



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Kay Hahn

**Respondent:** South West Essex Community Education Trust Limited (SWECET)

**Heard at:** East London Hearing Centre

**On:** 5 – 8 September 2023

**Before:** Employment Judge F Allen

**Members:** Mr S Pearlman  
Mr P Lush

## **Representation**

**Claimant:** Ms O'Halloran, Counsel instructed by Thompsons Solicitors

**Respondent:** Mr Williams, Counsel instructed by DAS Law Limited

**JUDGMENT** having been sent to the parties on 14 September 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

All references are to the agreed bundle.

## **Introduction**

1. The Claimant started work at Williams Edwards School on 1 September 2009 as a Technology Technician. From 12 January 2015 until 23 September 2021 (effective date of termination) the Claimant worked as a Food Technology Technician. Early conciliation started on the 28th of July 2021 and ended on 27th of August 2021. The claim was started on the 3rd of November 2021.
2. The Respondent says that the Claimant's employment was terminated due to capability (long term sickness absence).

## **The hearing**

3. The hearing was held over four days at East London Hearing Centre. The documents were checked at the start of the hearing. The panel had the following documents:

- Agreed bundle of 329 pages.
  - Witness statements from Mr Ovenden (Deputy Head Teacher), Mr Ball (HR Director), Mr Bell (Executive Head Teacher) and Mr Munday (Chief Executive Officer)
  - Claimant's statement
  - Agreed list of issues
  - Cast list and chronology.
4. Further documents submitted during the hearing were:
- Advertisement for the claimant's substantive role.
  - Terms and conditions
  - Equality and Diversity policy in place at the relevant time.
5. We heard sworn evidence from the claimant, Mr Ovenden, Mr Ball, Mr Bell and Mr Munday.
6. Both representatives provided written submissions and made oral submissions. We have carefully considered all the evidence including the oral evidence and the documentary evidence to which we were referred.

### **Issues**

7. The Respondent accepts that the Claimant had a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about.
8. The agreed issues for the Tribunal to determine are.

### **Unfair Dismissal**

9. What was the reason for the dismissal? The Respondent asserts that it was a reason related to capability, which is a potentially fair reason for dismissal under s.98(2) of the Employment Rights Act 1996.
10. Was the decision a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with those facts?
11. Did the respondent adopt a fair procedure? The Claimant challenges fairness of the procedure in the following respects:
- a. It was not reasonable to follow the capability/sickness process as she was not technically sick and had been working in an alternative role;
  - b. The Respondent failed to properly consider whether the Claimant could be moved to another administrative role within the Trust's group of schools; and
  - c. The Respondent failed to obtain an up-to-date Occupational Health report prior to the capability dismissal meeting.
12. If it did not adopt a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

Direct Disability Discrimination

13. Did the Respondent subject the Claimant to the following treatment:
  - a. The Respondent chose to commence sickness absence management procedures in respect of the Claimant despite the fact that she had not had recent sickness absences from a temporary role introduced as a reasonable adjustment.
14. Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies upon the following actual/hypothetical comparators:
  - a. A non-disabled employee would not have faced sickness absence management procedures and would not have been dismissed had they had the same level of recent sickness absences as the Claimant.
15. If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic.
16. If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?
17. Alternatively, can the Respondent show that it did not know, and could not reasonably have been expected to know that the Claimant had a disability?

Discrimination Arising from Disability

18. The allegation of unfavourable treatment as "something arising in consequence of the Claimant's disability" is:
  - a. The decision to dismiss the Claimant.
19. Can the Claimant prove that the Respondent treated her as set out in paragraph 18 above because of the "something arising" in consequence of disability?
20. Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?
21. Alternatively, can the Respondent show that it did not know, and could not reasonably have been expected to know, that the Claimant had a disability?

Failure to Make Reasonable Adjustments

22. Did the Respondent apply the following provision, criteria and/or practice ('the PCP') generally, namely:

The requirement that members of staff be able to perform their contracted role.

23. Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:
  - a. It put the Claimant at higher risk of being dismissed on ill health grounds.
24. Did the Respondent take such steps as were reasonable to avoid the disadvantage? The Claimant asserts that the following adjustments were reasonably required:
  - a. Proper consideration given to redeploying the Claimant to a more sedentary role; and
  - b. The creation of a role that was more sedentary in nature.
25. Did the Respondent not know, or could the Respondent not reasonably be expected to know that the Claimant had a disability or was likely to be placed at the disadvantage set out above?

