Case Number: 2408035/2021

EMPLOYMENT TRIBUNALS

Claimant: C Wood-Hope

Respondents: 1. Salford City Council
2. The Governors of Friars Primary School

HELD AT: Manchester **ON:** 7–10 February, 15–17 August 2023
[and in chambers 18, 30 August,
+ 4 September 2023]

BEFORE: Employment Judge Batten
P Owen
D Radcliffe

REPRESENTATION:
For the Claimant: L Price, Counsel
For the Respondent: A Smith, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. the claimant was automatically unfairly dismissed for trade union reasons;

2. the claimant suffered detriment on grounds of trade union membership/activities; and

3. the claimant suffered unlawful disability discrimination: by the respondents' unfavourable treatment because of something arising in consequence of disability which was not justified; and by the respondents' failure to make reasonable adjustments.

REASONS

1. By a claim form presented on 28 June 2021, the claimant presented complaints of unfair dismissal, automatic unfair dismissal for trade union activities, trade union detriment and disability discrimination (comprising discrimination arising from disability and a failure to make reasonable adjustments). On 2 August 2021, the respondent submitted a response to the claim.

2. A case management preliminary hearing took place on 10 November 2021 before Employment Judge Sharkett following which, on 15 December 2021, the claimant presented amended particulars of her claim. On 18 February 2022, at a further case management preliminary hearing before Employment Judge Buchanan, the respondent conceded that the claimant was disabled by reason of mental impairments consisting of stress reaction, depression and anxiety at the material time, being March 2019 to May 2021. A list of issues was then finalised for this hearing.

Evidence

3. A bundle of documents comprising 2 full lever arch files, running to 865 pages, was presented at the commencement of the hearing in accordance with the case management Orders. A number of further documents were added to the bundle in the course of the hearing. References to page numbers in these Reasons are references to the page numbers in the bundle.

4. It was agreed between the parties that the respondents would go first in presenting their witness evidence. The respondents called 3 witnesses to give oral evidence, being: Michael Earnshaw, Head Teacher of the Friars Primary School; Paul Scott, Deputy chair of the Governors; and Anne Kimber, Chair of the Governors.

5. The claimant gave evidence herself by reference to a lengthy witness statement and also called: Jill Baker, a former work colleague and teacher; and Judith Elderkin, a trade union official from the National Education Union, to give evidence in support.

6. All of the witnesses gave oral evidence from written witness statements and were subject to cross-examination.

7. The Tribunal was also provided with a cast list and chronology.

8. The oral evidence was completed on the afternoon of the sixth hearing day and submissions were delivered the following morning. The Tribunal then retired to deliberate, which required a further 3 days to complete.

Issues to be determined

9. A list of issues had been produced between the parties and agreed at the case management hearing with Employment Judge Buchanan. At the outset of the hearing, the Tribunal discussed the list of issues with the parties. It was agreed that liability only should be determined at the hearing and that the complaints and issues to be determined by the Tribunal were as follows [*the numbering below retains the numbering of the list of issues arrived at during the case management preliminary hearing conducted by Employment Judge Buchanan on 18 February 2022 but with matters of remedy removed*]:

1. Time limits

1.1 Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 4 March 2021, may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 EqA? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within 3 months (allowing for any early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within 3 months (allowing for any early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.3 Was the complaint of detriment under s146 TULRCA, made within the time limit in section 147 TULRCA? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within 3 months (allowing for any early conciliation extension) of the act complained of?

1.3.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the last one?

1.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, dos the Tribunal consider it reasonable to extend time?

2. Unfair dismissal (automatic and ordinary)

2.1 Has the respondent shown the reason or principal reason for dismissal?

2.2 Was it a potentially fair reason under section 98 Employment Rights Act 1996?

2.3 Was the reason or principal reason for dismissal as a result of union membership or activities? If so, the claimant will automatically be regarded as unfairly dismissed.

2.4 If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

2.4.1 The respondent genuinely believed the claimant was no longer capable of performing their duties?

2.4.2 The respondent adequately consulted the claimant?

2.4.3 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position?

2.4.4 The respondent could reasonably be expected to wait longer before dismissing the claimant?

2.4.5 Dismissal was within the range of reasonable responses.

4. Detriment - section 146 TULRCA

4.1 What are the facts in relation to the following alleged acts or deliberate failures to act by the respondent?

D1 placed the claimant on ill health/capability/managing attendance process on 24 May 2019;

D2 placed the claimant on a support plan on 15 November 2019;

D3 rejected the claimant’s grievance on 19 May 2020.

4.2 Did the claimant reasonably see that act or deliberate failure to act as subjecting him/her to a detriment?

4.3 What was the respondent's main purpose in carrying out the alleged treatment?

6. Discrimination arising from disability – section 15 EqA

6.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

6.2 If so, did the respondent treat the claimant unfavourably in any of the following alleged respects:

6.2.1 Commencing 24 May 2019 placed the claimant on the capability/managing absence process;

6.2.2 On 15 November 2019 putting the claimant on a support plan;

6.2.3 On 19 May 2020 rejected the claimant's grievance;

6.2.4 On 8 December 2020 dismissed the claimant with notice.

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

6.3.1 Her inability to fulfil her contractual duties?

6.3.2 Her sickness absence?

6.4 Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things?

6.5 If so, can the respondent show that there was no unfavourable treatment because of something arising in consequence of disability?

6.6 If not, was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

6.6.1 To ensure and maintain consistency in teaching pupils at the school;

6.6.2 To avoid or reduce the impact of a reduced teaching staff on the education of the school's pupils who have special needs;

6.6.3 To ensure and maintain the performance, effectiveness and viability of the school;

6.6.4 To avoid or reduce any financial impact on the school's budget as a result of teaching staff absences;

6.6.5 To avoid the detrimental financial impact caused by the second respondent spending approximately £40,000 from the school's budget in Teacher Agency fees to cover the claimant's period of absence from 18 November 2019 to 30 April 2021;

6.6.6 To avoid or reduce the impact on teaching staff in managing workloads due to teaching staff absences.

6.7 The Tribunal will decide in particular:

6.7.1 was the treatment an appropriate and reasonably necessary way to achieve those aims?

6.7.2 could something less discriminatory have been done instead?

6.7.3 how should the needs of the claimant and the respondent be balanced?

7. Failure to make reasonable adjustments – sections 20/21 + schedule 8 EqA

7.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

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

7.2.1 The imposition of the support plan;

7.2.2 The Managing Absence/Capability policy of the respondent.

7.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability?

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

7.5 Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

7.5.1 To remove the support plan as a precondition of return;

7.5.2 Taking into account the effect on her teaching of the stress caused to the claimant by the head teacher's confrontations by arranging alternative line management;

7.5.3 Providing informal support on Design and Technology ("DT") from the DT teacher; and

7.5.4 Arranging mediation to attempt to rebuild the relationship with the headteacher.

7.6 By what date should the respondent reasonably have taken those steps?

Findings of fact

10. The Tribunal has made the following findings of fact on the basis of the evidence before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of

probabilities. The Tribunal has also taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts.

11. Having made findings of primary fact, the Tribunal considered what inferences it should draw from them for the purpose of making further findings of fact. The Tribunal has not simply considered each particular allegation but has also stood back to look at the totality of the circumstances to consider whether, taken together, they may represent for example an ongoing regime of discrimination.

12. The findings of fact relevant to the issues which have been determined are as follows.

13. The claimant was employed by the first respondent from 24 February 2014, as a teacher at the second respondent's school ("the school"). She had qualified as a teacher in 2011 and was, by all accounts, an accomplished teacher prior to the events of this claim. The claimant became a member of the school's senior leadership team by virtue of being the school's Liaison and Cohesion lead, with responsibility for relations with parents and staff. Her contract of employment appears in the bundle at pages 258-267.

14. In May 2015, the school was rated 'good' by Ofsted. The Tribunal heard that the claimant was an excellent classroom teacher who had, in March 2017, been recommended for and received an additional pay award from the second respondent to reflect her 'highly competent' performance.

15. In 2017, the claimant became the NUT, later NEU, workplace representative for teaching staff members at the school.

16. In 2017, Michael Earnshaw was appointed to the post of Deputy Head which he commenced on 1 September 2017. The claimant had also applied for the post.

17. In December 2017, Jill Baker, the school's curriculum lead for English, submitted a grievance about the conduct of Mr Earnshaw, for presenting her work on the English curriculum to the Governing body as his own, and also for ignoring her and undermining her in front of staff and children. The claimant attended the grievance meetings as Ms Baker's trade union representative. The Head Teacher at the time, Pat Arnold, upheld Ms Baker's grievance and Mr Earnshaw had to apologise to Ms Baker.

18. On 18 June 2018, the claimant had knee replacement surgery and was off work, recovering, till September 2018.

19. In July 2018, at the end of the academic year, the Head Teacher, Pat Arnold left the school and Mr Earnshaw was appointed as Head Teacher with effect from 1 September 2018.

20. On 24 September 2018, Mr Earnshaw announced to a whole staff meeting that he was changing the classroom observation protocol and that observations would thereafter be conducted by drop-in to classes, unannounced. Trade union members raised their concerns to the claimant in light of the existing agreement on observations, which had been collectively negotiated and which was being ignored.

21. The next day, 25 September 2018, the claimant raised the concerns of trade union members about the announcement on classroom observations, at the Senior Leadership Team meeting. She came under pressure to say which staff had raised concerns, but the claimant refused to give names. Nevertheless, Mr Earnshaw was determined to proceed with 4 weeks of classroom observations, without prior warning to staff, and it became clear that he had not discussed or agreed his ideas with, nor had he shared any changes with the second respondent Governors. Mr Earnshaw's position was that it was his decision to make.

22. On 26 September 2018, the claimant called a meeting of trade union members in order to feedback on developments. The Deputy Head Teacher, Adam Curtis, first tried to come into the meeting, claiming that he was an NEU member. The claimant checked the membership records with the NEU Head Office and discovered that Mr Curtis was not in fact a member of the NEU. He was therefore refused entry to the meeting. Thereafter, Mr Curtis stood outside the room watching who went into the meeting. Staff felt intimidated.

23. Later that day, Mr Earnshaw called the claimant to a meeting, with himself and a colleague, Chris Frascatelli. Mr Earnshaw announced to the claimant that he was giving her an "informal warning" about her conduct at the Senior Leadership Team meeting. No procedure was followed in giving what was a disciplinary sanction. The minutes of this meeting appear in the bundle at page 333. The Tribunal considered that the warning was in response to the claimant carrying out her trade union role/duties.

