<sup>th</sup> August 2019 and travelled to Spain on 11<sup>th</sup> September 2019 before starting chemotherapy on 19<sup>th</sup> September 2019. The Claimant's chemotherapy and radiotherapy continued until 30<sup>th</sup> March 2020. The Claimant's GP confirmed she was not well enough to work during the period 9<sup>th</sup> July 2019 until 31<sup>st</sup> March 2020 and she had a further sick note from her GP in Spain (in March 2020) confirming the Claimant's sick leave was being extended until 30<sup>th</sup> September 2020. The Respondent paid the Claimant sick pay up until 3<sup>rd</sup> July 2020.
12. By letter of 29<sup>th</sup> July 2020 the Claimant confirmed her oncologist had agreed she could start working again from 1<sup>st</sup> September 2020. The Claimant's doctor's report (of 28<sup>th</sup> August 2020) confirmed the Claimant was "*in good general condition to resume her working life*" but was "*still a high-risk and clinically vulnerable patient therefore she must follow the following requirements due to the Covid 19 pandemic – restart the activity gradually; it is recommended that working from home and remote work systems be established and maintained whenever possible, avoiding closed environments such as offices where they are with other people; avoid public transport; avoid public meetings*".

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13. By email of 30<sup>th</sup> August 2020 the Claimant sent her doctor's report of 28<sup>th</sup> August 2020 to the Respondent and explained *"As you are aware I am clinically vulnerable to Covid 19 and my doctors are strongly recommending for me to avoid travelling to the UK especially as the new school year is starting and the uncertainty of the way the pandemic will develop. For these reasons and the fact that I find myself fit to return to my duties, I have requested the school to work from home"*.
14. By email of 4<sup>th</sup> September 2020 Ms Bellot (the school's HR & Volunteering Manager) apologised for the delay in acknowledging the Claimant's email and said she would ask occupational health to arrange a meeting with the Claimant.
15. Dr James Preston, Consultant Occupational Physician conducted a telephone consultation with the Claimant on 23<sup>rd</sup> September 2020. As part of his assessment, he completed the risk assessment devised by the Association of Local Authority Medical Advisors, which calculates a "Covid Age" and noted the Claimant's Covid Age *"was increased to some degree as a result of her health history and as such, I would put her into a "moderately vulnerable" category but not an "extremely clinical vulnerable group"*. He concluded *"my recommendation would be that Ms Molina does work from home if this is feasible from the point of view of her undertaking the work required of her in her role"*.
16. By email of 13<sup>th</sup> October 2020, the Claimant requested feedback from the school as to what was going to happen in light of Dr Preston's report.
17. By email of Thursday 15<sup>th</sup> October 2020 Ms Bellot replied *"Apologies for the delay in responding to this email and failing to keep you updated. It has been extremely busy at the school managing a multitude of situations but that does not excuse the lack of communication. Please do not stress about matters as you need to remain positive and well. The next step would be to arrange a meeting with you and your representative (should you wish their attendance). I have been speaking with Stephen and I will get back to you tomorrow with a further update."*
18. The Claimant didn't receive an update on Friday 16<sup>th</sup> October and so on Saturday 17<sup>th</sup> October she emailed Ms Bellot *"Good morning. I waited for an update yesterday as you said but I did not hear from you."*
19. On Monday 19<sup>th</sup> October 2020 Ms Bellot replied *"I thought I had sent you an update on Friday, but I had not pressed the send button so below is what I was sending. We are seeking some clarification from occupational health on a couple of questions....Would you and your representative be available for a meeting the week after half term?"*
20. The Claimant replied to Ms Bellot's email the same day, explaining she would prefer it if the meeting could be sooner and enquiring what clarification was being sought.
21. By email of 28<sup>th</sup> October 2020 Ms Bellot replied *"Just found this in my drafts I thought this had been sent – so very sorry. We will of course try for sooner rather than later. In terms of clarification we have sought from OHS it is in relation to the measures we have put in place in terms of safe working practices in the school / offices in line with DFE guidelines on the reopening of schools."*

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*Hopefully we will have a response shortly and once that is the case we will schedule the meeting.”*