### **Legal Framework**

#### **Unfair Dismissal**

26. Section 94 of the Employment Rights Act 1996 (ERA) contains the right not to be unfairly dismissed.
27. The primary provision is section 98 which, so far as relevant, provides as follows:

#### **98General.**

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—  
(a) the reason (or, if more than one, the principal reason) for the dismissal, and  
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—  
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(3) In subsection (2)(a)—  
(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality,

- (4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonable or unreasonably in treating it as a sufficient reason for dismissing the employee, and
  - (b) shall be determined in accordance with equity and the substantial merits of the case”.
28. The burden of proof is on the Respondent to satisfy the Tribunal that the reason for the dismissal was capability. Thereafter in applying section 98 (4) ERA and determining whether the dismissal was fair or unfair the burden of proof is neutral - *Boys and Girls Welfare Society v Macdonald* 1997 ICR 693, EAT. The Tribunal must consider whether the employer acted reasonably in dismissing the employee for the reason given.
29. Fairness is judged by reference to the objective standards of the hypothetical reasonable employer, taking into account all of the circumstances of the case. The Tribunal must not put itself in the position of the employer and consider how it would have responded to the established reason for dismissal.
30. In cases of long-term absence the question which has to be considered is whether in all the circumstances the employer can be expected to wait any longer: *Spencer v Paragon Wallpapers Ltd* 1977 ICR 301, EAT. If the employer concludes following consultation with the employee and a medical investigation that the condition is unlikely to improve and there is no prospect of a return to work in the foreseeable future even if adjustments are made, dismissal may be fair: *Smith v Post Office* ET Case No. 7707/95.
31. Fairness imposes a duty to investigate existing possibilities and establish whether arrangements could be made to accommodate the employee and the possibility of future redeployment should also be explored.
32. The fact that sick pay is provided or has ceased to be payable is a factor to be taken into account in deciding whether an employer could be expected to wait longer before dismissing an employee on long-term sick leave and in considering the reasonableness of any ill health-related dismissal. However, it is merely one of the factors to be considered and is not conclusive: dismissal effected during the currency of sick pay arrangements will not necessarily be unfair and nor will it necessarily be fair to dismiss once sick pay entitlements have been exhausted.

Disability Discrimination

33. The relevant legislation is found in Equality Act 2010 (EQA). This is a disability discrimination claim, where the respondent accepts that the claimant had a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about.
34. The relevant parts of the relevant sections are as follows:
- 15 Discrimination arising from disability
- (1) A person (A) discriminates against a disabled person (B) if—
- (a) A treats B unfavourably because of something arising in consequence of B's disability, and
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
35. The test under s.15(b) is an objective one and there is a balancing exercise between the discriminatory effect of the decision and the reasonable needs of the employer.
36. EHRC Employment Code at 5.21 states that “if an employer has failed to make a reasonable adjustment, it will be very difficult for them to show that the treatment was objectively justified.”
37. 20 Duty to make adjustments
- (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
- (2) The duty comprises the following three requirements.
- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- 21 Failure to comply with duty
- (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
- (2) A discriminates against a disabled person if A fails to comply with a duty in relation to that person.
38. The test of whether an adjustment is reasonable is an objective one and the central question is whether the respondent has complied with this legal duty or not (see *Tarback v Sainsburys Supermarkets Ltd* [2006] IRLR 664.

39. The Tribunal is also reminded of the relevant sections of the Code of Practice on Employment (2011) published by the Equality and Human Rights Commission (EHRC), particularly with respect to guidance on what might be reasonable steps in a reasonable adjustment case. Paragraphs 6.23 to 6.29 of the Code reminds us that what is reasonable will depend on all the circumstances of the case.
40. 13. Direct discrimination
- (1) 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.
- (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
41. Section 136 EQA provides that “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, unless A shows that they did not contravene the provision”. This requires the Tribunal to consider, on the oral and documentary evidence before it, whether there are facts which point to discrimination.