24. After the meeting, Ms Baker overheard Mr Frascatelli talking to Mr Earnshaw, raising concerns about Mr Earnshaw's behaviour at the meeting with the claimant and advising Mr Earnshaw to "calm down".

25. On 27 September 2018, the claimant was signed off work for 2 days because her GP diagnosed that she had suffered a panic attack.

26. That day, the NEU sent a letter to the Head Teacher which appears in the bundle at page 348. The letter refers to the Salford Performance Management and Classroom Observation Protocol which had been agreed with the Governors of the school, and states that the Head Teacher's latest actions are outside of the protocol and could be seen as an attempt to deter trade union activity, whilst reminding Mr Earnshaw that such is unlawful.

27. On 3 October 2018, the NEU Regional Officer attended a meeting of the school's NEU members, at which the staff voted against the Head Teacher's plans to change classroom observations.

28. Afterwards, Ms Elderkin, the NEU Regional Officer, met with Mr Earnshaw, to explain the basis of the Salford protocol on classroom observations and the need to negotiate and agree any changes. Mr Earnshaw remained unwilling to entertain any form of compromise. Eventually, his intransigence resulted in a ballot for strike action by the staff.

29. On 17 November 2018, the NEU wrote to the Governors about the impasse over classroom observations and asked for negotiations, pointing out that Mr Earnshaw's proposals were a clear breach of the Salford protocol and that the Head Teacher was intransigent. The letter appears in the bundle at page 364. The union received no reply from the Governors, not even the courtesy of an acknowledgement.

30. However, on 19 November 2018, the Head Teacher conceded to a request to conduct week-long observation periods, on 5 days' notice to staff.

31. On 22 November 2018, a full Governors' meeting took place. Mr Earnshaw, as Head Teacher reported to the Governors on developments with the observation protocol. There is no record of any mention of the NEU letter and the dispute with staff, nor of the ballot for strike action. Indeed, there was no evidence that either matter had been reported to the Governing body in any way.

32. Around this time, the claimant had supported a Teaching Assistant who was an NEU member, in a dispute over school milk duties. The claimant accompanied the Teaching Assistant to a meeting with Mr Earnshaw wherein Mr Earnshaw accused the Teaching Assistant of being unprofessional without any investigation and threatened the Teaching Assistant with disciplinary action. Nothing resulted from this threat. However, colleagues began to warn the claimant to "watch your back" in relation to Mr Earnshaw.

33. In March 2019, at a Senior Leadership Team meeting, the claimant suggested that the year 2 and 3 classes working in an open plan area should take lunch at different times in order to limit noise. Shortly after this, the claimant was accused by a colleague who was not at the Senior Leadership Team meeting, of complaining about the colleague's class noise to the Senior Leadership Team. There had been no such complaint.

34. As a result, on 15 March 2019, the claimant complained to the Head Teacher about a breach of confidentiality from within the Senior Leadership Team. Mr Earnshaw went to discuss the matter with the 2 teachers who worked in the open plan area and then he came back to the claimant to suggest that her colleagues had raised several issues about her which would have to be investigated. Mr Earnshaw would not tell the claimant what those issues were nor when the conduct complained of was said to have occurred. In effect, Mr Earnshaw turned the matter into a formal investigation into the claimant's conduct. As a result, the claimant developed a panic attack and was sent to A&E.

35. From 18 March 2019, the claimant was off work, sick, with work-related stress for 48 working days to 17 June 2019.

36. On 21 March 2019, the claimant sent the Head Teacher a letter about his failure to address the breach of confidentiality and she requested to know what the issues were to be investigated about her. The letter appears in the bundle at page 387. In response, the Head Teacher said he was taking advice. The Tribunal found that the claimant's letter was never responded to substantively by Mr Earnshaw and there was no evidence of any action by him thereafter.

37. On 30 April 2019, the claimant was invited to a 'management of absence' meeting with Mr Earnshaw. A representative of HR was present. The invite letter says that the meeting was to review "the claimant's absence since 18 March 2019". However, in evidence Mr Earnshaw said that he was concerned about the level of absences (plural) and that he had in fact reviewed and taken account of the claimant's record beyond the immediate period of absence set out in the invite letter.

38. On 24 May 2019, a Stage 1 capability meeting took place. In the course of this meeting, the Head Teacher told the claimant that, when she returned to work, she would not be returning to teach her year 3 class. Instead, he had decided that she should undertake 'PPA cover', which is a form of supply teaching, for the rest of the school year, until the end of July 2019. In the event, the supply teacher who had covered the claimant's class was kept on by the school, despite the cost of such, to ensure continuity of teaching for the class concerned. The claimant was told that being put on PPA duties was not a reflection of her teaching.

39. On 17 June 2019, the claimant returned to work for the last month of the school year, on a phased return, undertaking PPA duties until the start of the new school year in September 2019. Given the number of weeks left until the end of term and in an effort to maintain continuity of class teaching, the claimant agreed to undertake PPA duties until the school year-end.

40. In September 2019, the claimant had reasonably expected to return to teaching a class, in accordance with her job description and responsibilities. However, Mr Earnshaw unilaterally decided that the claimant would remain on PPA duties for the autumn term. The Tribunal found there was no explanation nor justification for this decision, which was a failure to make the best use of the claimant's skills and experience and at additional cost to the school.

41. On 2 October 2019, an email was sent by an HLTA, to Mr Curtis, raising concerns about DT work. The email appears in the bundle at page 425. The email does not identify a particular class or teacher said to be causing concerns. At the time, the claimant had delivered only 2 DT sessions that term and the Tribunal heard evidence that there was at least 1 or 2 other teachers who had been undertaking DT lessons at the time. Nevertheless, Mr Earnshaw sought to persuade the Tribunal that this email demonstrated the claimant's poor performance, a suggestion he was unable to explain or substantiate wen challenged.

42. On 15 October 2019, Mr Earnshaw conducted a lesson observation on the claimant. The record appears on page 427 of the bundle. The Tribunal considered the feedback to be good. Out of 30 observation areas, Mr Earnshaw marked only one as 'inadequate'. The Tribunal noted that this was "does not revisit lesson objectives or outcomes", a point that was contradicted by his comments, in the strengths section of the first page of the report, where he describes "a good build-up of learning with children able to review their past learning and supported with their previous work to do so".

43. In October 2019, Mr Earnshaw conducted the claimant's appraisal. The document appears in the bundle at page 433 onwards. In the document, Mr Earnshaw has recorded, under the heading of overall performance against teaching standards, that "There were acknowledged concerns during the Autumn term of 2018 with some elements of teaching". In fact, there was no evidence of any such concerns and Mr Earnshaw was unable to explain, in evidence, to what this referred. The Tribunal considered this to be a very serious inaccuracy.

44. On 1 November 2019, Mr Earnshaw told the Tribunal in evidence that he had received an allegation that the claimant was dishonestly sticking work into books immediately prior to DT book-looks that day and that children were saying they had not done the work in their books. In fact, the claimant was not at work that day because she was off with chest infection. When this was put to Mr Earnshaw in cross-examination, he was unable to explain this anomaly nor to substantiate the allegation by reference to any complaint nor evidence of what the claimant was alleged to have done. The Tribunal found that there were no issues documented with the claimant's work prior to October 2019 despite that Mr Earnshaw sought to suggest that issues had been raised with her in previous years. Indeed, prior to 2018, the claimant had taught year 6 and had achieved the highest Key Stage 2 SAT scores at the school.

45. On 4 November 2019, the claimant returned to work. At the start of the day, she had a return-to-work meeting with the Head Teacher.

46. After the meeting, the claimant was approached by a colleague, Ms Lally, who told the claimant that her planned classroom observation had never happened on notice as was agreed and, in fact, took place a week later, without notice, on 29 October 2019. In addition, Ms Lally said that the feedback was given to her on her own and that the Head Teacher was harsh. In essence, the Tribunal found that Mr Earnshaw was continuing to conduct classroom observations outside of the agreed protocol despite the previous dispute and without regard to the resolution to which he had purportedly agreed.

47. At 8.30am, the claimant asked to speak to the Head Teacher in her role of NEU representative, in order to inform him that he needed to follow the classroom observation protocol as agreed by the Governors and the trade union. The Head Teacher became very angry and only reluctantly agreed to do so, claiming that he had given verbal notice and suggesting that was sufficient. Eventually, he agreed to re-do the observations in question and to remove the previous observation records from the member of staff's record.

48. At 12 noon that day, Mr Earnshaw called the claimant to a meeting without notice. He opened the meeting by saying that it was going to be a difficult conversation and he proceeded to tell the claimant that she was to be the subject of a misconduct investigation. In support of his contention, Mr Earnshaw then produced a book-look sheet for a year 3 RE class, which he had completed. The claimant pointed out that she did not teach RE to year 3, whereupon Mr Earnshaw snatched the book-look back. Under cross examination, Mr Earnshaw accepted that he had erroneously criticised the claimant for another teacher's work. However, there was no

evidence that the other teacher was taken to task over the book look, as Mr Earnshaw had proposed to do for the claimant, or at all.

49. Mr Earnshaw then produced a single book-look sheet for DT, which was said to have been compiled by an HLTA. The claimant later showed this book-look to the HLTA who said that she had not written much of the content and, in fact, she had not written the majority of the book-look, which had been added to by a third party.

50. The claimant offered to sit down with the Head of DT to go over the schemes of work to review her teaching of DT, but Mr Earnshaw said it was a serious matter and had "gone past that", that he had referred the matter to HR and that there would be a disciplinary investigation. The claimant stated that this was not in accordance with procedure and that she was not clear what she was being accused of. The claimant was told that it was a "potential conduct issue" despite that it was suggested that this arose because her teaching was alleged to be not of a sufficient standard.

51. Within the next 2 hours, Mr Earnshaw emailed the claimant to say that the issues he had raised with her did require investigation. It was apparent to the Tribunal that HR advice had been taken only after matters had been raised with the claimant and not before.

52. The next day, 5 November 2019, the claimant asked Mr Earnshaw for details of the allegations and the process to be followed. Mr Earnshaw replied on 6 November 2019, to the effect that the matter was under investigation and so he was unable to provide further details. A member of the first respondents' HR team rang Ms Elderkin, the NEU Regional Officer, to notify the union that the matter was a serious breach of the respondents' disciplinary code by the claimant as a trade union representative. When Ms Elderkin asked for details, she was told that the matter had been investigated and included issues about unmarked work and a failure to properly teach the curriculum amounting to misconduct.

53. On 6 November 2019, Mr Earnshaw changed the claimant's timetable, to include swimming lessons without telling her, albeit that he told an HLTA what he had done. Later, Mr Earnshaw changed the claimant's timetable again, to year 3 Maths and English lessons. This made it very difficult for the claimant to prepare lessons in a timely manner or at all.