22. *The Claimant replied the same day asking Ms Bellot to be more specific. By email of 3<sup>rd</sup> November 2020 Ms Bellot replied “We have asked OHS to comment on the safe measures we have been asked to follow / put in place to ensure staff and students could return to the school site”.*
23. *By letter of 12<sup>th</sup> November 2020 Dr Preston responded to the school’s queries and concluded “My advice was that [the Claimant] would be best served working from home but I did say “if this is feasible”. If it is not feasible then you will need to communicate this to [the Claimant] and discuss next steps.*
24. *On 13<sup>th</sup> November 2020, a video meeting took place between the Claimant, her union representative, Mr Moore (the Respondent’s Director of Resources) and Ms Bellot. This meeting became heated (with the Claimant accusing Mr Moore of raising his voice and vice versa). Whilst the Respondent denies Mr Moore made these comments, if I assume the Claimant succeeds in proving her account of this meeting, she asserts Mr Moore was aggressive and said:*
- 24.1. *It had been the Claimant’s choice to live in Spain;*
  - 24.2. *He was not interested in the fact that the Claimant had returned to Spain to undertake radiotherapy for cancer; and*
  - 24.3. *He was not prepared to change the paper-based approach taken by the finance department of the school.*
25. *By letter of 20<sup>th</sup> November 2020, Mr Moore noted “We were pleased to hear when you advised the Headteacher at the end of July 2020 that you would be ready to return to your role subject to occupational health review. In your letter you discussed working from home, however we had assumed this would be your UK home and not a home in Spain...Your role is a UK based role for a UK based school requiring regular attendance on the school site to carry out the role efficiently. As such we were surprised that your request to work from home was in fact a request to work in Spain....This led to the school considering carefully this request in this new light and the implications for the operation of the finance team in such circumstances. Following this the school requested further information from the occupational health doctor in relation to his advice to confirm that your condition did not preclude you from returning to work in the UK and to clarify that the role was largely paper based and thus could not be fully performed from a home base.”*
26. *He continues “You asked why it had taken 3 weeks for the school to ask further questions of the occupational health doctor...In normal circumstances I would agree this was longer than might be expected, however in the current circumstances of a public health crisis there are so many new and urgent issues arising every day to keep the school running and unfortunately progressing these additional questions with the occupational health doctor took longer than we would have liked. The occupational health doctor has similarly faced a huge increase in referrals which led to delay in his response.”*
27. *He continues “In the occupational health report the doctor describes your condition as “moderately vulnerable but not clinically extremely vulnerable”. UK government guidance had been up to 5<sup>th</sup> November that all employees can safely return to UK school premises due to the safety measures that UK schools*

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*have put in place. From that date the advice has been for clinically extremely vulnerable to stay away until 2<sup>nd</sup> December. Your own assessed condition of “moderately vulnerable” does not meet the UK Government requirement to work from home but rather is part of the UK Government requirement for all schools to be open and for all available staff to attend to run those schools....the safest approach following your extensive period of absence would be a phased return, working some time at your UK home and some time at the school premises until you were able to fully resume your role on the school premises each day. Normally such a phased return would be over 4 weeks...we can discuss this being extended to 8 weeks....the role normally required a minimum of 2 days in the school, preferably more to ensure an efficient operation. As part of a phased return to work we had looked at a gradual return to working in school over an agreed period with support from agency staff during that period. The school does not have available funding or resources to support working from home beyond the phased return period.*