### **Findings of Fact**

42. The relevant facts are as follows. Where we have had to resolve any conflict of evidence, we indicate how we have done so at the material point.
43. There is no dispute that in January 2020 the Claimant began suffering from a ruptured Baker’s cyst on her left knee. On 15 January 2020 the Claimant was signed off sick by her GP and the GP fit notes have been provided [107]. An Occupational Health Report (OHR) was requested in March 2020. In March 2020 the Claimant was diagnosed with osteoarthritis in her left knee. The Claimant accepts that she was unable to work in her role as Technology Technician at that time. The Claimant was placed on full sick pay which lasted until July 2020 and then she would have been put on half sick pay.
44. On 9 July 2020 the Claimant’s General Practitioner (GP) advised that the Claimant may be fit for work if her duties were amended, such that she avoided work where she had to stand but worked in a seated position [113]. The GP’s position was maintained until the date of the Claimant’s dismissal [119-120].
45. On 9 July 2020 the Claimant commenced an alternative position of Administrative Assistant at the school. We accept the evidence of the Respondent’s witnesses that this role was created for the Claimant, recognising her mobility issues and as a reasonable adjustment. At the time the school was closed to most pupils due to the Covid 19 pandemic. The role created involved organisation of the staff to maintain the integrity of Covid 19 bubbles. The role was mainly sedentary although there were some minor requirements to walk to classrooms to check on vulnerable children.

The Claimant also assisted taking children to the toilet. This was not strictly part of her role but something that the Claimant took on to assist at what was a difficult time.

46. There is no dispute that this was a temporary adjustment to the Claimant's role and that it would end when Covid restrictions ended. It is not argued that this represented a new permanent position at the school. We find that this temporary arrangement suited both parties. The Claimant was able to continue working and receive full pay whilst the school had someone who could carry out this role consisting of additional duties arising due to the pandemic.
47. In January 2021 the Claimant was informed by her physiotherapist that she would need a partial knee replacement but that she was unlikely to be offered surgery given her age as the knee would need replacement again.
48. The Claimant had an Occupational Health Assessment on 9 March 2021. In a report dated 11 March 2021 it was said that the Claimant was unfit to carry out the Food Technology Technician role but that she would be able to carry out a more sedentary role which allowed her to sit down frequently during the day. The report recommended sourcing a role where the Claimant did not have to be on her feet for the majority of the day and that this adjustment should be permanent or until the Claimant had the knee replacement.
49. On 30 April 2021 the Claimant was invited to an informal absence review meeting pursuant to the Sickness Absence Management Procedure. The Respondent says that they used this procedure because the Claimant was off sick from her substantive role as Food Technology Technician whilst the Claimant says that she was not off sick as technically she was working, albeit in a temporary role.
50. We find that it was reasonable for the respondent to have used the Sickness Absence Management Procedure as a means of managing the Claimant's situation. It is reasonable for the respondent to want to use a clear process that can be followed and although the Claimant was technically working it was not in her contracted role but in a temporary position linked to Covid restrictions that would finish. It is not argued that this temporary role was a permanent change or variation in the Claimant's employment contract. In these circumstances we find that the Trust had to consider the Claimant's position with reference to her contracted role. The Claimant had been absent from her contracted role since January 2020 and, but for the temporary role, the process under this policy would have been initiated sooner. The Claimant accepted in her evidence that the process followed was reasonable.
51. We find that the respondent treated the Claimant as absent from her substantive role which she was unable to do. Her condition had worsened and there was no prospect of that changing in the foreseeable future.