54. On 7 November 2019, Mr Earnshaw completed no less than 7 book looks on the claimant's work. His comments include: 'thinking about neatness', 'using green comments', and 'consider varying tasks'. The Tribunal considered these documents and accepted the evidence of Ms Baker on the book-looks, to the effect that the strengths recorded far outweighed

any areas for development and that the book looks did not indicate performance issues.

55. At the end of the school day on 7 November 2019, the Head Teacher called the claimant to a meeting. He refused to allow the claimant to be accompanied and, instead, called a member of the school office staff, Gill, into the meeting to act as his witness. The meeting consisted of the Head Teacher telling the claimant that a support plan would be put in place, which the Tribunal understood to be a form of performance management, for which the Tribunal could see no justification. The claimant pointed out that such a matter needed to be discussed with HR first.

56. The next day, 8 November 2019, the Head Teacher announced that he was not continuing with the disciplinary investigation but would put the support plan in place, instead. Mr Earnshaw did not say why he had decided to change tack so radically beyond suggesting that it was because an investigation had already taken place but was inconclusive. Mr Earnshaw then proceeded to appoint the Deputy Head, Mr Curtis, to conduct a formal meeting with the claimant about the support plan at the end of the next week, on Friday 15 November 2019.

57. On 10 November 2019, the NEU trade union write to the first respondent's HR department to complain that its representative, the claimant, had been threatened with disciplinary action as well as capability procedures and seeking an explanation for the decisions taken in that regard.

58. Also on 10 November 2019, Mr Curtis emailed Mr Earnshaw, describing the institution of a support plan as "an issue of this importance and magnitude professionally for me and Carmen" and he asked for Mr Earnshaw to attend the meeting. Mr Curtis also set out his concern that the claimant and Ms Elderkin would be "on the attack with a barrage of issues and complaints." Mr Earnshaw's response was brief, amounting to an enquiry about whether anybody was running against the claimant for trade union representative in a forthcoming election. The Tribunal considered this was illustrative of Mr Earnshaw's focus on the claimant as a trade union representative.

59. On 12 November 2019, the claimant asked for the meeting about the support plan to be postponed until the information requested by the union was supplied to her and she had had an opportunity to take advice.

60. In response, on 13 November 2019, in a cursory email to the claimant, Mr Earnshaw declared that the meeting would go ahead regardless and even if the claimant did not attend. On the same day, the first respondent's HR manager emailed Ms Elderkin of the NEU, suggesting that "*The school initially decided a formal investigation would be required to take place in*

line with the School's disciplinary procedure" and that the claimant was "*… then notified from the Head Teacher that the school would not be continuing the investigation … and it was felt that it would be appropriate for all concerns to be put into a support plan …*" and that all concerns would be relayed at the "informal" support meeting scheduled for 15 November 2019. The HR letter ends with the suggestion that "*… a support plan is not intended to be a punitive measure …*".

61. On the morning of 15 November 2019, the claimant informed Mr Earnshaw that her trade union official was unable to attend the support plan meeting which was to take place that afternoon, but that Jill Baker would come with her. Despite his previous intransigence, Mr Earnshaw emailed the claimant to say that he was happy to move the meeting time to accommodate the change of person accompanying the claimant. This is also in contrast to Mr Curtis's email of 13 November 2019 to Mr Earnshaw, wherein he reflected the HR advice starkly – to the effect that the claimant should be told that the meeting will go ahead "at the designated time", stating that it was in the claimant's interests to attend and that her representative was not allowed to dictate when the claimant could attend a meeting in school. Further, Mr Curtis stated that the advice was that if the claimant did not attend or engage with the support plan meeting, it would still start at the prescribed time and that the support plan itself would still go ahead with the claimant working towards the objectives set.

62. In preparation for the support plan meeting, Mr Curtis compiled a document listing the school's evidence of what it said was the claimant's failure to comply with the required teaching standards and its justification for the proposed objectives under the support plan. This document appears in the bundle at pages 491-494 and goes back 2 years, gathering only the negative comments and/or areas for development, from a number of the claimant's book-looks and lesson observations over that 2-year period. There is no attempt to put any of the individual comments into context and no mention of any of the strengths listed in any of the book-looks or lesson observations. Having been taken to many of these documents in the respondent's evidence, the Tribunal considered the recorded strengths to far outweigh the developmental points when the totality of the documents were examined. In the circumstances, the Tribunal found that the evidence compiled, which was to be used against the claimant was selective and deliberately constructed to be critical of her. The Tribunal noted that Mr Earnshaw was involved in over three quarters of the documents referred to. In addition, in the bundle, the Tribunal found there were comparative examples of book looks, where one version was given to the claimant and another version was relied upon by the school, the school's version of which includes further adverse comments apparently not seen by the claimant at the time of the book

look, or at all until these proceedings. The respondents were unable to explain how the additional comments had found their way into the documentation, presumably at a later date. Bundle pages 336 and 334 are an example of a Maths book-look given to the claimant, contrasted with the same dated Maths book-look produced as "evidence" which includes further and different comments not seen by the claimant as well as comments that have been changed. Another example is that the school's "evidence" included a lesson observation dated 15 October 2019, purportedly classed as "inadequate" when that judgment relates to only one out of 30 aspects assessed. The Tribunal considered that selecting only that one aspect changed the overall impression of the observation and was wilfully misleading. In reaching its view on the "evidence against the claimant", the Tribunal also took account of the fact that the independent governors on the appeal panel commented that the vast majority of the evidence relied upon by the school was, in fact, good and that, in their experience, the 'areas for improvement' were no more than what was to be expected for teaching staff in general.

63. On 15 November 2019, the support plan meeting took place at which Mr Curtis alleged there were significant concerns over the claimant's teaching standards and that, as a result, she was to be put on a support plan which had already been drawn up. The Tribunal accepted the evidence of Ms Elderkin to the effect that the support plan attached was threadbare on support for the claimant; it did not outline arrangements for observing good practice elsewhere, nor how the school was going to offer professional development, training, coaching, and counselling by expert teachers.

64. At the meeting, the claimant questioned Mr Curtis, who could not say what the support plan was based on. He suggested the claimant's teaching of RE when that very week, the claimant's book-look feedback was "excellent". The claimant pointed this out, at which Mr Curtis became flustered and said that if the claimant did not feel RE needed to be improved then it would not be included in the support plan. He then said that the support plan was about DT but he could not identify which year group he meant.

65. The support plan, which appears in the bundle at pages 495-497, had already been drawn up and it had already been decided that it was to last for 9 weeks, during which time the claimant had to show improvement, through weekly lesson observations, book looks and 'pupil voice' feedback. All of the assessment methods were to be undertaken by the Head Teacher, Mr Earnshaw, rather than by the school's Head of DT or by Mr Curtis. The support plan also states that if the Head Teacher did not see an improvement, the matter would proceed to capability. The claimant was told the support plan would start the next Monday and the Tribunal

considered, in those circumstances, that it was presented as non-negotiable. Unsurprisingly, the claimant refused to sign the support plan.

66. The support plan document is set out in a grid with red headings and banners which the claimant found upsetting and aggressive. In his evidence, Mr Earnshaw claimed that this was standard practice at the school and that red was “the school’s colour”. However, it transpired that there had never been a previous support plan and he admitted that he had created the template specifically for the claimant. In the circumstances, the Tribunal considered that Mr Earnshaw’s suggestion of standard practice was without foundation.

67. The claimant asked for a week to consider the support plan and take advice on her position. This was apparently agreed, however, that week was subsequently cut because the claimant was required to agree by the next Wednesday, 20 November 2019, which gave the claimant 2 working days. At the meeting, Mr Curtis cited time constraints but was unable to say what he meant nor why it was apparently necessary to hurry.

68. The following day, 16 November 2019, the claimant’s trade union emailed the Head Teacher asking again for the basis for the school’s decision to pursue a support plan and the evidence to justify its implementation and the effective commencement of capability action against the claimant. In that communication, the trade union stated that it considered the support plan to be linked to the position of the claimant as an elected trade union representative at the school – see bundle page 499.

69. The respondents sought to suggest, in evidence, that the support plan was “informal”. In an email to Ms Elderkin, on 19 November 2019, Mr Earnshaw said that “*the claimant is not being subject to professional capability procedures*.” In light of the manner in which the support plan was presented to the claimant and pursued by the school, the Tribunal considered concluded Mr Earnshaw’s denial to be disingenuous and his motives highly questionable.

70. On Monday 18 November 2019, the claimant was signed off work, sick, with work-related stress. She never returned to work for the respondent.

71. On 19 November 2019, Mr Earnshaw replied to the claimant’s trade union suggesting that the basis of the decision was “numerous concerns with the claimant’s teaching” and continuing concerns. He did not substantiate these remarks. He also made a point of stating that “The actions being taken by the school are not threatening or heavy-handed …” The Tribunal disagreed with this assertion.

72. On 2 December 2019, the claimant submitted a grievance which appears in the bundle at pages 517-518, about the Head Teacher's actions towards her and the imposition of the support plan. The claimant wrote that she considered the misuse of capability procedure to be a means of controlling her as the NEU representative.

73. On 4 December 2019, the claimant resubmitted her grievance, with additions, in particular clarifying her points about trade union detriment – see bundle pages 526-528.

74. The following day, 5 December 2019, Mr Earnshaw emailed both HR and the respondents' occupational health service about bringing forward a sickness absence 6 monthly review meeting for the claimant. The Tribunal considered that Mr Earnshaw was pushing occupational health to see the claimant before 10 December 2019 with a view to a meeting during the next week, as he was suggesting 17 December 2019. The apparent urgency was never explained. Mr Earnshaw soon realised that the claimant's sickness absence review meeting had already been scheduled for 10 January 2020 and he attempted to find an earlier/cancellation slot, without success.

75. As it was, occupational health produced its report on 15 January 2020. A Stage 1 absence review meeting of the claimant therefore took place on 23 January 2020 following receipt of the occupational health report. The meeting comprised a discussion of the claimant's absence record going back 5 years even though that had not been the remit of the original sickness meeting in May 2019, thereby widening the remit of the review beyond the original remit and without notice to the claimant.

76. Shortly after the sickness review meeting, the respondent decided that the attendance procedure would be put on hold whilst the claimant's grievance was heard instead.