28. He continues *“In addition, allowing a UK employee to work in Spain would require the school to register a new Spanish branch with the Spanish tax authorities and incur additional costs and resources to manage this Spanish branch, your employment in Spain and related tax, legal, data protection etc issues. These costs will increase next year following the end of the EU / UK transition period for the UKs departure from the EU. The school does not have any need for a Spanish branch to deliver its objective of public benefit education to UK students. The school is also not allowed to incur unnecessary costs under its Funding Agreement with the UK Government nor under its Articles of Association. A Spanish branch, an employee working from Spain and the additional administrative and legal ramifications are thus not permitted for the school....The request to work from Spain is not a reasonable adjustment as the school would incur additional costs that it cannot afford and would be breaking its own legal obligations. Your role is predominantly paper based requiring attendance on the school premises and the school does not have available funding or resources to support home working for this role for longer than the phased return period. It would not be acceptable to add to the workload of other members of the finance team who are already working at their maximum. Thus apart from the phased return to work period, any continued working from home in the UK is not a reasonable adjustment.*
29. Department of Education Guidance that was released on 26<sup>th</sup> November 2020 again referred to the Guidance on Shielding and Protecting Extremely Vulnerable Persons from Covid 19 which was published on 13<sup>th</sup> October 2020. As of 26<sup>th</sup> November 2020, the UK guidance was that those school staff that were identified (through a letter from the NHS or specialist doctor) as being clinically extremely vulnerable (CEV or shielding list) could continue to attend school in all three local restriction tiers. *“Under local restriction tier 3: very high alert, staff and employers may wish to discuss flexibilities that support clinically extremely vulnerable staff, such as staggered start times to reduce travel during rush hour. In the future the government will only reintroduce formal restrictive shielding advice in some local areas in Tier 3: very high alert where this has been advised by the Chief Medical Officer and only for a limited period of time”.*
30. The same guidance confirmed that staff who were “clinically vulnerable” (like the Claimant) could continue to attend school and *“should follow the sector-specific measures in this document to minimise the risk of transmission.”*

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Sector-specific measures included maintaining 2-meter social distancing and observing good hand hygiene.

31. The Respondent's headteacher (Alex Thomas) and the Claimant's union representative exchanged emails with a view to arranging another meeting. Mr Thomas confirmed by letter of 11<sup>th</sup> January 2021 "*[The Claimant]'s role is a London UK based role as is every role at our school. As you know neither of the occupational health doctor's two responses conclude that [the Claimant] could not return to her UK home or UK place of work. We would have expected [the Claimant] to return to work in August / September last year but have continued to hold [the Claimant]'s role open to her. [The Claimant] has, to date, decided not to return to the UK to recommence her role. In the current circumstances we feel it is only fair to continue to hold the role open for [the Claimant] until 31<sup>st</sup> March 2021 to allow [the Claimant] time to organize her return to the UK and to recommence her role here at the school*".
32. Acas early conciliation commenced 8<sup>th</sup> February 2021 and ended on 22<sup>nd</sup> March 2021. On 6<sup>th</sup> April 2021 the claim form in case number 3305366 / 2021 was presented to the tribunal.
33. The Claimant's role remained open and in May 2021 the Claimant's representative enquired about the possibility of the Claimant taking ill health retirement. The school supported the claimant with this request and kept the Claimant's role open for a further period.
34. By August 2021, the UK government's travel restrictions had waived quarantine for amber list arrivals from Europe for people that had been fully vaccinated and international cruise travel had restarted.
35. In October 2021 the Claimant underwent breast reconstruction surgery in Spain. Since January 2022 the Claimant has experienced illness with complications following that surgery.
36. There was an occupational health report dated 3<sup>rd</sup> December 2021, in which Dr Preston confirmed he had conducted a telephone consultation with the Claimant and reported the Claimant was not currently fit for work on account of her mental health and he could not provide a date when she would be likely to return to work.
37. By letter of 8<sup>th</sup> March 2022 Mr Thomas wrote to the Claimant "*...When I last communicated with you in August 2021 I advised that as you had (at that time) been absent from work for more than 24 months and given the length of your absence and that there was no established return date, if you were unable to confirm a date when you would be returning to work the school would have no option other than look to terminate your employment. You asked us to consider ill health retirement which we agreed to. To date this has not been resolved but we will continue to progress it. We have now reached that stage where we need to consider your continued contractual relationship with the school. Given that you have now been absent in excess of 2 ½ years I therefore propose to get HR schedule a meeting with you to consider this matter. You will of course be invited, and you will have the right to have your representative support you at this meeting.*"