52. The Claimant's accepts that at this time she was unable to carry out her contracted role and that there were no reasonable adjustments that could be made to that role to enable her to carry it out. At the time of the meeting on 4 May 2021 the Claimant had been unfit to carry out her contracted role since January 2020.
53. We find in these circumstances that it was reasonable for the respondent to use this policy as a means of assessing the current situation in relation to her contracted role and following a recognised policy and procedure which included being able to obtain Occupational Health reports.
54. Before the meeting on 4 May 2021 the Claimant was provided with the Sickness Absence Management policy which sets out the process where there has been long term sickness absence and that a possible outcome is dismissal.
55. At the meeting on 4 May 2021, Martin Ovenden and Kirsty Hanmore (HR Business Partner) were present. The Occupational Health report dated 11 March 2021 was reviewed and the Claimant confirmed that there was no change and her GP was reluctant for her to have a knee replacement at that time due to her age and the time frame for such surgery was unknown. No suitable roles were then available. The Claimant was reminded that the current arrangements were temporary and likely to end at the end of the summer term 2021 and if no alternative employment was available then the respondent would have to consider whether the contracted employment could be sustained.
56. We find, that following this meeting the Claimant took no issue with the process being followed and what was said about her health, lack of suitable roles or that her current role was temporary and coming to an end. The Claimant confirms in her statement that the letter of 11 May 2021 is a fair reflection of what was said in the meeting.
57. In June 2021, an Admissions Assistant role, became available at Stifford Clays Primary School. This was changed to an Administrative Assistant role and on 15 June 2021 the appellant was invited to a meeting with Christine Pumfrey at Stifford Clays Primary School to discuss the suitability of this role.
58. On 6 July 2021 the Claimant attended a formal sickness absence review hearing. Present at that meeting was Simon Bell (Executive Head Teacher), Martin Ovenden (Deputy Head Teacher), Steven Ball (HR Director) and Kirsty Hanmore (HR Business Partner) and Francesca O'Riordan (colleague and note taker). The Claimant was informed that she could be accompanied and that a possible outcome was dismissal. There was no updated Occupational Health report, but the Claimant stated that her condition had deteriorated since the last OH report and this was confirmed by a GP letter dated 5 July 2021 which was provided for this meeting.
59. No issues have been raised by the Claimant as to the conduct of this meeting and her statement accepts that the notes of the meeting accurately reflects what was discussed. The Claimant was accompanied at that

meeting by her union representative Donna Noble and a colleague. At this meeting it was discussed that there were no redeployment opportunities at the time. The role at Stifford Clay was not suitable and that reasonable adjustments had been discussed with Christina Pumphry when they met on 15 June 2020. The Claimant said at the meeting that that she was having a further consultation with her Consultant in August 2021 and was potentially willing to have private surgery for the knee but the Claimant also recognised that she needed to make the knee stronger for the knee replacement.

60. The Claimant was dismissed at the end of the meeting by Simon Bell (Head Teacher) and by letter dated 7 July 2021 the Claimant was informed that her employment would terminate on 23 September 2021 and that she had a right of appeal.
61. On 3 September 2021 the Claimant was sent a list of job opportunities [182] which the Claimant accepted in oral evidence were not suitable.
62. On 12 July 2021 the Claimant appealed, and the appeal hearing took place on 4 October 2021. The decision to dismiss was upheld by Steve Munday. Present at that hearing was Steve Munday (Chief Executive Officer), Ray Moore and Gary Tapsell (Trustees), Edwin Parsons, Simon Bell, Steve Ball and Francesa O'Riordan. The Claimant was accompanied by two Union representatives. No issues have been raised by the Claimant as to the conduct of this hearing and the Claimant's statement confirms that the notes of the meeting are an accurate reflection of what was said.
63. We find that the Respondent had in place appropriate policies and training and that the Respondent understood its duties, as an employer to the Claimant under the Equality Act 2010 and Employment Rights Act 1996. We accept the evidence that training was provided during induction and that the policies were on the respondent's intranet. We accept that the Respondent does not have a reasonable adjustment and/or redeployment policy but find that this did not, in this case make any difference. The respondent had made a reasonable adjustment when creating the temporary role for the Claimant, no reasonable adjustments to her substantive role were identified by and requested by the Claimant and alternative employment was considered.
64. We have, in addition to the Sickness Absence Procedure been provided with the Equality and Diversity in Employment Policy which was in place at the relevant time and considering the evidence as a whole including the evidence of the respondent's witnesses and the documentary evidence of the procedure undertaken by the Trust we find that although there may not be any direct reference to the Equality and Diversity Policy the principles as set out in the policy were in the minds of the respondent and that the principles, as set out in the policy were applied to the Claimant.
65. We find that there is no suggestion that the respondent adopted a position, in relation to this claimant of limiting the reasonable adjustments to 6 weeks and in fact had placed the Claimant in an alternative role for over 6 weeks as provided for in the Sickness Absence Management Policy. We accept the evidence of Mr Ball that this limit of 6 weeks exists because this is the

usual time needed for reasonable adjustments to be in place whilst someone gets back to work but it is also clear that this is not set in stone and is adjusted depending on the particular circumstances as was the case with this Claimant. We can see from 4.6 of the Sickness Absence Management Policy that the 6 weeks is referenced in relation to return to work but also says that “In other circumstances longer term or permanent contractual or other adjustments may be made.”

