EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Jason Smith	Alpha Plus Group Limited

Heard at: London Central
On: 10, 11 (pm), 12, 15 – 16 April 2024
In chambers: 17 – 18 September 2024

Before: Employment Judge Lewis
Professor J Holgate
Ms R Rose

Representation

For the Claimant: Representing himself and also by his sister

For the Respondent: Mr A. Leonhardt, Counsel

RESERVED JUDGMENT ON LIABILITY

The unanimous decision of the tribunal is that:

Successful claims

1. The claimant was unfairly dismissed.
2. The claimant's dismissal was discrimination because of something arising from the claimant's disability contrary to section 15 of the Equality Act 2010.
3. Refusal to postpone the capability hearing on 1 July 2022 at which the claimant was dismissed was a failure to make a reasonable adjustment.
4. Failure to allow the claimant to bring a friend who was not a work colleague or trade union representative to the appeal hearing was a failure to make a reasonable adjustment.

Unsuccessful claims

5. The requirement to report sickness absence by 7.30 am was not a failure to make reasonable adjustments and was not indirect disability discrimination.
6. The refusal to postpone the capability hearing on 1 July 2022 was not indirect disability discrimination.
7. The limitations placed on choice of companion ie the failure to allow the claimant to bring a friend to the appeal hearing was not indirect disability discrimination.
8. The failure to obtain up-to-date medical evidence and advice from an OH expert to identify and address any other reasonable adjustments was not a failure to make reasonable adjustments.

Remedy

9. The Remedy hearing will take place on **12 and 13 August 2024.**

10. The parties will be notified of a date for a preliminary hearing to discuss preparation for the Remedy hearing.

SUMMARY

The claimant had been employed for 15 years at a pre Prep school. He had a good record. In 2020 he developed mental health difficulties as a result of a relationship breakdown. This led to long periods of intermittent and grouped absences. He was managed very supportively for most of that time. He was ultimately dismissed because of a combination of his attendance record and behavioural matters caused by his mental health, ie not reporting in on time when he was going to be late or absent; mood swings and a few occasions of brief sleeping while at work. The respondent obtained three Occupational Health reports and made a certain number of reasonable adjustments, but it did not follow any of the stages of its own Capability or Absence Policies until the point where the claimant was called to a final capability hearing which led to his dismissal. The claimant asked the respondent to postpone the capability hearing because he was unwell and his companion could not attend. The respondent refused, having already granted two postponements, but these were over a fairly short period. Prior to this, there had been an investigation meeting of which the claimant had no forewarning; he was not told it was an investigation meeting or what it might lead to, but simply that it was an informal meeting. The investigation meeting led to an investigation report which was heavily relied on by the respondent in taking the decision to dismiss. At the appeal stage, the claimant was not granted his request to bring a friend from outside work to the hearing and was unaccompanied because he had been unable to find a work colleague who would be willing to come.

The tribunal found that the claimant's dismissal was unfair and was for a reason arising from his disability of anxiety and depression. In addition, failure to postpone the capability hearing at least one more time and failure to allow him to take a friend to the appeal were failures to make reasonable adjustments. While the respondent had tried to be supportive for a long period, the tribunal felt that it had unduly accelerated towards dismissal without having followed structured procedures which would have given the claimant an opportunity in a formal context to understand, at some stage before dismissal was on the table, the seriousness with which the respondent viewed matters and what was expected of him.

REASONS

Claims and issues

1. This hearing was only concerned with liability, ie whether the claimant won or lost his case. The claimant no longer wished to be reinstated.

2. The issues to be decided at the liability hearing were confirmed at the start of the hearing as follows:

Unfair dismissal

2.1. Did the respondent have a fair reason for dismissal, namely capability? The respondent relies on capability as the reason and asserts that it dismissed the claimant because of his absence and his behaviour.

2.2. Did the respondent act reasonably in all the circumstances in treating that reason as a sufficient reason to dismiss the claimant?

2.3. Did the respondent follow a fair procedure?

2.4. Was the decision to dismiss within the band of reasonable responses?

2.5. If the dismissal was unfair, is there a chance that the claimant would have been dismissed fairly in any event and when would such dismissal have taken place? (Polkey.) If so, should the claimant's compensation be reduced and by how much?

Disability

2.6. The respondent admitted the claimant was disabled for the purposes of the Equality Act 2010 by virtue of his anxiety and depression but did not admit that the claimant was disabled by virtue of his adjustment disorder. The parties agreed that this did not add anything to the claim, and therefore it did not need to be decided whether it amounted to a disability.

Indirect disability discrimination

2.7. Did the respondent apply to the claimant a provision, criterion or practice at any relevant time? The claimant relied on the provisions, criteria and practices of:
  2.7.1. The requirement to report sickness absence by 7.30 am
  2.7.2. The limitations placed on the choice of companion. This referred to not being allowed to bring a friend to the appeal hearing who was not a work colleague or trade union representative.

2.8. Did the respondent – or would the respondent – also apply the provision, criterion or practice to non-disabled people?

2.9. Did the provision, criterion or practice put disabled people at a particular disadvantage when compared with non-disabled people?

2.10. Did the provision, criterion or practice put the claimant at that disadvantage?

2.11. Can the respondent show that the provision, criterion or practice was a proportionate means of achieving a legitimate aim? The respondent relies on the aims respectively of ensuring sufficient staff cover and to ensure the smooth running of the appeal process with input only from relevant people.

Failure to make reasonable adjustments

2.12. Did the respondent apply to the claimant a provision, criterion or practice? The claimant relied on the provisions, criteria and practices of:
  2.12.1. The requirement to report sickness absence by 7.30 am
  2.12.2. The refusal to allow the claimant's request for a postponement of the capability hearing on 1 July 2022 until he was fit and able to deal with it and/or to when his companion was also able to attend with him.
  2.12.3. The limitations placed on the choice of companion. This referred to not being allowed to bring a friend to the appeal hearing who was not a work colleague or trade union representative.

2.13. Did the provision, criterion or practice put the claimant at a substantial disadvantage in comparison with people who are not disabled?

2.14. Did the respondent know or ought it to have known that the claimant was likely to be put at a substantial disadvantage by that provision, criterion or practice?

2.15. Did the respondent take such steps as were reasonable to avoid that disadvantage? The claimant says the following steps would have been reasonable but were not taken:
  2.15.1. Alternative absence reporting procedures.

2.15.2. A postponement of the capability hearing.
2.15.3. Obtaining up-to-date medical evidence and advice from an OH expert to identify and address any other reasonable adjustments.
2.15.4. Giving permission for the claimant to be accompanied at the appeal hearing by a friend.

Discrimination because of something arising from disability: s15 Equality Act 2010

2.16. The respondent admits it dismissed the claimant because of his absences and behaviour, notably:
2.16.1. The claimant's absence record (89 days in 2021; 52 days in the first half of 2022 prior to his dismissal);
2.16.2. The claimant's repeated failure to follow the respondent's absence reporting procedures;
2.16.3. The claimant's unpredictable temperament;
2.16.4. The claimant's overly strict classroom management resulting in complaints from parents and pupils, and
2.16.5. Sleeping at work.

2.17. The respondent admits the dismissal amounted to unfavourable treatment.

2.18. In view of these admissions, it was agreed that the tribunal would find the claim under s15 to be well-founded unless the respondent can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim, The respondent relies on these aims: ensuring appropriate standards of behaviour and levels of attendance amongst its teaching staff, and being able to arrange class cover prior to the start of the school day.

2.19. If the discrimination claim is upheld, but for the discrimination, how long would the claimant have remained in the respondent's employment?

Procedure

3. The tribunal heard from the claimant and for the respondent, from Anna Dring, Paul Brereton and Sue Francis. There was a witness statement from each witness. There was an agreed trial bundle of 416 pages and a text message ['C1'].

4. The tribunal asked the claimant what adjustments would help him during the hearing. The claimant suggested that he could have a break when needed. The tribunal said that we would have additional 5 minute breaks every half an hour, in addition to the usual longer breaks, and he could also have an extra break any time he asked. As we went through the case, we allowed some lengthy breaks where the claimant was distressed, and allowed substantial extra time for cross-examination so the claimant could answer in his own time and Mr Leonhardt was be able to get through all his questions. Later on, we

suggested that Mr Leonhardt would be allowed to ask his own witnesses extra questions if in certain instances it alleviated the need to ask the claimant certain questions, and that the claimant would have the opportunity to come back and comment on anything which he had not yet had the chance to comment on. We also suggested the claimant's sister sit next to him in vision on screen and it was also agreed that she step in to question the respondent's witnesses, while still allowing the claimant input. Finally, the tribunal used all the allocated time for the evidence and arranged extra days for the tribunal panel to discuss and reach its decision. In this way, we were able to hear all the evidence and allow each side to ask all relevant questions.