77. On 31 January 2020, a Stage 1 grievance meeting took place, conducted by Paul Scott, vice chair of the governing body, supported by Rachel Gillies, HR consultant. The Tribunal was told that the meeting lasted around 2 hours, during which time the claimant told the meeting that she was being bullied by the Head Teacher because of her trade union role. The claimant's NEU representative, Ms Elderkin, told the meeting that the school had not followed correct procedures in respect of the support plan and had given no opportunity for it to be negotiated or challenged. No minutes of the meeting have been retained by the respondents - the Tribunal was surprised to be told that the HR department had destroyed the minutes of this important meeting.

78. On 24 February 2020, Mr Scott wrote to the claimant with the stage 1 grievance outcome, turning down her grievance. The outcome letter appears in the bundle at pages 572-574. In his letter, Mr Scott wrote that he understood that all of the points on the support plan had been discussed with the claimant. The Tribunal considered this to be wholly inaccurate, especially in relation to Mr Earnshaw's book-looks compiled on 7 November 2019. Mr Scott wrote that he had spoken to Mr Earnshaw, and also stated in the outcome letter that he had "seen the evidence". However, under cross-examination, Mr Scott admitted that he had not in fact looked at any books or documents himself and had simply taken the Head Teacher's word on the matter. In those circumstance, the Tribunal found that Mr Scott's letter largely reflected what Mr Earnshaw had told Mr Scott and was not independent. The letter also records the consensus of heads of subjects at the school to the effect that all teachers' book looks record improvements to be made and that points made in the claimant's book-looks had also been made to other teachers. Nevertheless, Mr Scott somehow decided that he was unable to ask Mr Earnshaw to remove the support plan because "this is his management decision to put in place". In those circumstances, the Tribunal considered the grievance process to have been pointless. The possibility of mediation was also raised but not pursued because the claimant did not feel comfortable about it.

79. On 27 February 2020, having been informed that the grievance outcome had been delivered, and within an hour of the email and letter having been sent to the claimant, Mr Earnshaw had emailed HR to ask about holding another absence review meeting with the claimant. The Tribunal found no need for such haste.

80. On 28 February 2020, the claimant appealed the grievance outcome to Stage 2 of the grievance procedure. Her appeal statement appears in the bundle at pages 579-581. The claimant challenged the support plan being imposed upon her without prior discussion and linked it to the fact of her trade union activities, pointing to a number of coincidences arising at the time of Mr Earnshaw's actions towards her, and complaining that she had still not seen the 'evidence' referred to and that the discriminatory aspects of her grievance had not been addressed. The claimant also pointed out that the grievance panel had acknowledged that all teachers had been and are given points for improvement within book looks but that the panel had not addressed why she had been singled out for a support programme.

81. On 3 and 4 March 2020, the second respondent school was inspected by Ofsted. The outcome of the inspection was that the school lost its previous "good" rating and was down-graded to "requires improvement". In the report, the 2 areas of particular concern were: (1) the quality of education; and (2) leadership and management.

82. Shortly after the Ofsted report was delivered, the Head Teacher threatened Ms Baker, the school's English lead, with a support plan because the teaching of reading had been criticised by Ofsted. This threat was, however, put on hold due to the COVID lockdown which commenced on 23 March 2020, and was subsequently withdrawn without explanation.

83. On 18 March 2020, a Stage 2 grievance meeting was conducted by Anne Kimber, the chair of governors. Catherine Allen from HR attended to support Ms Kimber. No minutes of this important meeting have been retained by the respondents and the Tribunal was concerned to be told that it was the policy of the respondents' HR personnel to destroy meeting minutes once an outcome letter has been despatched.

84. On 2 April 2020, the claimant was examined by the respondents' occupational health provider and a report was produced recording that the claimant was awaiting a conclusion to the investigation process, which was affecting her health negatively.

85. On 9 April 2020, Ms Kimber sent the claimant a grievance outcome letter confirming that her Stage 2 grievance was unsuccessful. The letter appears in the bundle at pages 599 – 604. In the letter, Ms Kimber told the claimant that she had undertaken a "thorough investigation", without saying what that involved, and that she was satisfied by the evidence, without saying to what evidence she referred and suggesting that she had "… considered the evidence where necessary". She then commented that the imposition of the support plan was "entirely acceptable. should the Head Teacher feel it is necessary".

86. The claimant appealed the Stage 2 grievance outcome to Stage 3 of the grievance process. The claimant's Stage 3 grievance appeal was conducted by way of a review by a panel of 3 Governors on 19 May 2020, via Zoom. On 22 May 2020, a Stage 3 grievance outcome letter was sent to the claimant, again rejecting her grievance for similar reasons to those cited by Mr Scott and Ms Kimber. The outcome letter appears in the bundle at pages 610-612. From the evidence before it, the Tribunal found that the Governors conducting each of the grievance hearings had been presented only with Mr Curtis's selective list of "evidence", thereby being given only the negative comments and/or areas for development in relation to the claimant – see paragraph 62 above - and had been briefed on a particular view of the claimant which they adopted and repeated, but did not substantiate. The "evidence" referred to in respect of the allegation of trade union discrimination, in the Stage 2 grievance outcome letter, at page 611 of the bundle, named 3 members of staff, none of whom were called to give evidence or to be challenged on their apparent assertions either in the grievance process or to the Tribunal.

87. Following the conclusion of the grievance process, the respondents resumed the management of absence process, sending the claimant again to occupational health, which produced a further report on 23 June 2020.

88. On 9 July 2020, Mr Earnshaw conducted a further Stage 1 absence review meeting with the claimant. The record of the meeting appears in the letter sent by Mr Earnshaw to the claimant on 9 July 2020 (bundle page 630 – 631) wherein he describes the meeting as a "notice to improve" meeting even though he states its purpose as "to ensure we were supporting you as much as possible to help you back in to school". In the letter, under 'work related factors', Mr Earnshaw describes in clear terms that he is not going to cease the support plan, pointing out to the claimant that "the formal grievance procedure [has] taken place, that it had upheld the school's position and that I had acted professionally and according to policy. The school would not therefore be changing its stance."

89. In the course of the absence management process, the claimant's trade union offered mediation in consultation with the first respondent's HR team but it was Mr Earnshaw who rejected this out of hand.

90. On 9 September 2020, a Stage 2 capability meeting was held. The outcome letter repeats much of Mr Earnshaw's previous letter word for word.

91. On 7 October 2020, a Stage 3 capability meeting was held and an outcome letter was sent on the same day. It was apparent only at Stage 3 of this process that the claimant had not in fact received some of Mr Earnshaw's previous correspondence and the outcome letters which had been sent by post to an old address of the claimant's rather than by email. Mr Earnshaw's response, when the error was put to him, was to show little concern about an important error and to suggest that the claimant should have realised that letters had not reached her and should have asked for copies of the letters.

92. On 8 December 2020, following a further occupational health report, the respondents held a Stage 4 attendance management hearing, chaired by Paul Scott, on Zoom. In preparation for the hearing, Mr Earnshaw compiled a lengthy report into the history of the claimant's absence – see bundle pages 681-685. The Tribunal considered that this report contains a number of inaccuracies, for example: the number of days of absence in question varies between this report and other records in the bundle and includes 2 periods of historic/planned absence for recovery from surgical procedures; it includes a statement that concerns about the claimant's

teaching performance had been shared with her throughout the previous year (2018-2019) on a number of occasions [*in fact, as the Tribunal has found, it was only on 4 November 2019 that any such concern was put to the claimant*] – see also paragraphs 48 and 49 above; that a number of staff had raised 'teaching concerns' in the 18 months prior to the claimant's absence [*see also paragraph 62 above wherein the matters listed were 'areas for development' taken from observation records rather than 'concerns' raised*]; and that all reasonable adjustments had been offered to the claimant. The Tribunal considered Mr Earnshaw's report to be unbalanced, inaccurate and self-serving, designed to ensure the claimant's dismissal. There was a distinct focus on criticism of the claimant's professional capabilities rather than on her sickness absence which had been the purpose of the meeting.

93. On 10 December 2020, Mr Scott sent the claimant a letter of dismissal which appears in the bundle at pages 723-724. The letter states that "… we are satisfied that your manager has undertaken reasonable steps to try and help you to improve and sustain your attendance at work. Therefore, it was explained to you that regrettably, it was necessary in all the circumstances to terminate your employment. The reason for your dismissal is because of persistent and/or excessive absence for sickness which in law is a reason related to capability or alternatively is in law some other substantial reason." The Tribunal noted that 4 out of the 6 points, which were said to be "key facts" taken into consideration, related to the support plan which the letter said, "… cannot be withdrawn" and that in the event of a mediation for a return to work, "the support plan would still remain in place." The letter provided for termination of the claimant's employment on notice, to the end of the spring term, 30 April 2021, pursuant to the Burgundy Book terms and conditions of employment for teachers.

94. On 14 December 2020, the claimant appealed her dismissal. Her appeal letter appears in the bundle at page 727. The appeal was on the basis that the sanction of dismissal was too severe and that all avenues had not been explored.

95. On 16 December 2020, Ms Baker was called in by the Head Teacher and was instructed not to give the claimant a reference for any future employment. The Tribunal considered this to amount to a veiled threat because Mr Earnshaw told Ms Baker that "if anything goes wrong in future, you'll be responsible as you gave her a reference."

96. When arranging the claimant's appeal, the respondents proposed that the appeal hearing should be conducted by a panel of a further 3 Governors from the school. On 14 January 2021, the claimant's trade union wrote to the respondents' HR department to object to the proposed appeal panel

on the basis that all of the proposed individuals had previously been involved in the claimant's case and were not truly independent. Eventually, the first respondent arranged for 2 Governors from other schools to be invited to be on the appeal panel under its "Governor swap" policy for such eventualities. However, Mr Earnshaw intervened to insist that the panel retained Anne Kimber, the chair of the school's governing body, as chair of the appeal. The Tribunal was told that Ms Kimber's daughter, Sarah Toole, was the Assistant Head Teacher at the school and heard evidence that Ms Toole was involved in the decision to impose the support plan in the first place. When questioned about this at the hearing, Ms Kimber did not seem to appreciate that there might be a perception of bias or a potential conflict of interest arising. At the material time, Ms Kimber did not disclose this relationship to her colleagues on the panel nor to the appeal hearing as the Tribunal considered she should have done.

97. Indeed, the claimant's trade union raised an objection but was told by the first respondent's HR team that the Head Teacher was not prepared to budge on the matter of Ms Kimber's involvement.

98. On 12 March 2021, the claimant's appeal hearing took place. Despite that the claimant was appealing against Mr Scott's decision to dismiss her, and despite that Mr Scott attended the meeting, Mr Earnshaw took it upon himself to present the school's case and make submissions to the appeal panel. The Tribunal noted that the independent governors on the appeal panel commented that the vast majority of the evidence relied upon by the school was, in fact, good and that, in their experience, the 'areas for improvement' were no more than what was to be expected for teaching staff in general.