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38. By letter of 18<sup>th</sup> March 2022, Mr Thomas invited the Claimant to attend a meeting to be conducted remotely by Google Meets on 30<sup>th</sup> March 2022, at which he would consider “*in light of your continued absence from work, 2 years and 8 months whether it is reasonable to keep your role open any longer and if so, for how long*”. The letter explained “*in view of the length of your absence and the unlikelihood that you will be returning to the UK in the foreseeable future one of the options available to me is to terminate your employment.*” The claimant was invited to be accompanied by a representative or work colleague and was invited to present witnesses and written statements for Mr Thomas to consider.
39. By email of 23<sup>rd</sup> March 2022, the Claimant confirmed to Mr Thomas that she had “*no intention of participating*” in the disciplinary procedure as employment tribunal proceedings were ongoing.
40. By email of 25<sup>th</sup> March 2022, Mr Thomas explained “*the employment tribunal is a separate process and is outside the matter to be considered by the school at the upcoming hearing. I would like to confirm that we have not instigated the disciplinary process but rather the hearing is to consider whether the school can feasibly leave you role open any longer. You have been absent for over 2.5 years. I encourage you to fully participate in the process as a decision will be made about your continued employment thereafter.*”
41. The Respondent sent the Claimant a pack of documents ahead of the hearing, which included a management report explaining the costs incurred by the school in terms of paying agency staff during the Claimant’s absence. It was noted that in the first year of the Claimant’s sick leave, agency costs of £42,811 had been incurred on top of the Claimant’s salary and that ongoing agency costs were exceeding the cost of directly employing a person to undertake the Claimant’s role concluding “*in light of the constraints on the school’s finances it is no longer financially viable to allow the situation to continue*”. It was also noted that operating with temporary staff in the finance team for 32 months was disruptive and inefficient and it “*was not operationally viable for the school to allow this disruptive situation to continue*”.
42. The Claimant was sent a meeting link to attend the review hearing, but did not attend. She did not make any written representations or request a postponement.
43. On 21<sup>st</sup> April 2022 the Claimant attended an online appointment with Dr Mansouri, who was considering her application for ill health retirement. His medical report of the same date confirmed the Claimant was currently unfit for work having developed an infection and fistula following reconstruction surgery but there were effective treatments available including surgery and therefore he could not conclude that her incapacity would be permanent.
44. By letter of 25<sup>th</sup> April 2022, Mr Thomas wrote to the Claimant explaining his decision following the review hearing, as follows,

*“In reaching my decision, I have considered the length of your current absence, which was at the time of the meeting, in its 32nd month and the fact that there has been no indication of a return date. I had asked Mr Moore if you returned to the UK could your role be reasonably carried out remotely. Mr Moore explained that it was a role that needed to be fulfilled in the school as*



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*the role is finance and procurement. The finance element is still quite paper-based with hard copies sent by post to the school and the procurement element which needs to accept deliveries and check these against purchase orders and arrange for distribution. In addition, the role also provides for support duties for the student cohort for which you need to be on-site for.*

*I also considered the fact that the school had supported your application for the early release of your pensions benefits on ill health grounds. The application was submitted to the Occupational Health Service mid October 2021. As I understand it, there were delays obtaining updated medical reports in order for a decision to be made. I am aware that there was a recent appointment with an occupational health specialist and we have yet to be advised of that outcome. Any application for the early release of your pension benefits will not be affected by this decision as it is based on you meeting the pensions scheme criteria.*

*In the circumstances, given the facts I deem that it is not possible to keep your role as Finance and Procurement Office open any longer, I have made the decision to terminate your contract of employment on the grounds of long-term absence / some other substantial reason (SOSR). It is regrettable that it has come to this however I consider that the school has been very reasonable in keeping your role open to this point.*

*Your last date of service is 25 April 2022, we will arrange to pay you in lieu of your notice.”*

45. Mr Thomas's letter confirmed the Claimant had the right to appeal his decision and explained the process for doing so. The Claimant did not appeal this decision.
46. The school arranged for a payment in lieu of notice to be paid into the Claimant's bank account.
47. On 3<sup>rd</sup> July 2022 the claim form in case number 3309050/2022 was presented to the tribunal, asserting the decision to terminate the Claimant's employment was unfair dismissal and an act of victimisation (as the Claimant had presented her earlier tribunal claim form).
48. By the date of this hearing, the Claimant has not returned to the UK; she continues to receive medical treatment and reside in Spain.