Fact findings

5. The respondent group operates a number of independent schools throughout the UK including the Wetherby Prep school for boys where the claimant was employed. The school has about 385 pupils between kindergarten or 'reception' and age 8. There are about 20 children per class.

6. The claimant was employed in September 2006. He was employed as teaching assistant for two terms and then as a teacher. For many years he was employed to teach Year 3. From September 2019, he was employed as a Floating Teacher.

7. Floating Teachers are timetabled to teach certain subjects across different year groups and also teach small group interventions as required. They also provide cover for absent staff.

8. Anna Dingle was promoted to Deputy Head and Designated Safeguarding Lead in April 2020, having previously worked as Head of Learning Support. She was the claimant's line manager. They considered each other to be friends.

9. The Head Teacher at the relevant time was Mark Snell.

10. The last two appraisals which the claimant received prior to his dismissal were glowing. These were for years 2017 and 2018. No appraisal was done during Covid or after the claimant became unwell.

11. The 2017 appraisal dated 3 February 2018 said that the claimant had had a very successful year. The results that boys in his sets achieved were excellent. As well as laying firm boundaries for behaviour, he was passionate about the well-being of the boys. Citing his handling of a particular boy, the appraisal stated, 'This high level of care and attention for the boys in his class make him an outstanding pastoral practitioner'. The classroom observation said the boys were very engaged and delighted with their learning; 'awesome response from boys'; 'enthusiasm was infectious'; boys wanted to answer every question – great to see!'; 'outstanding class behaviour'; 'learning atmosphere was excellent'.

12. The 2018 appraisal was carried out in February 2019. The claimant said he felt that professionally it was time to teach another year group for a change. This was something he had asked the previous year too. He was particularly keen to teach Reception.

13. The appraisal said that the claimant was an excellent teacher who gives all he can to motivate the boys to do the best they can. Together with his teaching assistant, he had created a positive and caring learning environment in his classroom. 'He has enjoyed an excellent relationship with the boys and is a caring, nurturing teacher who the boys respect. He adopts a fun but firm approach to the boys' learning and deals with pastoral issues sensitively, calmly and compassionately, … it is clear to see that his behaviour management is a real strength'. In general, the appraisal said that the claimant was a key member of the school staff 'whose humour, good nature and attitude develops a great atmosphere within the building'.

14. Over the years, the claimant had a good attendance record. The claimant was first absent with mental health issues in January 2020. He believes these were caused as the result of a breakdown in his personal relationship. He was off sick intermittently for a total of about 18 days from January – March 2020.

15. The claimant was visiting his family in Australia from 20 March 2020, when the Covid pandemic struck more widely and borders closed. On 26 March 2020, the UK went into the first lockdown. Staff were expected back in school in June 2020, but the claimant was allowed to extend his stay in Australia until September 2020, to support his mental health. The claimant was able to deliver on-line learning from Australia and he seems to have been good at this.

16. Ultimately the claimant was diagnosed by a psychiatrist as having an adjustment disorder with depressive features. The respondent accepts that he had the disability of anxiety and depression at the material time. The respondent does not specifically accept that he had the disability of 'adjustment disorder', but did not feel it would add anything to the claim in any event. The claimant describes his adjustment disorder as having excessive anxiety about anything outside his routine or that he is not used to. We consider that this is covered in any event by the disability of 'anxiety'.

Policies

17. The Group's Capability Policy is concerned with performance standards. It states that it does not apply where an employee is absent from work due to ill health which should be managed through the Absence Policy.

18. The principles of the Capability Policy are that employees will be informed at the earliest possible opportunity where areas of their performance are falling short of the required standard, initially through the informal capability procedure. At all stages, managers will discuss the situation with employees. Managers will investigate to establish the facts. Managers will give employees

the opportunity and support to improve their performance. Employees have the right to be accompanied by a trade union representative or workplace colleague at all formal meetings which form part of the Capability Policy.

19. The Informal Procedure in the Capability Policy states that managers are responsible for providing a supportive environment through 1-to-1 meetings. During such meetings, managers should discuss general performance standards and raise any issues where performance is not at the level required. Under the Informal Procedure, managers will draw an employee's attention to their unsatisfactory performance as soon as practicable 'and confirm that they are following this informal procedure'. Managers and employees will jointly identify and discuss clear targets for improvement with regular review points and any training or other activities necessary to achieve them.

20. Where managers have taken informal steps to improve performance and these have not led to the required improvements within the review period, then they will proceed to Stage 1 of the formal Capability Procedure'.

21. There are three formal stages. At Stage 1, an employee will be invited in writing to a capability hearing with their manager who will be accompanied by an HR representative to discuss areas of concern and hear the employees' views. The manager will review with the employee the previous targets and actions from the informal procedure. The possible outcomes of the meeting where performance is unsatisfactory are giving further time to make improvements under the informal procedure or giving a first written warning which will stay on file for 1 year. The manager should confirm the outcome orally and in writing, confirming the proposed actions required, with a time-scale for improvement (between 1 week and 6 months), a written warning H that unless performance issues are resolved within the review period, the matter will be considered under Stage 2, and the employee's right of appeal.

22. Stage 2 is similar to Stage 1 save that the capability hearing is with a panel chaired by the manager's manager plus an independent manager outside the manager chain, and the outcome can be a final written warning.

23. If the employee's performance remains unsatisfactory following a final written warning, line managers will instigate Stage 3, which can lead to dismissal.

24. Where any of the formal stages of the Capability Policy lead to a formal warning, the manager and employee must immediately work together to create a Performance Improvement Plan. The PIP must include specific performance objectives, a method of improving performance, success criteria and review dates.

25. If a manager or employee believes that a health condition or disability has contributed to unsatisfactory performance, line managers will take action set out in the Referrals to Medical Advice section of the Capability Policy before proceeding to any formal stages. Under this, the manager may obtain an Occupational Health ('OH') report. The line manager and HR must then

discuss with the employee the professional advice received and consider any recommended adjustments. The outcome of the meeting will be confirmed to the employee in writing. If performance still does not improve after reasonable adjustments have been made, management 'may continue to move through the formal stages of the capability procedure as usual'. The employee is entitled to have trade union representation or a workplace colleague at meetings under each formal stage.

26. The respondent's Group Absence Policy says that where an employee's attendance level gives cause for concern due to a number of short-term absences, the employee will be made aware that the level of absence is unacceptable. The respondent monitors absence by reference to the Bradford Factor, which is a formula commonly used by employers to monitor absence levels and ensure consistency. The formula is number of occasions sick x number of days sick (again) x total number of days' absence. The Policy says that when an employee's Bradford Factor score reaches 100 points or more in a rolling 12 month period, the respondent will follow informal counselling procedures. This entails meeting the employee to understand the reasons behind their absence and explore whether any support can be offered to improve attendance. Where appropriate, targets may be set for improved attendance and a review period. Where absences are due to an underlying medical condition, the respondent may obtain an OH report or seek permission to contact the employee's doctor.

27. Where attendance still gives cause for concern, the respondent 'may resort to taking formal action' as summarised below.

28. If an employee is unable to meet the required attendance standards given at the informal stage, they will be invited to a First Formal meeting under the Disciplinary Policy. The meeting is normally held with the line manager accompanied by an HR representative. The employee has the right to be accompanied by a work colleague or union representative. The employer will explain why attendance is not acceptable and the employee will be asked to explain their views and any mitigating circumstances. After the meeting, the employer may issue a first written warning.

29. There is a similar procedure at Stage 2, where a meeting is normally held with the line manager's manager, and which can end with a final written warning.

30. At Stage 3, the outcome might be dismissal. There is a right of appeal.

31. OH reports may be required where the employee's health is preventing satisfactory job performance. In regard to disability, 'The Company takes its obligations under the Equality Act very seriously and, where an employee is likely to be covered by the Act, will discuss and work with the employee to ensure that reasonable adjustments are made to their role and that their disability does not put them at a disadvantage within the workplace'.

32. The Policy also states that return to work interviews should be held where an employee has been absent for more than a week, and at the employer's discretion after shorter absences.

33. Bad timekeeping and failure to properly notify the employer are said to be generally matters of conduct and should be dealt with under the disciplinary procedure.

The first Occupational Health report

34. After he returned to the UK, the claimant told Miss Dingle that he was still struggling with his mental health. She therefore decided to obtain an Occupational Health ('OH') report. At that stage, there were no concerns about the claimant's work performance, but the school was concerned about his health and wellbeing.

35. The report was provided on 8 December 2020. The claimant had reached the trigger points in the Sickness Absence Policy of 5 episodes of short-term sick leave and a second episode due to mental health.

36. The OH report stated that the claimant had an underlying condition of anxiety and depression, and was likely to be disabled under the Equality Act 2010. He was suffering from very poor sleep due to his mental health and this had often been when he needed to be absent from work. The report made the following recommendations and stated that the claimant did not feel any other adjustments were required:
    36.1. That the claimant and his manager agree regular 1-to-1s where his well-being could be monitored and extra support offered if necessary.
    36.2. Consider adjusting the trigger points for the claimant's absence management targets.
    36.3. The employer may be interested in using the MIND tool WAP (Wellness Action Plan) to map out proactively what could be put in place to be mentally well at work.