66. We have considered the point raised by the Claimant that her sick pay was usurped by the reasonable adjustment of finding her an alternative role. We find that this was not an issue of usurping but simply that the Claimant was on full sick pay, but was due to start half sick pay whilst the alternative role enabled her to work on full pay.
67. Placing her on half sick pay would have been for a further 5 and half months in circumstances where there was no timeline put forward for any return to her substantive role. We have considered that the Claimant says that she raised the option of having a knee operation done privately but agree with the submission of the respondent that this was not a concrete suggestion with any known time frame and in evidence the Claimant said that she had not gone on to have this operation as her Consultant did not do private work. Additionally, the Claimant says she was biding her time due to her age.
68. We find that the Claimant was aware that dismissal was a possibility. The Claimant was herself aware that she was unable to fulfill her substantive role and that the temporary role was just that temporary. Additionally, the Claimant was sent the Sickness Absence Policy before the informal meeting on 4<sup>th</sup> May 2021, and this was explained at the meeting as confirmed by the outcome letter which is not disputed by the Claimant.
69. We find that there was a genuine attempt to identify and to offer suitable alternative employment. In reaching our conclusion we have considered the size of the employer and that at the time there were very few vacancies. The vacancies that did become available we find were shown to the Claimant. We accept the submission of Mr Williams that for example there are two alternatives in respect of the Stifford Clay School either the Client herself was monitoring potential jobs and saw none that were even potentially suitable, or the respondent brought the position to the Claimant's attention and was therefore itself monitoring the vacancies available and therefore complying with its duty.
70. Although there may be roughly 470 employees, we accept the respondent's submission that most of them would be teachers and teaching assistants. In terms of administrative staff we accept the evidence that there are around 25 posts across 6 sites and 3 of the sites were primary schools which the Claimant said in evidence posed difficulties as there is more sitting on the floor. One site was a school, Orsett Heath, that was starting off and at the relevant time had one admin staff, leaving only two senior schools which potentially could offer a position. Ms O'Halloran in her submissions talked of growth and that they were looking to have 1200 children at Orsett Heath but we accept the evidence of Mr Munday that this was not going to be the case until 2027.

71. We accept that there was a change in the position from what was advertised at Stifford Clay School but it remains the case that the Claimant went along to the school on 15 June 2021 to discuss the amended position and to see if it could be adjusted and made suitable. The Claimant says that there is no adequate explanation for the change but does not go as far as saying that the change related to her and that it was changed in order to prevent her from obtaining an alternative suitable position.
72. The explanation provided is that having an Attendance and Admissions role was not working within the school structure and the Head of School had taken the decision to reorganise the school office. The Claimant says that the old post should have been made available to her, but we find that it is reasonable not to have reverted to an old way of working that the Head of the School had decided was not suitable for the school. We have additionally considered that that the Claimant did attend the school to speak to the Head of the school to discuss whether there were adjustments that could be made. The Claimant accepts that the position as amended was not suitable.
73. We find that the proposed vacancies sent to the Claimant on 3 September 2021 were not suitable. The Claimant's own evidence was that there were only two potentially suitable both of which are apprenticeships. Mr Williams invited us to consider his own evidence on apprenticeships, but we find there is no need too. We have considered the evidence of the respondent's witness that they were essentially full time consisting of 4 days' work placements and one day at a college and that this was not suitable for either part time or job share and the Claimant's own evidence that they were full time and so not suitable.
74. The remaining positions of teaching assistants were with primary age children, and special needs involving an element of mobility. The Claimant's own evidence is that she did not have the relevant qualification. The payroll position was not available during the Claimant's employment but in any event, we cannot determine that the Claimant had the relevant skills and recent experience to undertake this position. We accept that bookings was not a standalone job and the elements of the Claimant's role either disappeared or went back to those staff who had done these roles previously.
75. We find that there was no suitable alternative employment available that could be and ought to have been offered to the Claimant.
76. We find that there had been meetings and discussions related to the Claimant and her work situation. We find that firstly this is shown by the fact of her alternative role about which there is no minuted meeting but a discussion must have occurred for it to have happened and been put in place. Additionally both Mr Bell as the executive head of both the senior schools and Ms Pumphrey as executive head of the primary schools were aware of the Claimant and her situation. We find that the Claimant would have clearly been part of the staffing needs discussions taking place with a view to ensuring that the needs of the school were met in time for the new

September 2021 term when schools were opening up and practical lessons starting again.