99. Nevertheless, on 16 March 2021, the claimant's appeal was turned down. The letter appears in the bundle at page 801. Once again, despite the claimant having been dismissed purportedly for absence, the appeal outcome letter focussed on the support plan and used it in effect against the claimant. The letter stated that "… whilst you informed us that you were welcoming of the opportunity of mediation, you were only willing to take part in this if the headteacher withdrew the support plan" and "The panel also took into consideration your passion for teaching and your desire to return to work. However, there was no clarity about when this could be achieved if the support plan remained in place."

100. Following her dismissal, the claimant applied to a number of teaching agencies for supply work. On 26 April 2021, Tradewind Recruitment rejected the claimant's application for work, saying that there was a problem with her reference, from the school. In the bundle at page 803 is a copy of the reference which Mr Earnshaw had supplied. In a list of 12 aspects of work performance, 9 were rated as 'good' or 'satisfactory' yet

Mr Earnshaw wrote that he considered the claimant to be “Not at all suitable” for teaching without substantiating this conclusion. In response to an enquiry about the claimant’s suitability to engage in work with children and young people, he answered in the negative, again without providing details despite a specific request for such.

101. On 27 April 2021, Vision for Education contacted the claimant to tell her that her application for work could not be progressed because the Head Teacher’s reference indicated there may be a “safeguarding issue”. This reference was never produced by the school and Mr Earnshaw was unable to shed any light on how such a conclusion may have been arrived at.

102. The claimant’s last official day of employment was the end of the spring term, on 30 April 2021.

103. On 5 May 2021, the claimant started supply work elsewhere in Salford, at Willow Tree primary school. She was told that the supply booking was to last until the end of the summer term. However, the following day, 6 May 2021, the claimant noticed that Willow Tree’s Head Teacher appeared to be deliberately ignoring her. The claimant was later told that Willow Tree primary school had decided not to continue the claimant’s booking, saying that she had apparently not got enough EYFS experience. The claimant understood that the deputy head of Willow Tree had telephoned Mr Earnshaw to enquire about the claimant and that, shortly after their conversation, the claimant was released from her engagement at Willow Tree.

104. On 11 May 2021, the claimant secured an alternative booking, teaching a year 3 class at Flixton primary school, in Trafford. Thereafter, the Tribunal found that the claimant began to receive feedback from schools via several agencies and all the feedback thereafter was positive and in complete contrast to that from the school and Willow Tree primary school.

105. On 3 June 2021, the claimant commenced early conciliation. An early conciliation certificate was issued on 4 June 2021.

106. On 28 June 2021, the claimant presented her claim to the Employment Tribunal.

The applicable law

107. A concise statement of the applicable law is as follows.

Unfair dismissal

108. Section 98 ERA sets out a two-stage test to determine whether an employee has been unfairly dismissed. First, the employer must show the reason for dismissal or the principal reason and that reason must be a potentially fair reason for dismissal. The respondent contends that the reason for dismissal was the claimant's capability. Capability is a potentially fair reason for dismissal under section 98 (2) (a) ERA.

109. Under section 152(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"), it is automatically unfair to dismiss an employee because of their trade union membership or activities. Such a dismissal is not subject to the reasonableness test.

110. Even if there is a potentially fair reason for dismissal, a Tribunal can still conclude that the employer had an ulterior motive for dismissal: ASLEF v Brady [2006] IRLR 576. In Jhuti v Royal Mail [2019] UKSC 55, where a manager decided to engineer the dismissal of an employee, and faked an admissible reason which fooled the dismissing officer, the 'principal reason' for dismissal was held to be the hidden reason operating in the mind of the manager, instead of the admissible reason operating in the mind of the decision-maker.

111. If the employer shows a potentially fair reason in law, the Tribunal must then consider the test under section 98 (4) ERA, namely whether, in all the circumstances, including the size and administrative resources of the respondent's undertaking, the respondent acted reasonably or unreasonably in treating that reason, i.e. capability, as a sufficient reason for dismissing the claimant and that the question of whether the dismissal is fair or unfair shall be determined in accordance with equity and the substantial merits of the case. In Jhuti, it was held that "*the question of whether the knowledge...of a person other than the person who actually decided to dismiss, could be relevant to the fairness of a dismissal, could arise both in relation to the Tribunal's consideration of the reason for dismissal under section 98(1) and/or its consideration of the section 98(4) question...[In] a case where someone responsible for the conduct of a pre-investigation did not share a material fact with the decision-maker, that could be regarded as relevant to the Tribunal's adjudication of the section 98(4) question.*"

112. In considering the reasonableness of a dismissal for capability concerning a period of prolonged absence, the Tribunal must have regard to the question of whether, in all the circumstances, the employer could be expected to wait any longer and, if so, how much longer taking account of the employer's efforts to ascertain the true medical position and consultation with the employee before making a decision.

113. The issue of the reasonableness of the dismissal must be looked at in terms of the set of facts known to the employer at the time of the claimant's dismissal, although the dismissal itself can include the appeal; so, matters which come to light during the appeal process can also be taken into account: West Midlands Co-operative Society Ltd -v- Tipton [1986] IRLR 112.

114. The Tribunal must also consider whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer in the circumstances of the case: Iceland frozen Foods Ltd -v- Jones [1982] IRLR 439. The range of reasonable responses' test applies both to the decision to dismiss and to the procedure by which that decision is reached: Sainsbury's Supermarkets Ltd –v- Hitt [2003] IRLR 23.

115. The ACAS Code of Practice on Disciplinary and Grievance Procedures contains guidance on the procedures to be undertaken in relation to a dismissal capability. Although compliance with the ACAS Code is not a statutory requirement, a failure to follow the Code should be taken into account by a Tribunal when determining the reasonableness of a dismissal.

Detriment for trade union activities

116. Section 146 of TULRCA provides:

(1) A worker has the right not to be subjected to any detriment as an individual by any act, or deliberate failure to act, by his employer if the act or deliberate failure takes place for the sole or main purpose of –

(a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,

(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so,

(ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or

(c) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.

(2) In subsection (1) "an appropriate time" means –

(a) a time outside the worker's working hours, or

(b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union or (as the case may be) make use of trade union services;

and for this purpose "working hours", in relation to a worker, means any time when, in accordance with his contract of employment (or other contract personally to do work or perform services), he is required to be at work.

117. Section 148(1) TULRCA provides that it shall be for the employer to show what was the 'sole or main purpose' for which it acted or failed to act. In University College London v Brown [2021] IRLR 200 the EAT held that the question of the employer's sole or main purpose is a subjective one, to be judged by the Tribunal enquiring into what was in the mind of the person or persons within the employer who committed the act or failure to act complained of. In contrast, the question of whether an employee qualifies for protection under subsections (a) to (c) of section 146 TULRCA is an objective one.

118. The term 'detriment' replaced 'Action short of dismissal' in TULRCA in 1999. The term "detriment" is to be given the same meaning as it has in the context of discrimination law, so its scope is wider than that which applied hitherto. In Ministry of Defence v Jeremiah 1980 ICR 13 the Court of Appeal took a wide view of "detriment" in discrimination legislation. Brandon LJ said it meant simply "putting under a disadvantage", while Brightman LJ stated that a detriment "exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment". Brightman LJ's words, and the caveat that detriment should be assessed from the viewpoint of the worker, were adopted by the House of Lords in Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337.

119. Subsequent cases have established that detriment covers such things as a refusal or reluctance to investigate grievances (see Bone v North Essex Partnership NHS Foundation Trust 2016 IRLR 295, CA), as well as general unfavourable treatment, and that the worker must have at least some reasonable sense of grievance.

120. As to the burden of proof in a section 146 claim, in Serco Ltd v Dahou 2017 IRLR 81 the Court of Appeal accepted that the approach to the

burden of proof in section 146 claims, is akin to that in section 152 claims. Where a claimant has established a prima facie case, in that there are issues which require explanation, it is for the respondent to prove its reason, albeit this does not prevent the Tribunal from finding the reason is something other than contended for by either party.

Disability discrimination

121. The complaint of disability discrimination was brought under the Equality Act 2010 ("EqA"). Disability is a relevant protected characteristic as set out in section 6 and schedule 1 EqA.

122. Section 39(2) EqA prohibits discrimination by an employer against an employee by subjecting her to a detriment. By section 109(1) EqA an employer is liable for the actions of its employees in the course of employment.

123. The EqA provides for a shifting burden of proof. Section 136(2) and (3) so far as is material provides as follows:

(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.

124. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the EqA. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

125. In *Hewage v Grampian Health Board [2012] IRLR 870* the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in *Igen Limited v Wong [2005] ICR 931* and was supplemented in *Madarassy v Nomura International plc [2007] ICR 867*. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Discrimination arising from disability

126. The prohibition of discrimination arising from disability is found in section 15 EqA. Section 15(1) provides:

    (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.

127. The proper approach to causation under section 15 was explained by the Employment Appeal Tribunal in paragraph 31 of <u>Pnaiser v NHS England and Coventry City Council EAT /0137/15</u> as follows:

    (a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

    (b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

    (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant …...

    (d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links …[and] may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) *….. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.*

(f) *This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.*

(g) *…..*

(h) *Moreover, the statutory language of section 15(2) makes clear …. that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so.*

128. In City of York Council v Grosset [2018] WLR(D) 296 the Court of Appeal confirmed the point made in paragraph (h) in the above extract from Pnaiser: there is no requirement in section 15(1)(a) that the alleged discriminator be aware that the "something" arises in consequence of the disability. That is an objective test.

129. Section 15(1)(b) EqA specifically provides that, in addressing a complaint of discrimination because of something arising in consequence of disability, an employer may rely upon a defence of justification, which is a question of fact. The employer must show the aim of any alleged discrimination treatment and that its aim was objectively justifiable due for example to a business need or on economic grounds. The greater the discriminatory effect, the greater the objective need an employer must show it has and that the means chosen are no more than is necessary to achieve the aim contended for.

Reasonable adjustments

130. The duty to make reasonable adjustments, in section 20 EqA, arises where:

(a) the employer applies a provision criterion or practice which places a disabled employee at a substantial disadvantage in comparison with persons who are not disabled; and

(b) the employer knows or could reasonably be expected to know of the disabled person's disability and that it has the effect in question.

131. As to whether a "provision, criterion or practice" ("PCP") can be identified, the Equality and Human Rights Commission Code of Practice in Employment ("the EHRC Code") paragraph 6.10 says the phrase is not defined by EqA but "*should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one-off decisions and actions*".

132. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, section 212(1) EqA defines substantial as being "*more than minor or trivial*". In the case of Griffiths v DWP [2015] EWCA Civ 1265 it was held that if a PCP bites harder on the disabled employee than it does on the able-bodied employee, then the substantial disadvantage test is met for the purposes of a reasonable adjustments claim.

133. The duty is to take such steps as it is reasonable, in all the circumstances, to take to avoid the provision criterion or practice having that effect. The duty is considered in the EHRC Code. A list of factors which might be taken into account appears at paragraph 6.28, but (as paragraph 6.29 makes clear) ultimately the test of reasonableness of any step is an objective one depending on the circumstances of the case. An adjustment cannot be a reasonable adjustment unless it alleviates the substantial disadvantage resulting from the PCP – there must be the prospect of the adjustment making a difference.

134. Under section 136 EqA, it is for an employer to show that it was not reasonable for them to implement a potential reasonable adjustment.

Time limits –trade union detriment

135. Section 147 TULRCA provides that a complaint about trade union detriment must be brought:

    (a) before the end of the period of three months beginning with the date of the act or failure to which the complaint relates or, where that act or failure is part of a series of similar acts or failures (or both) the last of them, or

    (b) where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as it considers reasonable.

136. Two issues may therefore arise: whether it was not reasonably practicable for the claimant to present the complaint within time; and, if not, whether it was presented within such further period as is reasonable.

137. Something is "reasonably practicable" if it is "reasonably feasible" (see Palmer v Southend-on-Sea Borough Council [1984] ICR 372 *Court of Appeal*). Health issues can make it not reasonably practicable to present a claim (see Schultz v Esso Petroleum Co Ltd [1999] ICR 1202 Court of Appeal). In University Hospitals Bristol NHS Foundation Trust v Williams UKEAT/0291/12 the EAT upheld a Tribunal decision that a late claim was within section 111(2) even though the medical evidence "did not entirely support the Judge's findings about the Claimant's mental health" (EAT judgment paragraph 12) and even though the claimant had been able to move home and find a new school for her child during the period when the Tribunal found it had not been reasonably practicable to have presented a claim.

138. In Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293 the Court of Appeal reviewed some of the authorities and confirmed in paragraph 20 that a liberal approach in favour of the employee was still appropriate. What is reasonably practicable and what further period might be reasonable are ultimately questions of fact for the Tribunal.

Time limits – discrimination complaints

139. The time limit for presenting complaints of unlawful discrimination is found in section 123 EqA, which provides that such complaints may not be brought after the end of: -

(a) the period of three months starting with the date of the act to which the complaint relates, or

(b) such other period as the Employment Tribunal thinks just and equitable.

140. Conduct extending over a period of time is to be treated as done at the end of that period and a failure to do something is to be treated as occurring when the person in question decided on it, or does an act inconsistent with doing it, or on the expiry of the period in which that person might reasonably have been expected to do it. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question.

141. In British Coal Corporation –v- Keeble [1997] IRLR 336, the EAT confirmed that in considering the just and equitable extension, a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. As the matter was put in Keeble,

"… It requires the court to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances and in particular, inter alia, to –

(a) the length of and reasons for the delay;
(b) the extent to which the cogency of the evidence is likely to be affected by the delay;
(c) the extent to which the party sued had cooperated with any request for information;
(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;
(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."

142. In Robertson –v- Bexley Community Centre (T/A Leisure Link) [2003] IRLR 434 the Court of Appeal considered the application of the "just and equitable" extension and the extent of the discretion and concluded that the Employment Tribunal has a "wide ambit". Subsequently in Chief Constable of Lincolnshire –v- Caston [2010] IRLR 327 the Court of Appeal, in confirming the Robertson approach, held that there is no general principle which determines how liberally or sparingly the exercise of discretion under this provision should be applied. The Tribunal is however required to consider all the circumstances of the case when considering whether to extend time: Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.

143. In the course of submissions, the Tribunal was referred to a number of cases by the parties' Counsel, as follows:

Abernethy v Mott, Hay and Anderson [1974] ICR 323
Spencer v Paragon Wallpapers Ltd [1977] ICR 301
W Devis and Sons Ltd v Atkins [1977] ICR 662
Ministry of Defence v Jeremiah [1980] ICR 13
Gilham v Kent County Council (no. 2) [1985] ICR 233
Barclays Bank plc v Kapur [1989] IRLR 387
Clarke v Hampshire Electro-Plating Co Ltd [1991] IRLR 490
Byrne v BOC Limited [1992] IRLR 505
Boys and Girls Welfare Society v MacDonald [1997] ICR 693
Ridout v TC Group [1998] IRLR 628
Bahl v The Law Society and others [2004] IRLR 799
Copal Castings Ltd v Hinton [2004] EAT/0903/04
Smith v Churchills Stairlifts plc [2006] ICR 524
Taylor v OCS Group Ltd [2006] ICR 1602
Project Management Institute v Latif [2007] IRLR 579
Romec Ltd v Rudham [2007] EAT/0069/07
Environment Agency v Rowan [2008] ICR 218

Secretary of State for Work and Pensions (Jobcentre Plus) and others v Wilson [2009] EAT/0289/09
Tameside Hospital NHS Foundation Trust v Mylott [2009] EAT/0352/09
Gibbons v Dartford and Gravesend NHS Trust, ET case no. 1101264/2009
Secretary of State for Work and Pensions v Alam [2010] ICR 665
Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327
Wilcox v Birmingham CAB Services Ltd [2010] EAT/0293/10
Leeds Teaching Hospital NHS Trust v Foster [2010] EAT/0552/10
Royal Bank of Scotland v Ashton [2011] ICR 632
Chief Constable of West Midlands Police v Gardner [2011] EAT/0174/11
Woodcock v Cumbria Primary Care Trust [2012] ICR 1126 CA
North Lancashire Teaching Primary Care NHS Trust v Howarth [2013] EAT/0294/13
Miller v Ministry of Justice [2015] EAT/0003/15
T-systems Ltd v Lewis [2015] EAT/0042/15
Risby v London Borough of Waltham Forest [2015] EAT/0318/15
Bone v North Essex Partnership NHS Foundation Trust [2016] IRLR 295
Secretary of State for Justice v Dunn [2016] EAT/0234/16
Trustees of Swansea University Pension & Assurance Scheme v Williams [2017] EWCA Civ 1008
Bowden v Ministry of Justice [2017] EAT/0018/17
County Durham and Darlington NHS Foundation Trust v Jackson [2017] EAT/0068/17
Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194
Sheikholeslami v University of Edinburgh [2018] IRLR 11090
Efobi v Royal Mail [2019] IRLR 35
Department for Work and Pensions v Boyers [2019] EAT/0282/19
Kane v Barclays Bank UK plc ET case no. 1203210/2019
Gray v University of Portsmouth [2020] EAT/0242/20

The Tribunal took these cases as guidance but not in substitution for the relevant statutory provisions.

Submissions

144. Counsel for the claimant made a number of detailed submissions both in writing and orally, which the Tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:- placing the claimant on the absence management pathway in May 2019 was reasonably seen by the claimant as a detriment because it put her at risk of dismissal; the support plan was reasonably seen as a detriment because if she did not meet the targets in the allotted 9 weeks, she would be subject to formal capability procedures; the support plan was not "supportive"; the rejection of the claimant's grievance was a rejection of

the claimant's legitimate concerns with the support plan and with Mr Earnshaw's approach; the respondents' dogmatic approach to the support plan was a detriment, including to the claimant's health; and that the respondent's main purpose was to prevent or deter the claimant from her legitimate trade union activities. In addition, it was submitted that the procedures adopted were not fair, including in particular the appeal and the role of Ms Kimber; that the respondent did not genuinely believe that the claimant was no longer capable of performing her duties; and the respondent failed and/or refused to consider other methods of support, or any support for the claimant.

145. In respect of the complaint of disability discrimination, it was submitted that the respondent plainly had knowledge that the disability was liable to disadvantage the claimant substantially in that she was more likely to have time off work, and that the imposition of a support plan was likely to have an adverse effect on her mental health; nevertheless the respondents refused to countenance a number of reasonable adjustments or lesser measures which would have facilitated the claimant's return to work. In addition, it was submitted that the respondent treated the claimant unfavourably because of her disability related sickness absence and inability to fulfil her contractual duties; and the respondent dismissed the claimant because of those matters.

146. Counsel for the respondent produced a skeleton argument and also made a number of detailed submissions orally which the Tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:- the claimant developed an unreasonable response to any of Mr Earnshaw's actions; the support plan was reasonable because the claimant's work as a teacher required improvement – it had nothing to do with her trade union activities; the claimant had reasonably been placed on absence management and became unwilling to return to work unless her grievance was resolved in her favour; her grievance went through 3 stages of the process and was rejected at all 3 stages, by different people; at the date of her dismissal, the claimant had been absent for over a year with no prospect of returning to work; the claimant's absence had imposed a financial burden on the school; the claimant had been under-performing and had rejected offers of support; she had unreasonably refused to engage in processes that were designed to support her and blew matters out of all proportion, presenting the respondents with no other option; and that, in all the circumstances, dismissal was the only fair outcome;

Conclusions (including where appropriate any additional findings of fact)

147. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

Unfair dismissal

148. The Tribunal first considered what was the respondents' reason for dismissing the claimant. Mr Scott's reason, given in his letter of 10 December 2020, was capability, namely the claimant's absence. The Tribunal accepted that, at the material time, Mr Scott's view was based on the case presented to him; that the claimant was merely off work sick with no apparent prospect of a return to work. However, the Tribunal considered that the position was not so simple. The Tribunal found that absence was not the true reason for the claimant's dismissal. On the basis of the Tribunal's findings of fact as to the manner and conduct of the procedures to which the claimant was subjected over several months, the Tribunal found that Mr Scott was the "deceived decision maker" in the Jhuti sense, because he was presented with what has been shown by the evidence in this case to be limited and selective evidence, wholly influenced and steered by the Head Teacher, Mr Earnshaw, with key matters of importance, and context, having been withheld from Mr Scott, who was also misled at the disciplinary hearing on a number of key matters. The Tribunal considered it significant that, in the dismissal letter, which Mr Scott admitted he had written with assistance, 4 out of the 6 bullet points said to be "key facts" in the decision were about the support plan and the fact that it "could not be withdrawn". In those circumstances, the Tribunal considered that there was a strong case for attributing to this employer both the motivation and knowledge of Mr Earnshaw, acting behind the scenes, setting up the claimant to fail.