37. The claimant says that these recommendations were not put into effect and that as a result, his mental health became worse.

Implementation of the OH recommendations

38. On 11 December 2020, the claimant had a nasty cycle accident which caused 4 fractures to his face. He was off sick for a few days and on 6 January 2021 he had surgery to fix the fractures. Christmas holidays also intervened. He returned to work on 18 January 2021.

39. The third national lockdown had started in early January 2021. Miss Dingle was aware that the claimant wanted to be in school and working, so she put him in charge with a group of Key Worker boys. On 8 March 2021, all staff returned to school.

40. In the period from 18 January 2021, there was no meeting with the claimant, Miss Dingle and HR to discuss the first OH report as required under the Capability Policy. Regarding the OH recommendations, no arrangements had been made for regular 1-to-1s between the claimant and Miss Dingle. However, Miss Dingle kept in close and friendly touch via WhatsApp messages and phone calls, and contact when they were in school together.

41. The absence trigger points were not formally adjusted but in practice, the respondent did not enforce any triggers though Mr Snell did at one point tell the claimant that his score was high and this was not very good on the Bradford Indicator.

42. Miss Dingle did not look up what the MIND WAP tool was.

Instruction to work from home

43. In early evening on Friday 19 March 2021, the claimant had a long telephone conversation with his close friend and work colleague, Ms Khangura. At the end of the conversation, he told her that he had had some suicidal thoughts 5 days earlier. The claimant was feeling better at this point and did not plan to take any time off work. He wanted to work if at all possible because it gave him purpose and structure, and was helpful for his mental health.

44. Ms Khangura then rang Beverley Gill, a member of the Senior Leadership Team and Assistant Head (Pastoral). At 6.38 pm, Ms Gill emailed Mr Snell, Miss Dingle and Carrie Symes, Head of Wellbeing, to say Ms Khangura had just called her: 'She is very worried about Jason and concerned that he is progressively getting worse. She spoke to him on the phone this evening. He was crying and very upset. He told her that he has been having suicidal thoughts. She gave him a number of a suicide support service. I suggested that she also send the link to CALM. It has a helpline each evening 8 – 12pm, which she said she would send. ' Ms Gill went on to say that she had tried to call him, but he did not pick up.

45. At around 9 pm, Miss Dingle messaged the claimant to say 'lots of worried people about you. What's going on?' and 'Here all weekend if you need me xx'.

46. On Sunday 21 March 2021, the Head, Mr Snell, sent the claimant 3 communications, by email, voicemail and text. These said essentially the same thing. The email reads:

> 'I am very sorry to hear from Anna, Carrie and Beverley that you are continuing to struggle with mental health issues. To support and help you with your issues, I am going to ask you to work from home until further notice. Whilst you are working from home we do not require you to do any work. It is very important that you seek help and the Employee Assistance Programme is there to help you. I attach a document about the EAP for your information. I hope some rest and recuperation will help you get

better. If you wish to discuss this with Anna, Beverley, Carrie or myself please do not hesitate to contact us.'

47. The claimant did not know at this point that Ms Khangura had reported her concerns to the school. The three communications therefore bewildered him.

48. The claimant exchanged WhatsApp messages with Miss Dingle at 9 pm. She said he did not understand why he could not go into work and do his job: he had done nothing wrong. Miss Dingle telephoned the claimant and talked to him for about an hour and a half. She explained that Ms Khangura had informed a member of the Senior Leadership Team about the claimant's suicidal thoughts. The claimant was shocked that Ms Khangura had shared such sensitive information. Miss Dingle told the claimant to call his GP in the morning. It upset the claimant that other people knew this sensitive information and that he was being told to stay away from work despite his protests that he wanted to be there.

49. The claimant called Ms Gill on 21 March 2021. He said he wanted to be at work. She convinced the claimant that he should not come in, but should use the time to recover.

50. On 22 March 2021, the claimant's GP signed a Fit Note stating the claimant was not fit for work from 22 – 29 March 2021 due to 'low mood'.

51. There were more supportive WhatsApp messages from Miss Dingle on 22 and 24 March and 1 April 2021, including a supportive message passed on from Mr Snell.

52. Apart from these, the school did not contact the claimant to do any welfare checks. He feels that it was within the spirit of the Staff Welfare Policy that they should have checked in with him, especially as London was in lockdown at the time. The Staff Welfare Policy says, amongst other things:

> AIMS: We aim to ensure that Wetherby school is recognised for its commitment to mental health and wellbeing of its staff, pupils and parents; supports staff mental health and wellbeing all year round including remotely; keeps abreast of latest developments in mental health in the workplace. 'The Assistant Head (Wellbeing and Co-Curricular) is responsible for ensuring that all staff adhere to this policy, and that Wetherby is at the forefront of optimum mental health and wellbeing provision.'
>
> The Head, SLT and Assistant Head (Wellbeing) are also responsible for 'maintaining contact with staff during long absences'.

53. There was a school break from 1 – 19 April 2021. On 15 April 2021, Miss Dingle sent the claimant an email asking if he was better and to let them know if he was unable to return to work on 19 April 2021 for any reason.

54. The claimant did not reply to the email. The claimant did not attend school at his starting time on 19 April 2021. Miss Dingle sent him a WhatsApp message at 10.47 am: 'Morning Jase. Wondering where you are? Hope all OK. Pls let me know'. The claimant replied at 12.19 pm: 'Morning Anna, I am at Home. I am ok. On my way to work now unsure of what to do and feeling lost, nervous and anxious, wondering who i am'. Miss Dingle replied at 13.45: 'Sorry to hear that Smithy, lets catch up tomorrow. A.' At 14.28, the claimant responded: 'Yeah let's. I have missed seeing you and was close to messaging you during break, but didn't want to disturb. It's just hard and I feel alone, and it's one step at a time'. Miss Dingle responded a few minutes later: 'I'm sure. Poor you. We need to have a return to work chat anyway so lets meet after school? Does that work?'

55. The claimant attended the return to work meeting. He was emotional during the meeting and even cried. He said he cared about his job and had been made to feel ashamed for having mental health issues. The claimant said he had seen his GP and therapist, but there were NHS delays in getting other therapies. It was agreed that the claimant would return to his GP and the school would get a further OH report to see what adjustments could be put in place. Miss Dingle told the claimant not to attend work until further notice, during which time the school would get the OH assessment and stay in touch via email.

56. On 22 April 2021, the claimant's GP signed a Fit Note stating the claimant was not fit for work from 20 April 2021 to 7 May 2021 due to 'anxiety and depression'. On 27 April 2021, the claimant's GP made a private referral to a Psychiatric Consultant, headed 'low mood and anxiety for the past 12 months, worse in past few months'. The claimant remained signed off work until the end of the academic year in early July 2021.

<u>Second OH report</u>

57. On 27 April 2021, Miss Dingle referred the claimant to OH for a second report. She consulted him over the wording of the referral. The claimant's self-esteem was hurt by what she had written, and he felt that it was not all true. He says she told him she was exaggerating so that he would receive the best help and support possible, and that she said she used to do something similar when she was applying for funding for a child with special needs. The claimant did not feel that was a comparable situation. Miss Dingle says she did not use those words. She says she wrote an accurate referral document because she believed that it was important not to sugarcoat the facts to OH. We accept that her comments accurately reflected her view. We believe it is possible she may have suggested to the claimant that she was boosting the wording to save his feelings, as she was aware he would be hurt to read her description. However, we find that what she wrote in the referral was the truth as she saw it.

58. The claimant felt the referral was misleading and did not take account of the stresses of the pandemic and lockdowns for everyone.

59. Miss Dingle completed her draft and telephoned the claimant the following week to check he agreed the final wording. Miss Dingle was on her way to a meeting and the claimant was out in the park when the conversation took place. He was upset and cried. He said he felt that the referral had presented him in a negative light and it was not him. However he agreed the referral on the basis that Miss Dingle assured him it was the best way to get support.

60. The referral stated that the claimant' mental health had impacted him through:
    60.1. Sleeping difficulties which sometimes led him to take sleeping tablets and sleep through his alarm, and not arrive at work on time.
    60.2. Low energy at work and falling asleep at his desk.
    60.3. Low mood and often finding it difficult to control his emotions, crying at his desk – though in the majority of cases, he was able to put on a 'game face' when going into class to teach.
    60.4. Tasks taking double the time so long hours at work.
    60.5. Being sent home from work 21 March 2021 when they became aware he had had suicidal thoughts. Signed off work by doctors up to 29 March 2021 and then Easter holidays meant he was not due back in till 19 April 2021; unable to pass him as fit to return after return to work conversation on 21 April due to his fragile mental health, high levels of anxiety and evident exhaustion. He has since been signed off work by the doctors (more detail was given regarding attempts to get counselling).