77. We find that the Respondent had the requisite information to be able to identify suitable alternative employment as they had on record her application from when she joined the school which would have given her employment history and her school records of her employment up to date including the role she undertook as a temporary role. We find that the respondent would have been aware of the Claimant's skills, abilities and work history.
78. The Claimant accepts that there were no reasonable adjustments to her substantive role and the Respondent made a reasonable adjustment in providing her with the alternative role. There is no record of the Claimant requesting any reasonable adjustments.
79. We find that the respondent did perform a balancing exercise between the needs of the Respondent and needs of the Claimant prior to making its decision to dismiss and upholding this decision. We find again that this is evidenced by the respondent's actions. Although no balance sheet has been provided, we find that they were considering in line with both the interest of the school, the children but also their staff and their relevant policies.
80. We find that it was not reasonable for the respondent to keep open the job of Food Technology Technician any longer in circumstances where there was no timeframe for when or even if the Claimant could return to this role. The school was reopening in September 2021 and a Food Technology Technician was needed and needed to be in place in September 2021, bearing in mind that Covid restrictions had meant that a whole class year had missed out on these practical lessons. The Claimant's statement says that she believes she would have been able to work in a more mobile role by the beginning of January 2023, but she does not actually confirm that she would have had the mobility required for her substantive role.

## **Conclusions**

### **Unfair Dismissal**

81. Applying the facts as found above we find that the Respondent has established on the balance of probabilities that the principle reason for the dismissal relates to capability and that this is a potentially fair reason for dismissal under the ERA 1996.
82. We find that the set of facts or beliefs known to the decision maker which caused him to dismiss the Claimant was that the Claimant had been unable to undertake her contracted role since January 2020. That the Claimant remained unable to undertake her contracted role and that there were no reasonable adjustments which could be made to her substantive role such that she could return to that position. That there were no suitable alternative positions for the Claimant and no time frame for when she would be able to

return to work or concrete proposals in place for when such a time frame would be known.

83. We now turn to determine whether the dismissal was fair or unfair. In considering this question we have had regard, as we must, to the size and administrative resources of the respondent and the key question is whether the respondent acted reasonably or unreasonably in treating this reason as a sufficient reason to dismiss the Claimant. We remind ourselves that we are not deciding what we would or would not have done but whether the decision of the respondent to dismiss is within the band of reasonable responses.
84. Applying the principles in *BS v Dundee City Council* [2014] IRLR 131 the question for us to consider is whether the employer acted reasonably in concluding in the light of the position of the employee and the medical evidence that it could not wait any longer.
85. We have found above that the Claimant's condition had started in January 2020, that there was no improvement but in fact a deterioration and there was no suggestion of any improvement in the foreseeable future such that she could undertake her contracted role as a Food Technology Technician. As we have found above the Claimant's assertion that she could have an operation privately was not a concrete proposal with any indication of an appointment with a private Consultant or of an operation date or recovery date and when she would be fit to resume her contracted role.
86. By the time of the dismissal, the claimant had been unable to do her contracted role for 18 months and there were no reasonable adjustments that could be made to her contracted role. There were no suitable alternative roles for her, and we find that the respondent had investigated possibilities for alternative role, and none were available. We bear in mind the size of the employer and the number of administrative roles that were in existence at the relevant time and the nature of the potential roles that would be available in a school environment. In terms of alternative employment, we find that there was a very limited pool from which alternative employment could be sourced, bearing in mind the limited number of schools and the limited number of administrative posts within those schools. We have considered the possibility of growth of the new school but find that growth was incremental with full capacity not envisaged until 2027.
87. We accept that the Claimant was a long serving and hard working employee but find that the respondent did recognise this by the finding the alternative role in July 2020 and in attempting to find alternatives, albeit it without success.
88. We find that it was not unreasonable for the respondent to terminate her employment rather than place her back on sick pay which would by then be half sick pay as there was no prospect of the Claimant being able to resume her role within a reasonable time frame and the school would have been placed in a position of having no choice but to use agency staff at extra cost until such a time as she had had a knee replacement operation or alternative employment could potentially be found.