**My approach to considering this decision**

49. Firstly, I note there is a public interest in discrimination claims being determined at a full final hearing and that striking out a claim of discrimination is a draconian step that should only be taken in the clearest of cases. Ordinarily discrimination claims are fact sensitive and should be considered at final hearing where witness evidence can be tested by cross examination. However, in this case there are very limited issues of fact. I note the Claimant is a litigant in person; I have carefully considered the claims set out in the claim forms and all the other documents, looking for documents that support the Claimants assertions and could strengthen her case. I have been assisted by the large body of contemporaneous documents where parties provide detailed explanations for their decisions. Throughout, I have been careful to take the

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Claimant's case at its highest (eg where there are issues as to what was said during the meeting of 13<sup>th</sup> November 2020 I have assumed the Claimant successfully proves Mr Moore made the statements she alleges in the manner she alleges).

50. I am also mindful of the shifting burden of proof in discrimination claims – at the final hearing, it is for the Claimant to prove facts from which the Tribunal could properly conclude (in the absence of adequate explanation) that the Respondent committed an act of discrimination and then the Tribunal is to find that discrimination had occurred unless the Respondent is able to prove that it did not. In considering my decision today, if there is any prospect of the Claimant establishing facts from which the Tribunal could conclude there has been discrimination, the claim should not be struck out.

51. **Direct discrimination** is described in section 13 (1) of the Equality Act 2010 as:

“A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

52. This means to succeed with a direct discrimination claim the Claimant would need to establish two elements

52.1. The Respondent has treated her “*less favourably than*” it treats or would have treated someone that has not had cancer; and

52.2. The reason why the Respondent treats her like this is “*because of the protected characteristic*” (ie because of her disability).

53. **Harassment** is defined in S26 Equality Act 2010 as:

“(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to [disability], 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.”

54. The effect of s26 is that at the final hearing the Claimant needs to demonstrate 3 essential features: unwanted conduct; that relates to her disability and that has the proscribed purpose or effect.

55. **Failure to make reasonable adjustments** - Section 20 Equality Act 2010 imposes, in three circumstances, a duty on an employer to make reasonable adjustments. They include, at Section 20(3), circumstances where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage in comparison with those who are not disabled. The duty then requires an employer to take such steps as it is reasonable to have to take to avoid the disadvantage (Section 20(3)). To succeed with her failure to make reasonable

adjustments claim, the Claimant will need to prove that permitting her to work remotely, from Spain, was a reasonable step.

56. **Victimisation** is defined in s27 Equality Act 2010 as:

*“(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*

*(a) B does a protected act [eg bring a discrimination claim]”*

To succeed with a victimisation claim, the claimant must establish two matters:

1. that she has been subjected to a detriment (here it is agreed the Claimant has been dismissed, so the Claimant can establish this part of the victimisation claim); and
2. that she was dismissed because she had brought a discrimination claim (She does not need to prove she was dismissed solely because of the discrimination claim; if the discrimination claim had a “*significant influence*” on the headteacher’s decision-making this will suffice.)

57. **Unfair dismissal** – in this claim, the tribunal will examine the principal reason for dismissal and whether the Respondent acted reasonably in all the circumstances, including whether dismissal was within the range of reasonable responses of a reasonable employer.

58. Having noted the matters the Claimant needs to prove for each of her claims, I considered the application for each claim to be struck out.

59. Rule 37 of the Employment Tribunal Rules of Procedure 2013 provides:

*“(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*

*(a) that it ....has no reasonable prospect of success.....*

*(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.”*

60. In exercising this discretion I also have in mind Rule 2 of the Employment Tribunal Rules of Procedure 2013 which provides

*“The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*

*(a) ensuring that the parties are on an equal footing;*

*(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*

*(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*

*(d) avoiding delay, so far as compatible with proper consideration of the issues; and*

*(e) saving expense.*

*A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules.”*

## Conclusions

### Direct disability discrimination claims

61. Considering the first two allegations (delay in investigating Claimant's fitness to return to work between August 2020 and 13th November 2020 and Mrs Bellot making comments such as 'I forgot to press the send button' and 'I found the response on the draft tray'), the contemporaneous documents conclusively disprove the assertion that this behaviour related to the Claimant's cancer. It is quite clear from the documents that Mrs Bellot and colleagues were responding to "so many new and urgent issues arising every day to keep the school running" in the face of the ongoing "public health crisis". I am entirely satisfied that there is no reasonable prospect of the Claimant demonstrating facts from which the tribunal could conclude the Claimant's disability formed any part of the reason for these omissions / comments. Further and in the alternative, I am entirely satisfied that there is no prospect of the Claimant establishing facts from which the tribunal could conclude the Claimant had been treated less favourably than someone who had not experienced cancer would have been treated in these circumstances. The Claimant has no prospect of proving she has been treated worse than someone who was on sick leave and had relocated to Spain but did not have a disability, would have been treated – the only conclusion the tribunal could reach is that that hypothetical person would have experienced the same delay and received the same messages.