61. The referral concluded that the claimant was committed to improving his mental health, 'he enjoys coming to work, the support, routine and sense of community that it offers him. He finds it very difficult not to be in work.'

62. The report, dated 28 May 2021, was provided on 2 June 2021. The report identified that the severity of the claimant's GAD anxiety score had increased since the last report – he was now scored Severe on anxiety. The report said the claimant had reported no specific work triggers. He felt it had been mainly personal issues over the previous 18 months which had caused him emotional distress and affected his recovery. He was under the care of his GP and had been prescribed medication and had long-term private counselling. He was awaiting a start date for 8 intrapersonal psychotherapy sessions. The report stated that the claimant remained unfit for work and that was likely to remain the case until he had received further therapeutic treatment and support. There had been little improvement over the past 12 months. The claimant would benefit from a medication review and possible NHS referral to mental health services. No return to work date could be identified at this stage and no adjustments had been identified which would facilitate an earlier return to work.

63. Regarding reasonable adjustments, the report recommended the following reasonable adjustments 'to support this employee's return to work when considered fit to do so':
    63.1. Phased return.
    63.2. Consider review of workload.
    63.3. Consider reducing working hours
    63.4. Updating him on any workplace changes in his absence.

63.5. The claimant and his manager agree to regular 1-to-1 sessions where his well-being could be monitored and additional support offered if required.
63.6. Adjusting absence trigger points.
63.7. Using the MIND WAP tool.

64. The last three recommendations were the same as had been made in the first OH report.

Returning to work following second OH report

65. No suggestion was made to the claimant at this stage that a formal meeting be held with HR and Miss Dingle to discuss the OH report and recommendations.

66. On 8 June 2021, the claimant rang Miss Dingle and said he wanted to come back to work. She told him that he should go back to his GP as OH had recommended and share the OH report with his GP. She said the next time he should make contact was when a doctor told him he was able to come back to work.

67. The claimant supplied a Fit Note from 6 June to 6 July 2021. When it expired, he wanted to return to work.

68. On about 2 July 2021, the claimant went into the school unannounced. It was at the end of the day after the children had gone home. He noticed his belongings were packed in a corner which upset him. In fact it was not unusual for the school to pack up the belongings at the end of a term for various staff as desks are frequently moved around.

69. Miss Dingle told him by WhatsApp voicemail on 5 July 2021 that the school required a formal 'fit for work' note from his doctor together with any adjustments they needed to make. She said Paul Brereton would contact him to discuss this as the matter was now in the hands of Head Office.

70. Mr Brereton was Head of HR for the Group. He telephoned the claimant mid June 2021. He told the claimant that Miss Dingle and Mr Snell 'had done an amazing job so far in dealing with him'. This comment upset the claimant because he did not feel they had done an amazing job and the wording made him feel like he was a disease which they had finally been able to rid themselves of. Indeed, Mr Snell had not telephoned him once to see how he was doing. Mr Brereton told the claimant they felt it was now time to look after the school, the staff and the boys.

71. Mr Brereton told the claimant he would telephone him over the summer regarding when he would return. The school holidays ran from 6 July to 31 August 2021. The claimant was not contacted by any member of staff during that time. Mr Brereton did not call him.

72. Mr Brereton told the tribunal that he had tried to do so but had erroneously telephoned a friend who had recently died who had the same first name and had left a message on the mobile phone provider's voicemail each time. He said he had done this twice. At the time, he did not realise his error. He believed that the claimant had simply failed to get back to him. He did not send the claimant any email.

73. The new school year began on 1 September 2021. The claimant was keen to return to work. He did not notify the school that he was coming back or provide any note from his doctor. As far as he was concerned, he had made it clear at the end of the summer term that he wanted to return, His doctor had told him it was unnecessary to provide a note stating he was fit to return, because he had no longer been signed off as unfit for work after 6 July 2021.

74. Also, the claimant was included in the usual email sent out to all staff prior to the start of the school year. The email, dated 27 August 2021, contained a timetable for the first three or four days before the pupils restart.

75. There was a whole staff meeting at 8.30 am on 1 September 2021. The claimant was anxious about what people would think when about him and he was an hour late.

76. All staff except the claimant were given a weekly timetable on 1 September 2021 for the coming term. The school had not prepared a timetable for the claimant because they were not expecting him to return to work at the start of term, not having heard from him, and because they wanted to create a timetable in conjunction with him when he did return.

77. No return to work meeting was held that day. Miss Dingle and Mr Snell greeted the claimant but did not have time to meet with him. The start of a school year is extremely busy.

78. The claimant did not attend the 'specialist teachers and floating teachers' meeting later that day and had to be fetched to attend. He had not gone to the meeting because he felt uncertain about his role, not having been given a timetable. Miss Dingle said that there was no reason for him not to think that he continued to be a Floating Teacher and therefore he should have gone to the meeting.

79. The next morning, the claimant did not go into work. He was upset that there had been no timetable and no allocated desk space waiting for him. Miss Dingle messaged him at 9.17 am asking if he was OK. The claimant replied, 'Yep, just slept badly and have no idea what I'm doing at the moment as regards to my job as I have no table, and feel like I have no purpose'. Miss Dingle replied that he did have a table in the workroom; they had moved a member of staff downstairs to ensure this. She said Mr Snell and herself had tried to find time the previous day to discuss his timetable but had been unable to do so and planned to talk today at 10.30 am to discuss their plan. Not having a timetable was only a temporary measure. The claimant said he

would greatly appreciate it if they could talk that day. He said he had not heard from either of them to say hello or check how he was.

80. The claimant went in to work at 2 pm. That evening, Mr Snell and Miss Dingle met him to talk about his timetable and expectations moving forward. They also talked him through changes which had taken place in the school. Over the weekend, Mr Snell wrote a timetable for the claimant. Miss Dingle talked the claimant through his timetable on Monday 6 September 2021.

81. Unfortunately, the sense that he was not wanted, because of what had happened on 1 September 2021, lodged in the claimant's mind. He was already feeling insecure and rejected because of the periods when he had been instructed by the school to stay at home and particularly the way the message on 21 March 2021 had been handled.

82. The timetable did not build in a phased return to work as OH had recommended. Mr Snell and Miss Dingle did not suggest it and the claimant did not ask for it, because he was keen to get back. Mr Snell and Miss Dingle did however make a number of adjustments to reduce workload which they discussed with the claimant at the meeting. They took away any need for him to plan lessons. They put him into many sports lessons, which they knew he liked. They said he would not be asked to cover a lesson for at least a week. They gave him mornings' reading with Reception pupils, because they knew he wanted to move to Reception.

83. Mr Snell and Miss Dingle still did not give any thought to using the MIND WAP tool, which had been mentioned again by OH.

84. Miss Dingle still did not have regular 1-to-1 meetings with the claimant, but her office was a few feet away and she checked in with him every day or every other day.

85. Over the period 7 – 16 September 2021, the claimant's mood was up and down and he was tearful at school and complaining about his treatment by management in the staffroom. The lack of a timetable had made him feel he was being pushed out. On 8 September 2021, the claimant messaged Miss Dingle on WhatsApp only at 9.13 am to say he was on his way.

86. On 16 September 2021, when she had not heard from the claimant, Miss Dingle messaged the claimant at 9.33 am to ask if he was OK. She heard nothing. She messaged again at 12.18 to say she had tried to call. The claimant replied at 13.34 to say he was not OK and had a cold / 'flu and felt so stressed and anxious about work. The claimant was off sick for two weeks with stress, anxiety and coryzal symptoms (an upper respiratory tract infection).

Third OH report

87. On 23 September 2021, Miss Dingle emailed the claimant to say they were keen to put adjustments in place to best support his return to work and to

suggest an updated OH report. The claimant agreed. However, there was a delay in getting the report because the claimant felt that Miss Dingle's draft referral wording was inaccurate. Eventually, on 15 November 2021, it was agreed that the referral would be sent with Miss Dingle's draft and the claimant's comments and disagreements.

88. In the referral, Miss Dingle stated that the claimant had returned to work in September 2021, but it was apparent that he needed further support, and they needed guidance on whether he was fit to be in school and how best to transition him back into the workplace. There had been several incidents in the 16 days when he was back in school before being signed off. Miss Dingle said that the claimant did not agree with the employer's views on the issues which prompted the referral, but their main concerns were:
    88.1. Failure to attend meetings relevant to him; arriving 60 minutes late on 1 September. Having to be called to a meeting the same day.
    88.2. Not informing school of absence and not turning up for work despite HR meeting on 14 September stating the importance of timekeeping: 2, 8 and 16 September.
    88.3. Volatile and emotional mood; bouts of tears at desk and in staffroom 7, 8, 14, 15 September. Found asleep at school 7 and 8 September. Staff and parental complaints about treatment of boys (bellowing at a boy for different reasons).
    88.4. Not following direct instructions: told not to meet teachers to discuss lesson plans as new school system was that teachers in control of plans. Also ordered £500 of resources for RE without asking the teachers if they wanted to use them.
    88.5. Hypersensitive: taking school decisions personally. Doesn't like some of the changes made to modernise the school over the past few years.
    88.6. Lack of professional boundaries: speaking ill of others, mainly his line managers, in common places, causing disruption and unrest. 7 September, complained to staff in his workroom about his line managers. 8 September, spoke to several members of staff in the staffroom. 15 September, spoke in his workroom about not feeling supported by his line managers.