149. Occupational Health had repeatedly reported that the claimant was off work due to the imposition of the support plan. The Tribunal considered it was unreasonable for the school to have put the claimant on a support plan both in terms of the substance of the plan and also the procedures undertaken to impose it. There was no fair evidence to justify a support plan which the Tribunal considered was contrived at the behest of the Head Teacher and with his considerable direction and involvement in selecting the "evidence" used. Mr Curtis expressed misgivings and the independent governors at the appeal highlighted the weakness of the evidence used against the claimant. Indeed, in his report to the absence management appeal hearing, in the bundle at page 765, the school recognised that the support plan was "consistently the reason stated fro [the claimant]'s continuing absence from work".and Mr Earnshaw agreed in evidence that, had the support plan been removed it is likely the claimant would have returned to work and not been dismissed.

150. Mr Earnshaw's intransigence over the support plan led to an impasse. His actions, largely unexplained under cross-examination, were tainted by a personal animosity towards the claimant which the Tribunal considered to

have arisen because the claimant had challenged him in her capacity as the trade union representative of the staff. It had been right for the claimant to do so on behalf of concerned trade union members at the school, as Mr Earnshaw sought to adopt a dictatorial attitude and ride roughshod over collectively negotiated and long-standing policies and procedures. He did not like the fact that the recognised trade union, the NEU, was preventing him from exercising free reign and that the union required him to negotiate with staff and follow protocol. In response to challenges, Mr Earnshaw adopted an approach of threatening the claimant with unsubstantiated allegations of misconduct or performance, with disciplinary action or a support plan in a manner which he later repeated with other individual staff connected to the claimant, such as Ms Baker, and which underlined his inexperience in dealing with people. The Tribunal considered that the timing of such issues being raised was indicative of the negative reaction which Mr Earnshaw had to the claimant's trade union duties and her representation of other staff.

151. Taking the totality of the circumstances leading to the claimant's dismissal, the Tribunal considered that Mr Earnshaw's actions and apparent need to control the processes of grievance and dismissal were motivated by the fact that he wanted rid of the claimant. Further, having secured her dismissal, he continued to pursue the claimant's demise by supplying damaging and unsubstantiated references which had the potential to prevent her from working elsewhere or at all.

152. In light of all the above, the Tribunal considered the claimant's dismissal to be automatically unfair because the principle reason was the claimant's trade union activities and, as such, the respondents have not shown a potentially fair reason in law. In addition, and even if the respondents had shown a potentially fair reason, the Tribunal considered that the procedures followed were not fair particularly in light of the fact that Mr Scott admitted that he took into account matters alleged to be misconduct which were unproven and adopted the Head Teacher's view, without question, that the support plan was a requirement. In addition, Ms Kimber's role in the appeal was highly unusual given that it was recognised that somebody from outside of the school should hear the appeal. The school's insistence on her as the chair of the appeal was never explained and the Tribunal noted her conduct in having chaired the grievance appeal was further reason to question her impartiality, particularly as she referred to the grievance in the dismissal appeal meeting.

Trade union detriment

153. Dealing first with the detriments contended for, the Tribunal considered that the claimant reasonably saw each of the 3 matters as subjecting her

to a detriment. In respect of (D1) the respondents did place the claimant on the ill health/capability/managing attendance process on 24 May 2019. One potential outcome of such was dismissal and so the process can be said to be a detriment.

154. The significance of the support plan (D2) was recognised by the Deputy Head Teacher, Mr Curtis. He conducted the meeting on 15 November 2019, when the claimant was informed of the support plan. He described it as “an issue of such importance and magnitude professionally for [the claimant]” and he confirmed that competency proceedings could take place if the plan did not succeed. The Tribunal considered that the support plan was not in any sense “supportive”. The Tribunal accepted the evidence of Ms Elderkin, a long-standing and experienced teacher, who described it as heavy on scrutiny and accountability, with no planned training or mentoring. In addition, the claimant’s success was to be judged by Mr Earnshaw, despite the difficulties arising from his relationship with the claimant due to her trade union role at the school. All the evidence showed that the support plan, the manner and timing of its introduction and Mr Earnshaw’s slavish and unyielding commitment to it was a detriment which caused the claimant considerable stress and anxiety, contributing to the exacerbation of her disability and ill-health.

155. The respondents, through Mr Scott, rejected the claimant’s grievance on 19 May 2020 (D3) and in so doing, Mr Scott declared that the support plan could not be removed because it was the Head Teacher’s decision. The Tribunal found this to be nonsensical. By implication, the Governing Body of the school were effectively saying that they could not do anything and so there could be no outcome to such a grievance except for things to stay as they were. The Tribunal noted the ACAS Code of Practice advises that a grievance should be dealt with by a person or panel with higher authority to the subject of the complaint. The governors are ordinarily above the Head Teacher, he should be accountable to them and it is their role to manage him. However, Mr Scott’s statement was tantamount to saying that a grievance about Mr Earnshaw was a waste of time because the governors were not going to address any issue raised about his conduct and that the Head Teacher is not to be questioned.

156. The Tribunal then considered the respondent’s main purpose in carrying out the detrimental treatment. Having regard to the Tribunal’s findings of fact and its conclusions under ‘Unfair dismissal’, the Tribunal has found that it was Mr Earnshaw’s objective to remove the claimant, either by encouraging her to leave or embarking upon, and steering a process to that end. A misconduct allegation was raised and, as the respondents candidly submitted, when disciplinary action was looked into, it was soon dropped but then the support plan was pursued “instead”. The Tribunal questioned the use of the word “instead” in this context and were told that

this meant "as an alternative to a disciplinary". Hence the Tribunal had no hesitation in concluding that the implementation of the support plan was punitive in this case and was seen by the respondents as an alternative way to deal with issues with the claimant, albeit that the respondents provided no justification for such an approach. This antipathy towards the claimant was also demonstrated when the claimant put in her grievance and Mr Earnshaw moved with extreme hast to seek to hurry up the sickness review meetings – see for example paragraphs 74 and 79 above. The rejection of the claimant's grievance was a rejection of her concerns with the support plan and with Mr Earnshaw's approach. This also meant that the school was unwilling to change that approach and further, it insisted on continuing with the support plan regardless.

157. In light of the above, the Tribunal concluded that the claimant had suffered detriment because of her trade union duties. The respondents' main purpose in carrying out such treatment was to prevent or deter the claimant from taking part in the activities of an independent trade union at an appropriate time and also to penalise her for so doing. This is further indicated by Mr Earnshaw's conduct across his dealings with the claimant. For example, on 24 September 2018, he gave the claimant an informal warning about her behaviour when conducting trade union duties, claiming that she did so in an 'aggressive' manner but without any corroborating evidence. His handling of the issue of noise in a shared classroom, leading to somebody breaching confidentiality and then Mr Earnshaw's failure to investigate the matter properly all caused the claimant unnecessary stress and anxiety. In addition, the unsubstantiated allegation of misconduct was raised within 3 hours of the claimant representing a colleague at a meeting with the Head Teacher, conducted without notice and in what the Tribunal considered to be menacing terms. The claimant was never told what the concern was and Mr Earnshaw was forced to accept that he had erroneously criticised the claimant for another teacher's work; the allegation was swiftly withdrawn, and the other teacher never spoken to about it. In this regard, the Tribunal accepted the submission of Counsel for the claimant, to the effect that the most telling indication of the fact that Mr Earnshaw did not like the claimant's trade union activities was the fact that he raised the prospect of disciplinary action at all. An allegation of dishonesty was raised about the claimant and was said to have occurred at a time which the claimant was off sick. Mr Earnshaw was well aware of this because he had conducted the claimant's return to work meeting that very day. Yet, having received an allegation that could not have occurred, rather than question in, he pursued the claimant and notified HR. Under cross-examination, Mr Earnshaw was unable to explain his actions. In the absence of any explanation, the Tribunal concluded on a balance of probabilities that Mr Earnshaw was intent on extracting revenge and that his animus to the claimant betrayed him.

158. As to the alleged need for a support plan, the Tribunal noted there was no evidence of issues with the claimant's work prior to October 2019 and rejected the respondents' contention that issue had previously been raised. This was particularly in light of the fact that the claimant had been granted an additional pay award in 2017, having been judged as having met all the relevant teaching standards and that she taught year 6 prior to 2018 and had achieved the highest KS2 SAT scores. The respondents notably failed to disclose any of the claimant's appraisals for the relevant period.

159. The Tribunal has also found the evidence for the support was weak and contrived to show the claimant in as poor a light as possible – see paragraph 62 above – and heard that the consensus of heads of subjects was that all book-looks include something about improvements to be made. The claimant's classes' book-looks were no worse than others. But as Mr Scott in particular admitted that he had not himself look at the book-looks, nor teacher observations nor any teaching records. He did not ask to see the claimant's appraisals nor did he seek any independent advice on the need for the support plan. Both he and Ms Kimber confirmed in evidence that they felt they had to adhere to Mr Earnshaw's view, in rejecting the grievance, when the evidence was that Mr Earnshaw had told Mr Scott that the claimant's books were worse than others and had intimated that the claimant was the subject of a misconduct allegation and despite that the Head teacher knew that allegation could not be true.

160. In all the circumstances the claims of trade union detriment and unfair dismissal for trade union activities succeed.

Disability discrimination because of something arising from disability

161. First, the Tribunal noted that the respondent has accepted that it had knowledge that the claimant had the disability from March 2019 to May 2021. The Tribunal then considered each of the acts of unfavourable treatment contended for.

162. The Tribunal considered that the capability/managing absence process which the claimant was placed on from 24 May 2019, was unfavourable treatment in that it out the claimant at a disadvantage, her job was in jeopardy and that led to the claimant being stressed; an ailment for which the Tribunal found the claimant had not, before March 2019, been off work and that such a process ultimately resulted in her dismissal. Mr Earnshaw produced a document intended to justify his actions, which appears in the bundle at page 269, and lists the number of days which he said the claimant had been absent over the past 5 years. It is not an official document but just Mr Earnshaw's summary with his descriptions of the

reasons for absence. The Tribunal considered the descriptions were at best inaccurate, for example "Musculo" was used to describe a planned period of absence when the claimant had undergone surgery and recovery from that. At the bottom of the list is a statement which is plainly incorrect: "Total absence in the last 5 years = 328 working days *not including* [our emphasis] the current absence." In fact, the figure of '328' did include the current absence. In addition, at the end of this document is a further statement alleging "14 recorded appointments or additional days of leave" none of which are identified with any particularity, it being entirely unclear as to the reason, duration or timing of such, but by implication suggesting that all of these were disruptive to the school. Rather than present an objective record of the claimant's absences, Mr Earnshaw sought to paint a picture of the claimant as taking lots of time off sick and possibly malingering. It was apparent to the Tribunal that the Head Teacher viewed any time off as problematic hence the derogatory way he portrayed the claimant's not unreasonable request for a couple of days to go to her goddaughter's wedding in Italy during school term-time. The Tribunal noted that, despite this portrayal, Mr Earnshaw had consented to each and every one of the claimant's requests for time off when he could have refused them.