- 89 We find that it is not unreasonable for the respondent to take the decision to terminate the claimant's employment at that time and that the reason for the decision was capability as the Claimant was unable to carry out her contracted role.
90. We find that this was a decision that was within the range of reasonable responses open to a reasonable employer when faced with the facts set out above.
91. We find that the respondent adopted a fair procedure. Dealing with the Claimant's points in turn:
- a) It was not reasonable to follow the capability/sickness process - For the reasons set out above at paragraphs 50-53 we find that it was reasonable to follow this process.
- b) As we have found above the respondent did properly consider and went to reasonable lengths in seeking alternative employment but none was available. As stated in *Merseyside and North Wales Electricity Board v Taylor* [1975] IRLR 60 HC there is no rule of law that an employer is obliged to create a special job or to find other work.
- c) Failed to obtain an up to date Occupational Health Report - although not raised by the Claimant in her skeleton argument we deal with this for completeness and find that this would not have had any impact on the decision taken. Although the OH report was dated March 2021 the Claimant confirmed at the meeting that her medical situation had not changed but in fact had got worse and a recent GP letter dated the day before the meeting confirmed the position. We find that the respondent had the most up to date medical evidence at the date of the dismissal and an updated OH would not have revealed any further information which could have changed the decision.
92. The claimant's claim for unfair dismissal fails and is dismissed.

**Direct Disability Discrimination**

93. Did the Respondent chose to commence sickness absence management procedures in respect of the Claimant despite the fact that she had not had recent sickness absence from a temporary role introduced as a reasonable adjustment.
94. For the reasons set out above at paragraphs 50- 53 we have found that it was reasonable for the respondent to commence the sickness absence management procedure given that she had been absent due to ill-health from her substantive role since January 2020.
95. We find that the respondent did not treat the Claimant less favorably than it would have treated a non-disabled person with the same amount of sick leave who it was established was not capable of undertaking their

contracted role with no timeline for when they could and no alternative roles available.

96. It follows that we find that the Claimant has not proved primary facts from which the Tribunal could properly and fairly conclude that discrimination on the grounds of disability have taken place.
97. The claimant's claim of direct discrimination on the grounds of disability fails and is dismissed

**Discrimination arising from disability**

98. The Claimant was dismissed for reason of capability because she was unable to undertake her contractual role and had been absent due to ill-health from her substantive role since January 2020.
99. The respondent followed a fair process in circumstances where there were no alternative roles available, the Claimant was unable to undertake her contractual role and there was no timeframe for when she would be able to.
100. We find that the respondent did carry out a balancing exercise before reaching a decision. We accept the evidence of the respondent's witnesses that the Claimant was valued member of staff and an alternative role had been previously created which ensured that the Claimant was on full pay. The respondent has demonstrated that dismissing the claimant was a proportionate means of achieving the legitimate aim of ensuring the school was adequately staffed for the lessons that the children were going to be taught in September 2021 in circumstances where the children had already suffered much upheaval and had not been able to attend practical lessons.
101. The Claimant's claim of discrimination arising from disability fails and is dismissed.

**Failure to make reasonable adjustments**

102. The Claimant asserts that the following reasonable adjustments were reasonably required:
  - a. Proper consideration given to redeploying the Claimant to a more sedentary role:
  - b. creation of a role of a sedentary nature.
103. For the reasons we have explained above we find that the respondent took all steps as were reasonable to avoid any disadvantage to this Claimant and considered redeployment to a more sedentary role but there were nonavailable. Unlike the respondent in *Southampton City College v Randall* [2006] IRLR 18, EAT the respondent in the instant case did consider alternative employment and redeployment and were not undergoing a restructuring exercise giving them 'a blank sheet of paper' in respect of job specification such as to be able to devise a job.



104. The claimant's claim of failure to make reasonable adjustments fails and is dismissed.

**Employment Judge F Allen  
Dated: 6 November 2023**