89. Miss Dingle noted that the last OH report had said the claimant was not fit to return, but that his GP did not state this. She said there had been incidents in the 16 days that the claimant was back which had prompted the referral. She said since his return, they had put in the following reasonable adjustments in place:
    89.1. A flexible timetable with no planning or marking
    89.2. Teaching in year groups which the claimant knew and was interested in, ie Year 3 and Reception
    89.3. Regular meetings with the claimant.

90. However, she said the claimant felt, using his own words, that it was his return to work and what had happened in that time, and there being no communication, back to work meeting held, support or adjustments put in place which had affected him. His work had been fine but the stress of coping with the circumstances had made him ill. He said his self-esteem and

confidence as a teacher was not good by being told he had no timetable and trying to navigate the day. He had been unaware of his duties and had no specified role, so he had not attended the meeting.

91. The report was by an OH physician, Dr Barhey. He summarised the issues which the claimant had with the school including lack of communication and enquiry about his welfare while he was off sick; no communication, back to work meeting, support or adjustments when he returned; not being given a timetable which made him feel worthless; feeling his role as Head of RE had been undermined with teachers doing everything themselves and feeling he was not wanted back at work.

92. He disagreed with the allegations in the referral letter: he had not attended meetings on 1 September because he was unsure where he should be. He had missed calling into work because he felt so unwell. He felt the volatile and emotional mood had been exacerbated by how he had been treated by the school.

93. Dr Barhey said the claimant was not fit for full hours or duties at present, but he may be able to return to work once a meeting had been held with the Head or Deputy Head to clarify his position and responsibilities. A phased return to work was then recommended. His treatment was helping him somewhat but 'the ongoing stressors with school as described are impairing his recovery, in my opinion'.

94. Dr Barhey suggested the following adjustments:
    94.1. Update the claimant on any workplace changes to procedures or policies.
    94.2. A phased return to work.
    94.3. Continue with adjustments previously made on return to work for 3 – 4 weeks ie flexible timetable no planning and marking; teaching in year groups he is comfortable with; regular meetings with manager and Head; reducing responsibilities and teaching times; flexible with start times if needed.
    94.4. It may be advisable to adjust absence triggers or authorised absence. Adjustments of this nature tend to be about 2.5 times the normal level.
    94.5. It may be advisable to explore work-related factors using the HSE Work Stress Assessment as a basis for discussion.
    94.6. Unless the employee can engage with management and address the perceived current workplace issues, it is unlikely he will be able to progress from a psychological perspective.

95. In answer to the question whether the claimant was fit to attend formal meetings, Dr Barhey said yes. He added that he would recommend the employee was allowed to take a representative along for support.

<u>Return to work</u>

96. A meeting was held with the claimant, Miss Dingle, Mr Snell and Ms Gajjar, Head of HR on 12 January 2022 to discuss the OH report and put in place a plan for the claimant's return to work. Miss Dingle explained to the claimant that a timetable had not been ready for the claimant because they had not realised he would be coming back to work on 1 September 2021. Once they realised he had returned, they met him the next day to say he would be given a timetable and his role had not changed. The pupils had not come back at this point. It was explained that Mr Brereton had been calling the wrong number over the summer and as they also had not heard from the claimant, they had assumed he would not be coming back. The claimant said he had told Miss Dingle in July that he would be coming back and his GP had said as his Fit Note had finished, he could return. It was agreed that both viewpoints were understood and they would draw a line under the matter.

97. The claimant felt his role as Head of RE had been undermined because teachers would be doing everything themselves. Mr Snell explained that it was the way the school was run generally that had changed and he would be updated.

98. Regarding the recommended adjustments, a phased return to work was agreed during which the claimant could start at 8.30 am. The claimant would be used as a Floating Teacher and would not be expected to plan or take sole responsibility for the class. Where possible, they would avoid using him to do cover while he was phasing back. He would work a reduced timetable while he transitioned back. While transitioning, his timetable would reflect the classes he was keen on ie Reception, Years 1 and 2. Miss Dingle would meet the claimant every Monday at 12 – 12.30, though at 9.30 – 10 on 17th. The claimant need not worry about his duties as RE Lead until he had fully transitioned back. The HSE Work Stress Assessment Tool could be used once the claimant had transitioned back if necessary.

99. The claimant did not ask for any adjustments to the absence reporting procedure or make any suggestion that he start later on the half days.

100. Miss Dingle emailed the claimant on 13 January 2021 with a copy of the meeting minutes and a timetable which she would go through with him on his return on Monday 17 January 2022.

101. Miss Dingle considers that the claimant's return to work went smoothly until 21 February 2022, when it was reported to her by two staff members that he had fallen asleep in class. .At 10.55 am on 22 February 2022, the claimant texted Miss Dingle to say that he had just woken up with a fever and he had tested positive with Covid.

102. The claimant returned to work on 7 March 2022. Miss Dingle raised with him that he had been asleep in class. The claimant denied this and said he was only resting his eyes.

103. The claimant was off sick again on 10 March until 12 March 2022. On 14 March 2022, he called in sick at 8.15 am, after the cover email had been sent to other staff for the day.

The Investigation

104. At 11.30 am on 15 March 2022, the claimant was called straight into a meeting with Miss Dingle, Ms Gajjar and another HR Officer as notetaker. He was given no prior notice of the meeting or what it would be about. He was not told it was an investigation meeting which would be leading to an Investigation report. He was not told he could bring anyone with him to accompany him.

105. Ms Gajjar introduced the meeting by saying they were going to cover a range of subjects including his failure to report his absences on time and falling asleep in class. The claimant said he was unaware he would be having a meeting that day. Ms Gajjar said they did not need to give him notice of the meeting as it was not a formal meeting.

106. Miss Dingle said that falling asleep in class was unacceptable and this was not the only occasion. The claimant gave various excuses. He said he had Covid. He said he was a deep thinker and closed his eyes in order to think, and he was not leading the lesson. And he said he had a big lunch.

107. Miss Dingle said that the claimant was not following the Absence Policy and letting them know by 7.30 am if he was unable to come into work that day. They had had this conversation the previous year. She gave several examples of when the claimant had not called in when he arrived late, and said it had been discussed with him in their Monday meetings. The claimant said he used three alarms.

108. Ms Gajjar said that no one was disputing that the claimant was genuinely unwell. But he had been absent despite the adjustments and they needed to consider if he was well enough to fulfil his role in terms of absence.

109. Miss Dingle then raised briefly how he had been talking to boys and complaints from parents. However, there was no discussion about this. The discussion was almost completely about falling asleep and late reporting.

Confidentiality instruction

110. Shortly after the investigation meeting ended, the claimant asked a new member of the Senior Leadership Team ('AS') on the stairs if he could have a word. He asked if she had thought he was asleep. He then asked if she thought he was a competent teacher. AS said he should speak to Miss Dingle. The claimant became very upset and started to cry and say it was hard living alone during Covid and then getting Covid himself.

111. Miss Dingle spoke to the claimant at the end of the day about it. Her tone was fairly harsh. She said he should not be discussing his situation with other

members of staff and she reminded him of 'confidentiality'. She said he should not put other staff members in uncomfortable positions. She said only herself, Mr Snell and Head Office were aware of the situation and he should not be discussing it with any other members of staff.

112. Miss Dingle told the tribunal that she had said what he discussed out of school was his choice. When pressed in the tribunal, she said she had told him that if he had a close friend who was a work colleague, he could discuss it discreetly outside school. We do not accept that she said that. It seems unlikely that she would have introduced the idea of having discussions with work colleagues outside school. Moreover, it is clear from what she wrote in the log in her investigation report that she did not want him to be discussing his work situation with any work colleague at all. That is certainly the impression she gave to the claimant in the way she delivered the message and it made him feel extremely isolated and anxious.

113. We do accept Miss Dingle's evidence that the claimant had been constantly discussing his situation and unhappiness with how it was being handled with 'all and sundry' at work at every opportunity, including in places where boys might hear.

114. We also accept that the instruction not to talk to work colleagues and the way it was delivered, without any suggestion for example, that he could talk to one nominated individual, caused the claimant great distress and increased his sense of isolation from then on.