163. For all the reasons given at paragraphs 154 – 156 above, the Tribunal considered that putting the claimant on a support plan from 15 November 2019 was also unfavourable treatment. It put her at a significant disadvantage and, when she sought to challenge its imposition, through the grievance procedure, she was told it could not be altered or removed.

164. For the reasons given in paragraph 155, the Tribunal also considered that the rejection of the claimant's grievance on 19 May 2020 amounted to unfavourable treatment particularly as the stance of the governors was that they were unable to do anything about the Head Teacher's decision thereby rendering Mr Earnshaw effectively untouchable.

165. The claimant's dismissal on 8 December 2020 with notice was plainly unfavourable treatment.

166. Next, the Tribunal considered those matters which the claimant contended were 'things arising in consequence of' her disability. First, the claimant's inability to fulfil her contractual duties arose because the claimant was off work, sick. The Tribunal found that the claimant was off sick because of stress, which is part of her disability. The claimant's sickness absences from March 2019 were because of disability, that is to say because of stress which the Tribunal considered was caused by the respondent's unfavourable treatment of her. This is borne out by the occupational health reports obtained by the respondent. As a result, the claimant was unable to fulfil her contractual duties which included returning to work.

167. The respondent's own case has been that the claimant was dismissed because of her inability to fulfil her contractual duties and her absence from work, both of which the Tribunal has found arose in consequence of her disability. In addition, the Tribunal considered that Mr Earnshaw's view of the claimant was tainted by her sickness and absence record of which his subjective account appears in the bundle at page 269. Mr Earnshaw's evidence was that he had put the claimant on a support plan due to his perception that her teaching was not of a sufficient standard. However, the Tribunal has found the support plan to be a punitive measure – see paragraph 156 above. No alternative methods of support were countenanced despite that the respondents knew the insistence on the support plan exacerbated the claimant's stress/disability and the ill-health absence for which she was ultimately dismissed.

168. In light of the above, the Tribunal concluded that the unfavourable treatment was because of those things arising in consequence of the claimant's disability; the claimant's inability to fulfil her contractual duties and her sickness absence had a more than trivial influence on the unfavourable treatment amounting to a cause of it in the Pnaiser sense.

169. The respondents have contended that any unfavourable treatment was a proportionate means of achieving legitimate aims, as set out in the list of issues, paragraph 9 above, section 6.6. The Tribunal heard a lot of evidence from the respondent's witnesses that the aims contended for were important for the financial position of the school. However, there was no evidence that other, quite possibly cheaper, measures to support the claimant had been countenanced and elsewhere the respondents confirmed that an additional teacher who had covered the claimant's absence was kept on in order to teach the claimant's class whilst the claimant was used as "cover" despite her significant experience and the obvious additional cost of such action. In the absence of any apparent consideration of alternative methods of support which might not have caused the claimant stress couple with Mr Earnshaw's insistence on the support plan, the Tribunal was unable to conclude that the support plan and the respondents' actions were appropriate or reasonably necessary, let alone proportionate. The unfavourable treatment was not justified.

Failure to make reasonable adjustments

170. The respondent has accepted that it had knowledge that the claimant had the disability at the relevant time, from March 2019 to May 2021.

171. The Tribunal has found that the respondent operated the PCPs contended for, namely the imposition of the support plan which, if not passed, would

lead to formal proceedings, and the respondents' Managing Absence/Capability policy which included a requirement to attend work for a certain number of days per year.

172. The Tribunal therefore considered whether either PCP put the claimant at a substantial disadvantage in comparison with somebody without the claimant's disability, and found that both PCPs did. The claimant was more likely to have time off for reasons linked to her mental health, she was unable to attend work due to the stress and anxiety caused by the imposition of the support plan and Mr Earnshaw's attitude towards it and towards her. Mr Earnshaw accepted in evidence that it was the support plan that was "consistently the reason stated for [the claimant]'s continuing absence from work" – see also the report to the appeal at bundle page 765 - and he agreed that, had the support plan been removed, it is likely the claimant would have returned to work and not been dismissed.

173. The Tribunal found that Mr Earnshaw's awareness of the reason for the claimant's absence contributed to his intransigence. The governors should have acted as independent checks and balances, questioning the Head Teacher's judgment on the matter in any event but they were unwilling and/or unable to hold the Head Teacher accountable. Likewise the Tribunal was unable to find any evidence of HR direction or advice as appropriate in circumstances where the respondents knew or could reasonably have been expected to know that the claimant was likely to be placed at the disadvantage. The claimant was unable to attend work and was therefore more likely to be subject to the formal process of the Managing Absence/Capability policy. Here, the Tribunal accepted the submissions of Counsel for the claimant, that this aspect was clear from 18 November 2019, when the claimant was again absent from work and citing the support plan as causing her stress and anxiety. The continued insistence on the support plan caused the claimant substantial disadvantage. Mr Earnshaw himself admitted as much in evidence.

174. The claimant has advanced a number of steps which the Tribunal considered it would have been reasonable to have taken to avoid the disadvantage through adjustments to the PCPs as set out in the list of issues above at paragraph 9, section 7.5. The Tribunal considered that removal of the support plan as a precondition of return to work was plainly reasonable. It was the source of the claimant's stress and Mr Earnshaw admitted that it was likely the claimant would be able to return to work if it had been removed. The claimant could have been supported in other ways to ensure she met the necessary standards, including a period of support that was not limited to 9 weeks, provision of CPD and support from a mentor, for example the Head of DT. The Managing Absence/Capability policy could also have been adjusted so that disability-related absence was not counted for the purposes of addressing the

claimant's attendance at work. There were also sufficient senior managers at the school to provide alternative line management for the claimant, in light of the effect of Mr Earnshaw's conduct and actions on the claimant's disability. Mediation was raised by the claimant's trade union on several occasions but was not pursued by the school, which unreasonably sought to blame the claimant for a lack of mediation.

175. The Tribunal considered that all the steps contended for were reasonable adjustments in the circumstances of the case. In reaching its conclusion, the Tribunal took note of the fact that Ms Elderkin had highlighted a number of alternative ways to support the claimant to return to work in an email of 27 November 2019 – see bundle page 510- and thereafter. In addition, the school recognised that it was the support plan that was consistently the stated reason for the claimant's continuing absence from work, yet was unwilling to consider its removal or any alternative. The Tribunal considered that the respondents could reasonably have taken those steps from the dates of the occupational health reports which continually identified that the claimant was suffering from stress and that the support plan needed to be removed to facilitate the claimant's return to work. However, the fact was that Mr Earnshaw did not want the claimant back and so he effectively blocked any consideration of removing the support plan and he engaged personnel to conduct the capability and grievance procedures who would follow his lead – see for example paragraphs 78 and 93 above. In doing so, Mr Earnshaw and the school deliberately gave no thought to the potential for reasonable adjustments or any other way to support and address what he propounded as the claimant's performance issues.

176. For all the above reasons, the Tribunal concluded that the respondents had failed to make a number of reasonable adjustments available to them to alleviate the substantial disadvantage suffered by the claimant.

Time points

177. The claim for was presented on 28 June 2021. Early conciliation was commenced on 3 June 2021 and the ACAS certificate was issued on 4 June 2021. Therefore the respondent has submitted that, in respect of those acts taking place prior to 4 March 2021, the detriment and discrimination claims are out of time and that there was no continuing course of conduct.

178. Dealing first with the discrimination complaints, the act of dismissal, which the Tribunal has found to be discrimination because of something arising in consequence of disability, is in time. The imposition of the support plan and the application of the Managing Absence/Capability policy feature in both the discrimination complaints. In the circumstances of the case, the

Tribunal considered that each of these matters constituted a continuing regime which it was open to the respondents to alter at any time but that they, though the actions of Mr Earnshaw, made a number of conscious decisions to reject the claimant's challenges to the support plan and to ignore the advice of the union or to engage in any form of alternative support and/or mediation. This meant that the school adopted an approach which discriminated against the claimant. So long as the claimant was employed by the respondents the Tribunal considered that there was continuing discrimination against her, thereby bringing both discrimination complaints in time. The rejection of the claimant's grievance was part of the continuing regime of discrimination, given that the rejection was founded upon the governors professed inability to remove the support plan – see for example paragraph 155 above. Further, if any such discriminatory acts had been out of time, the Tribunal also considered that it would have been just and equitable to extend time in all the circumstances of the case. The Tribunal here took account of the claimant's continuing ill-health absence because of disability which meant that she was not at times thinking clearly and the fact that the claimant had sought to exhaust all internal procedures before presenting her claim to the Tribunal. The balance of hardship weighed firmly in the claimant favour given that, otherwise, she would be time-barred from bringing complaints of sufficient gravity as these, which the discrimination legislation is designed to address.

179. The respondents have sought to argue that the individual detriments which form the basis of the detriment claim are all on the face of it out of time because they are separate decisions by separate individuals. However, the Tribunal rejected this submission; the detriments were not individual and unlinked acts. The respondents repeatedly asserted the detriments in response to challenges such that they were a series of active decisions over time. The Tribunal has found that the claimant was unwell throughout the processes undertaken by the respondents, her ill-health being inextricably linked to the imposition of the support plan by the school, which was reasserted at a number of stages of the internal procedures up to and including the appeal against dismissal. Therefore, the Tribunal has concluded that there was a continuing course of conduct to the claimant's detriment and that the submissions made at the various meetings were largely because of the representation the claimant had from a very experienced trade union official, rather than because the claimant was somehow coping with matters, which she was not. If not a continuing course of conduct, the Tribunal accepted the argument of Counsel for the claimant, that it was not reasonably practicable for the claimant to have brought a claim about each detriment when she was going through processes with multiple stages and without knowing the outcome of the various stages, particularly given her continuing ill-health. Once dismissed the claimant brought her claim within a further reasonable

period, given the complexity of the case and the effects of her ill-health which continued in the wake of the effects of the detrimental references that Mr Earnshaw was intent on giving.

Remedy

180. In light of the above successful complaints, a remedy hearing shall be listed on a date to be notified in due course.

Employment Judge Batten
Date: 27 February 2024

JUDGMENT SENT TO THE PARTIES ON:
18 March 2024

FOR THE TRIBUNAL OFFICE