62. Turning to the 3 comments Mr Moore is alleged to have made on 13<sup>th</sup> November 2020, even when I take the Claimant's case at its highest and assume the tribunal prefers the Claimant's account and accepts these comments were made, I accept that the only possible inference from these comments was that Mr Moore was not considering the Claimant's cancer. Again I am satisfied that there is no reasonable prospect of the Claimant establishing the facts necessary to prove direct disability discrimination.

### Harassment claim

63. Considering the 3 comments Mr Moore is alleged to have made on 13<sup>th</sup> November 2020, and accepting the Claimant's case at its highest (ie assuming the tribunal prefers her account of that meeting), I accept the Claimant is likely to be able to prove that being spoken to in an aggressive manner is unwanted conduct and that the Claimant may be able to demonstrate it has the proscribed purpose or effect. However, the only inference that can be drawn from these comments was that Mr Moore was not considering the claimant's disability so it would not be possible for a Tribunal to find the unwanted conduct related to disability. Again, I am satisfied that there is no reasonable prospect of the Claimant establishing the facts necessary to prove disability harassment.

### Failure to make reasonable adjustment claim

64. Turning to consider the failure to make reasonable adjustments claim, whilst I accept the claimant may be able to prove the PCP existed and that she was placed at a substantial disadvantage because of it, I cannot see that there is any possibility of the Claimant proving that permitting her to work remotely in Spain was a reasonable adjustment that the school ought to have taken in the circumstances recorded in detail in the contemporaneous documents (as

described in paragraphs 27, 28, 29, 30, 31, 34, 41 and 44 of this judgment). I do not find that there is any reasonable prospect of the Claimant succeeding with this claim.

### **Unfair dismissal claim**

65. Having considered the contemporaneous documents carefully, there are no errors in procedure that might render a dismissal unfair. With the agreed fact, that the Claimant had been absent from school for 32 months, there is no reasonable prospect of the Claimant proving that dismissing her in these circumstances was beyond the range of reasonable responses of a reasonable employer. She might be able to prove that some schools would have continued her employment, but the test that has to be met to succeed with an unfair dismissal claim is “whether the decision to dismiss her was beyond the range of reasonable responses of a reasonable employer”. The tribunal will inevitably find that some reasonable employers would have taken the same decision. The Claimant has no reasonable prospect of succeeding with her unfair dismissal claim.

### **Victimisation claim**

66. I have looked for evidence on which a tribunal could find the discrimination tribunal claim had a “*significant influence*” on the headteacher’s decision-making but have found none. The assertion that her dismissal was because she had brought a discrimination claim is conclusively disproved by the contemporaneous documents. I am entirely satisfied that there is no prospect of the Claimant proving facts from which the tribunal could find the discrimination claim had a significant influence on the decision to dismiss the Claimant. I find there is no reasonable prospect of the Claimant succeeding with her victimisation claim.

67. Having found that none of the claims has any reasonable prospect of success, I considered whether to exercise my discretion to strike out these claims. I decided that it furthered the overriding objective to strike out these claims now, avoiding parties from incurring additional cost, devoting more time, and living with the stress associated with ongoing tribunal proceedings whilst litigating claims that had no prospect of succeeding. I know this will be a disappointment to the Claimant. As she said during the hearing, if the claims are not going to succeed, she would rather get on with her life and put these proceedings behind her. I hope knowing that an employment judge meticulously examined the contemporaneous documents and carefully listened to her submissions, (looking for any prospect of success, before concluding there was none) will give her some comfort.

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Employment Judge Howden-Evans

Date 18<sup>th</sup> April 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

19/4/2023

NG. - FOR EMPLOYMENT TRIBUNALS