<u>The investigation report</u>

115. There were a few incidents in the following days. On 23 March 2022, a staff member expressed concern regarding the claimant's behaviour management in the classroom, being too harsh on the boys, and shouting at them to move their stars down simply for not looking at him when he was talking to them.

116. On 25 March 2022, the last day of term, the claimant did not attend work and did not notify the school. At 13.58, Miss Dingle emailed the claimant to ask if he was OK. The claimant replied at 18.16 that he had been sick all day and had only just made it out of bed.

117. The school was then closed for the Easter holidays, reopening on 19 April 2022.

118. In a Monday meeting on 25 April 2022, the claimant said his absence on 25 March 2022 was a build up of exhaustion and stress brought on by the end of term. He said he had woken at 10 am or 11 am and thought 'What's the point?' before falling back asleep again. We do not take that to mean, as the respondent suggested, a calculated 'What's the point of complying with reporting procedures?'. We took it to be a more general cry of despair. The claimant tells us this is correct.

119. On 25 April 2022, Miss Dingle also identified some further concerns which were discussed.

120. Miss Dingle prepared a detailed investigation report dated 11 May 2022. It said that the issues being investigated were allegations of falling asleep while on duty; persistently failing to follow the school's absence reporting processes; and a wider concern regarding the employer's capability to perform their teaching role in light of the numerous health and behavioural concerns which have been impacting on his role over recent years'.

121. In terms of Findings and Recommendations, the report set out the evidence that the claimant had been asleep for approximately 10 minutes during a lesson on 21 February 2022. It said he had previously fallen asleep on 3 occasions in this academic year in front of boys or staff: 7 September at Westway during a games lesson; 8 September 2021 during a subject leaders meeting in school and 11 February 2021 during whole school inset training, and the Senior Leadership Team had had conversations around this with him.

122. Regarding failure to follow absence protocol, Miss Dingle set out the instances on 14 March 2022 and 25 April 2022. It said the protocol had been broken on numerous occasions. The claimant had been fully aware of steps he must take. On 14 September 2021 a meeting was held as he was absent without leave on 2 September 2021 and Miss Dingle had to call and chase him. Since the meeting on 14 September 2021, there had been a further set of occasions when he had failed to inform the school.

123. The report said there was a case to answer in relation to falling asleep and not following the protocol when being absent from work. These should be considered as part of a wider assessment of the claimant's capability to do his role rather than as disciplinary matters. As managers of the school, they felt they had exhausted all reasonable options to try to support the claimant. It was felt there was a need to review and assess the claimant's capability to carry out his role and recommended it was done at a formal meeting.

<u>The importance of reporting absence by 7.30</u>

124. The Staff Code of Conduct says that all staff should arrive in good time. If they need to be absent or expect to be late, they should telephone or text 'at the earliest opportunity, preferably before 7.30 am'.

125. The school wanted to know by 7.30 am to ensure appropriate cover was in place for the start of the day. Given there were 60 members of staff, there were often absences which needed to be covered. With Floating Teachers, early notification was particularly important because they were used to cover absences of other staff. Pupils arrive at 8.30 am.

126. Around 5 or 10 past 8, Miss Dingle would send the daily email concerning cover, so it would be difficult if she only found out after 8 am that someone was going to be late or away. Also, she was often in meetings after 8 am and then she would be on doors from 8.30 am, away from her phone. Every class

usually has a teaching assistant who can watch the pupils if the teacher is late, but cannot do the teaching. Parents pay high fees and expect proper teacher cover. If the person on cover unexpectedly does not arrive, then the original teacher needs to take the class if possible because they were doing marking or other tasks (as opposed to being ill), or a member of the Senior Leadership Team had to drop everything and cover.

127. Miss Dingle was aware that the claimant's medication had side-effects which made him sleepy and also hard to wake up. At that stage, Miss Dingle did not mind if he notified her at 8 am rather than 7.30 am if he was running late. They tried to organise his timetable so it was not catastrophic if he did not arrive because there would be another member of staff (a teaching assistant) in class to watch the boys. The claimant never asked for a later start.

128. Miss Dingle tried to be supportive by allowing the claimant to let her know by 8 am rather than 7.30 am, but he did not always stick to that either.

Termination of employment

129. On 16 May 2022, Mr Brereton emailed the claimant requiring him to attend a formal capability meeting. He said the meeting would be chaired by him and attended by Mr Snell, with Ms Nish as witness and notetaker. Mr Brereton said he needed to consider whether the claimant was capable of fulfilling his role and make a decision regarding his continued employment or whether additional support could be provided. Mr Brereton attached the investigation report. He said one possible outcome was termination of the claimant's employment. Mr Brereton said that the claimant could be accompanied by a work colleague or trade union official. If he chose to be accompanied, 'please confirm the name of the individual who will accompany you in advance of the meeting'.

130. The next day, Ms Nish (who was Mr Brereton's PA) emailed to confirm the hearing was scheduled for 25 May 2022. She repeated that the claimant could be accompanied by a work colleague or trade union official, and asked the name to be provided in advance.

131. The claimant provided a Fit Note for the period 18 – 27 May 2022, stating that he was not fit for work due to 'work-related stress and mental health'.

132. The claimant said that he was unable to attend the meeting and by email dated 25 May 2022, it was rescheduled after half-term for 7 June 2022. Mr Brereton said the Fit Note did not state that the claimant was unable to attend a formal meeting at work so he was expected to attend or provide medical evidence if unable to - otherwise the hearing would go ahead anyway. If he was not willing to attend, the claimant should tell Mr Brereton by 30 May 2022 that he would be providing written submissions and do so by 1 June 2022. Mr Brereton reiterated his statement about the claimant's right to be accompanied and letting him know the name in advance.

133. The claimant responded on 30 May 2022 attaching a GP letter which stated that he was unable to attend a hearing on 25 May or 7 June given his ongoing anxiety / depression and state of mental health. The claimant asked for any meetings to be postponed until his GP said he was fit to attend.

134. The claimant had been further signed off work by his GP from 26 May – 30 June 2022. The claimant did not want to provide written submissions. His job was very important to him and written information can be misunderstood. He wanted to be available to answer questions.

135. Mr Brereton emailed on 1 June 2022 to reschedule the meeting for 1 July 2022. He said they would factor in breaks and consider any adjustments in meeting format including holding it over Teams. Mr Brereton said they would not postpone the meeting again, so if the claimant could not attend, this was an opportunity to provide written submissions.

136. On 30 June 2022, the claimant was further signed off until 11 July 2022.

137. At 11.39 pm on 30 June 2022, the claimant emailed to request a postponement of the meeting. He said 'the person who was acting as my fiduciary is unavailable to attend this Friday. Having had the benefit of his professional advice and support it would be inappropriate for me not to have them join us for the meeting. To be without his advice in this meeting would be wrong in principle'. He also stated that he had a Fit Note confirming he would be unable to attend. He said he made the application to postpone as soon as he was aware of the two difficulties with the hearing date. He said he would be able to attend a rescheduled meeting at a mutually agreed time and date along with a person of his choosing which would ensure the meeting was conducted efficiently and fairly.

138. This was the first mention of who the claimant wished to bring with him. The claimant had been unable to bring a trade union rep because he did not join the union prior to the relevant work issue arising and he thought he could not bring a work colleague because he had been told not to talk to work colleagues. However, he had not said any of this explicitly to the respondent. He did not say who the person was that he had wanted to bring with him.

139. Mr Brereton decided to go ahead with the meeting. He felt there was no indication of when the claimant might be well enough to attend. He replied at 12.03 pm on 1 July 2022. He said that they had provided the claimant with a month's notice of the new date. There would have been ample time to make alternative arrangements if his companion could not attend. He was doubtful the claimant first became aware of this at 11 pm the previous night. If the claimant felt unable to attend, he had been told he could provide written representations. The claimant's email showed he was able to do so. That option was still available to 4.30 pm that day.

140. The claimant did not supply written representations. He did not see the email until about 5 pm, after the deadline. The hearing went ahead without him present, although we were not shown any minutes of it.

141. Mr Brereton considered the investigation report, the claimant's absence record and the OH reports. He also saw the appraisals, but considered they were not recent. Without having the claimant's input, which he had wanted, he relied on the investigation report, which he felt was well written and included what several people had reported to Miss Dingle. He decided to dismiss the claimant.

142. On 4 July 2022, Mr Brereton wrote to the claimant saying his employment would be terminated on grounds of ill-health. The reason was that 'despite the best efforts of all concerned, your continued absence is having a detrimental impact on the school and the children, and your behaviour when in school falls below the standard expect of an employee of Alpha Plus'.

143. Mr Brereton told the tribunal that his reasons for dismissal were all five at paragraph 23 of the List of Issues, ie:
    143.1. The claimant's absence record (89 days in 2021; 52 days in 2022 up to dismissal).
    143.2. The claimant's repeated failure to follow the absence reporting procedures.
    143.3. The claimant's unpredictable temperament.
    143.4. The claimant's overly strict classroom management resulting in complaints from parents and pupils.
    143.5. Sleeping at work.

144. Mr Brereton said to the tribunal that he would not have dismissed the claimant at that stage purely because of his absence record. He would have put in place a 30-day or 60-day programme to monitor absence reduction and if it did not improve, he would have followed the procedures.

145. Regarding which Policies were followed Mr Brereton said a variety of Policies could have been used, but he had used the Capability Policy rather than the Absence Policy because the Doctor had referred to Capability Policy in the third OH report. Mr Brereton felt that the claimant had been given plenty of warnings regarding his behaviour in school. However, since his behaviour was related to his illness and had not changed for over a year, he did not see how formal disciplinary action would change that behaviour.

146. As for the suggestion that the claimant should have been allowed to bring a friend, Mr Brereton said the claimant had worked at the school for a long time and was part of the family. A work colleague would have fulfilled the function of a friend. The claimant had not told him that he was not sure he could bring a work colleague because of Miss Dingle's instruction about confidentiality.

Appeal

147. The claimant appealed by letter dated 18 July 2022 addressed to Ms Nish in HR.

148. At the end of his letter of appeal, the claimant asked confirmation of several reasonable adjustments to facilitate his attendance at the appeal hearing. These included confirmation that the appeal hearing take place by Zoom/Teams and that he was allowed to bring a friend with him for moral support.

149. Ms Gajjar wrote to the claimant on 26 July 2022 providing an appeal date and stating that he could attend via Teams. The appeal panel would be Russell Seaman, Director of IT, and Liz Francis, Director of Governance and Standards. An HR consultant from WorkNest would attend to provide HR support and take minutes. The letter stated that the claimant had the right to be accompanied by a trade union representative or work colleague, and asked him to confirm the name of his representative by 8 August should he wish to take that option. It added 'Please note that legal representation is not permitted'. The letter did not address the claimant's specific request to bring a 'friend'.

150. The claimant did not bring any representative with him. At the start of the appeal hearing, Ms Francis asked the claimant whether he had brought a colleague. The claimant said he had not. He said he did not know if she had seen his email to Ms Nish. He said it was hard to find a work colleague who, as it was school holidays, was in London, available and willing to attend. He referred to Miss Dingle having told him everything was confidential. He said that if you ask someone to come with, they want to know more about it and then they feel they will have their name black marked if they come along.

151. From our reading of the hearing minutes, it is not clear whether the claimant was saying he had actually asked a colleague who had refused or whether he feared that would happen. Ms Francis took it as the latter. Either way, she did not explore it further. She did not think of rescheduling. The claimant told us that he had actually asked a colleague who had refused because they feared a black mark against their name. We accept his evidence.

152. Ms Francis had the key documents including the dismissal letter, grounds of appeal, investigation report, OH reports, the claimant's absence record and correspondence leading up to the dismissal hearing which the claimant had not attended.

153. The appeal lasted 1 hour 48 minutes. Ms Peterson asked some clarification and enabling questions as well as the panel members.

154. Ms Francis wrote to the claimant a 12 page outcome letter on 26 August 2022, rejecting the claimant's appeal. She said she agreed that the claimant was not well enough to do the role. Indeed, during the appeal hearing he had been unable to answer whether he was well enough to teach at this point.

Law

Discrimination arising from disability

155. Section 15 of the Equality Act 2010 prohibits discrimination arising from disability. This occurs if the respondent treated the claimant unfavourably because of something arising in consequence of the claimant's disability. The respondent has a defence if it can show such treatment was a proportionate means of achieving a legitimate aim.

Failure to make reasonable adjustments

156. The duty to make reasonable adjustments is set out in sections 20 – 21 of the Equality Act 2010 and in Schedule 8. Where a provision, criterion or practice applied by the employer or a physical feature of the premises or a lack of an auxiliary aid puts a disabled person at a substantial disadvantage in comparison with people who are not disabled, the employer must take such steps as it is reasonable to have to take to avoid the disadvantage or provide the auxiliary aid. Substantial' means more than minor or trivial (EqA s212(1)).

157. 'Substantial' means more than minor or trivial (EqA s212(1)).

158. The House of Lords in Archibald v Fife Council [2004] IRLR 652 said this about the duty to make reasonable adjustments:

> 'The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination.'

159. The EHRC Employment Code says at para 6.32 that any reasonable adjustment should be implemented in timely fashion. It goes on to say that a good starting point is for an employer to conduct a proper assessment in consultation with the disabled worker of what adjustments may be required. The prevailing case-law suggests that failure to carry out such an assessment is unlikely in itself to be a failure to make reasonable adjustments, because an assessment per se does not remove disadvantage. However, the failure to carry out an assessment may lead to a failure to make the necessary adjustments through ignorance of the situation.

160. It need not be certain that making the adjustment would remove the claimant's disadvantage. It is not even necessary for there to be a 'good' or 'real' prospect of that happening. It is sufficient simply if there is a prospect of the adjustment removing the disadvantage. However, the likelihood of it succeeding may affect compensation. (Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10; Redcar and Cleveland Primary Care Trust v Lonsdale UKEAT/0090/12.)

161. By the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made. The claimant must establish that the duty has arisen and there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. It is not enough to show there was a provision, criterion or practice which caused substantial disadvantage. There must be evidence of some apparently reasonable adjustment which could be made. That is not to say that in every case the claimant would have to provide the detailed adjustment that would need to be made before the burden would shift. It would, however, be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not. (Project Management Institute v Latif [2007] IRLR 579, EAT.)

Unfair dismissal

162. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under s98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.'

163. The question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for the tribunal to substitute its own decision. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA)

164. In reaching their decision, tribunals must take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings. The Code is also relevant to compensation. Under section 207A, if the claim concerns a matter to which the Code applies and there is unreasonable failure by either the employer or the employee to comply with the Code, there can be an increase or reduction in compensation (respectively) according to what is just and equitable of up to 25%.

165. If the dismissal is unfair on procedural grounds, the tribunal must consider whether, by virtue of Polkey v AE Dayton Services [1987] IRLR 503, HL, there should be any reduction in compensation to reflect the chance that the claimant would still have been dismissed had fair procedures been followed.

Conclusions

Disability: Issue 2.6

166. The respondent admits the claimant had the disability of anxiety and depression. That was clear to us from the evidence in any event. The claimant's adjustment disorder does not add anything to this because it was part of his anxiety. The claimant was therefore disabled at all material times. The disability we refer to is 'anxiety and depression'.

Alternative reporting procedures - failure to make reasonable adjustments: Issue 2.12 – 2.15.1

167. The respondent admits that it applied a provision, criterion or practice that the claimant notify the school by 7.30 am if he was going to be late or absent.

168. This did put the claimant at a substantial disadvantage because of the effects of his disability which caused sleep disturbance and therefore fatigue and also because of the effects of his medication which caused drowsiness and also affected his sleep.

169. The respondent knew this. The first OH report says that the claimant is suffering from very poor sleep due to his mental health. Miss Dingle was aware of this. For example, she referred in her referral for the second OH report to sleeping difficulties which led to the claimant taking sleeping tablets and not hearing his alarm go off.

170. The final question is whether the respondent took reasonable steps to avoid that disadvantage. Miss Dingle did take one step. She gave the claimant leeway. She accepted that he could let her know by 8 am.

171. The claimant did not suggest to us any alternative mode of reporting in or any later reporting time.

172. It would not be reasonable to expect the respondent to formally allow the claimant to report later than 8 am because the pupils come in at 8.30 am, the cover email goes out just past 8 am, and the school needed to know whether it had to find cover for the claimant's classes, or alternatively whether he was available to cover other absent teachers. There may have been teaching assistants available to watch over the boys, but it is not satisfactory for the class not to start on time. In fact, Miss Dingle was as flexible as she could be within the constraints of the service.

173. This claim for failure to make reasonable adjustments is therefore not upheld.

Requirement to report sickness absence by 7.30am - indirect disability discrimination: Issue 2.7.1 – 2.11

174. The claimant did not provide us with evidence that a requirement to report sickness absence by 7.30 am would put disabled people, or people with his disability, at a particular disadvantage when compared with others. This might be the case, but we were not given the evidence.

175. In any event, the requirement would be a proportionate means of achieving a legitimate aim. The aim was to ensure classes were not left without teachers or without teachers for any length of time at the start of a lesson and to minimise disruption to other staff who might be forced to cover at the last minute. These are clearly legitimate aims.

176. In terms of whether it is proportionate, the respondent did allow the claimant to delay reporting till 8 am. Obviously the requirement had a serious impact on the claimant and we take that into account. It was part of the reason he was ultimately dismissed. However, the problems caused by reporting later than 8 am on unpredictable occasions unfortunately outweighed the impact on the claimant and made the requirement proportionate.

177. This claim for indirect discrimination is therefore not upheld.

A postponement of the capability hearing - failure to make reasonable adjustment: Issue 2.12 – 2.15.2

178. The respondent refused to postpone the capability hearing on 1 July 2022 until the claimant was fit to attend and his chosen companion could come.

179. This did put the claimant at a substantial disadvantage in comparison with someone who did not have his disability because he was not at that stage well enough to attend. On 30 May 2022, the claimant emailed asking that any meetings were postponed until his practitioner decided he was fit to attend. He attached his GP's letter of 26 May 2022 which said he was unable to attend the hearings of 25 May 2022 and 7 June 2022 because of his state of mental health.

180. Although strictly speaking the GP did not write another note saying the claimant could not attend the meeting on 1 July, he did provide a general Fit Note saying the claimant was not fit for work up to 11 July 2022 and it would have been obvious that continued to mean unfit for the meeting.

181. This did put the claimant at a substantial disadvantage because due to his disability he was not fit to attend the hearing at that point and certainly not without a companion. Putting his arguments would not have had the same persuasive effect even if he had been able to do so within the limited time-scale. The end result was that he was dismissed without being heard. He had had no opportunity to comment on the investigation report. He had not even known that the investigation meeting was an investigation meeting which

could feed into a dismissal process. He had not had the opportunity to be accompanied to that investigation meeting.

182. Mr Brereton knew or ought to have known from the claimant's letters and the general circumstances that the claimant would be put at a substantial disadvantage by him not agreeing to further postpone.

183. This leaves the question whether it would have been a reasonable adjustment to postpone further.

184. The claimant's letter of 30 June 2022 says he would be able to attend a rescheduled meeting along with a person of his choosing. The claimant was first notified that there would be a formal capability hearing on 16 May 2022. The next day he was told the hearing would take place on 25 May 2022. That was then rescheduled for 7 June 2022, which was after half term. On 30 May 2022, the claimant provided his GP letter saying he had not been fit to attend on 25 May 2022 and would not be fit on 7 June 2022. On 1 June 2022, it was rescheduled for 1 July 2022 and Mr Brereton said they would not postpone again. Right at the last minute, at 11.39 pm on 30 June 2022, the claimant said he could not attend and was further signed off sick until 11 July 2022.

185. So altogether there had been two postponements, ie from 25 May 2022 and from 7 June 2022. The total time from the first intended date ie 25 May 2022, until 30 June 2022 was 5 weeks 2 days. That included half term. If the claimant was fit to attend after 11 July 2022, this would bring the total delay up to about 7 weeks.

186. We bear in mind that this was a relatively small private school and not the public sector where lengthy dismissal processes are common. However, this was a fast moving process. The investigation report had been supplied on 11 May 2022. From that report to dismissal for a teacher who had been employed 15 years was only 7 weeks 2 days. This was a case where there had been no prior formal meetings under the procedures. The claimant had had no previous opportunity to answer in a formal setting with representation, knowing the seriousness of the potential consequences. We appreciate that this latest postponement request was right at the last moment. We also appreciate that a hearing of this nature cannot be postponed indefinitely. But the postponements had been for short periods and the claimant did say in his 30 June 2022 email that he would be able to attend a rescheduled meeting at a mutually agreed time. It would therefore have been a reasonable adjustment to postpone the 1 July 2022 hearing and reschedule at least one more time.

187. The failure to postpone the capability hearing of 1 July 2022 was therefore a failure to make reasonable adjustments.

<u>Permission to be accompanied to appeal hearing by a friend: - failure to make reasonable adjustment: Issue 2.12 – 2.15.4</u>

188. The respondent applied a provision, criterion or practice that employees could only be accompanied by a workplace colleague or trade union representatives to various meetings including appeals against dismissals.

189. In his appeal letter, the claimant asked for confirmation that he could bring a friend for moral support by way of reasonable adjustment. The respondent never directly addressed this request. Ms Gajjar in her letter of 26 July 2022, simply repeated the usual formulation that the claimant could bring a trade union representative or work colleague, and asked him to provide the name of his representative by 8 August 2022. She added that legal representation was not permitted. She said nothing about a 'friend'.

190. As a result, the claimant arrived at the appeal hearing with no representative. He had tried to ask a work colleague, but they had been reluctant about having a black mark against them. Ms Francis asked him if he had brought a colleague. When the claimant replied that he had been unable to find a work colleague who would come, Ms Francis simply moved on.

191. Therefore, the respondent did in effect apply the provision, criterion or practice to the claimant of limiting his choice of companion, ie not allowing him to bring a friend from out of work.

192. This provision, criterion or practice did put the claimant at a substantial disadvantage compared with people who are not disabled or who do not have his disability. We accept that all employees are potentially put at a disadvantage by being limited to their choice of companion - especially if they are not a trade union member - other work colleagues may be reluctant to get involved. However, the impact of not having a companion was greater on the claimant because of his disability. He was very anxious and he had difficulty focusing on issues at hand.

193. The respondent knew or ought to have known that the claimant would be put at such a disadvantage because of his disability. He had explicitly asked for that adjustment in his letter of appeal and said he needed a friend for moral support. He did not ask to bring a legal representative. His appeal letter talks about stress, anxiety and feeling marginalised and isolated. He had been unable to attend the dismissal meeting due to anxiety and stress. Also, the third OH report, when saying he was fit to attend formal meetings, made a point of adding 'with a representative'. The appeal panel could see that he had arrived with no representative. The respondent suggests that a work colleague could also act as a friend, but when the claimant arrived at the appeal hearing, he explained he had been unable to find a work colleague for reasons which applied specifically to work colleagues (out of London; not wanting a black mark against their name etc).

194. We find that the respondent should have made the reasonable adjustment of allowing the claimant to come to the appeal hearing with a friend who was not a work colleague or a trade union representative. The respondent did not put forward any reason in evidence why the claimant could not be allowed to bring a friend to the appeal hearing. In her witness statement, Ms Francis

says he did not make contact prior to the appeal meeting to say he would bring a companion, but the appeal letter clearly asks for permission to bring a friend by way of reasonable adjustment, and Ms Gajjar ignored that request, or implicitly refused it by her reply. Then at the appeal hearing, seeing the claimant was without someone, the appeal panel did not explore with him whether he would like to postpone and bring a non-work friend. We cannot see what difficulty allowing him to bring a friend would have caused the respondent. If anything, it would have helped everyone, by keeping the claimant calmer and perhaps helping him focus. We cannot see why, as stated in the List of Issues, having a friend as a companion would impede the smooth running of the appeal process. Any inappropriate inputs could have been disallowed. It was particularly important given that he had not attended the dismissal hearing.

195. We therefore find that the failure to allow the claimant to bring a friend to the appeal hearing was a failure to make reasonable adjustments.

Limitations placed on choice of companion - indirect disability discrimination: issue 2.7.2 – 2.11

196. The limitation which the claimant meant was not being able to be accompanied by a friend.

197. Indirect discrimination law is different from the law on failure to make reasonable adjustments - it is a wider proposition to say that there was group disadvantage in limiting choice of companion and specifically in refusing to allow an employee to bring a friend outside work. We were not given wider evidence on this.

198. This claim for indirect discrimination is therefore not upheld. The issue is more sensibly covered by the claim for failure to make a reasonable adjustment for the claimant, which we have upheld.

Failure to obtain up-to-date medical evidence and OH report. Failure to make reasonable adjustment: Issue 2.12 – 2.15.3

199. The law about making reasonable adjustments does not cover consultation and assessment. These are important steps to enable an employer to decide whether and what adjustments are needed, but they are not steps which in themselves alleviate disadvantage.

200. In any event, this argument was not explored during the tribunal hearing. There was almost no mention of the suggestion that the respondent should have obtained a further OH report prior to dismissal and there was no cross-examination of the respondent's witnesses on this point.

201. We would also say that the respondent had already obtained three comprehensive OH reports with detailed suggestions for reasonable adjustments. The most recent had been obtained in December 2021. The

second and third reports had entailed disputes over what should be written in the referral documents.

202. For these reasons, the failure to obtain up-to-date medical evidence and advice from an OH expert to identify and address any other reasonable adjustments was not a failure to make reasonable adjustments.

<u>Dismissal – discrimination because of something arising from disability under s15. Issues 2.16 – 2.18</u>

203. The respondent admits the reasons it dismissed the claimant were matters which arose in consequence of his disability of anxiety and depression. The reasons were

203.1.1. The claimant's absence record;
203.1.2. The claimant's repeated failure to contact the school by 7.30 am or at least by 8 am to report lateness or absence;
203.1.3. The claimant's unpredictable temperament;
203.1.4. The claimant's overly strict classroom management resulting in complaints from parents and pupils, and
203.1.5. Sleeping at work.

204. We agree that these matters arose in consequence of the claimant's disability. His absence record was almost entirely due to his disability. His failure to report absence in time or at all until chased up was due to his low mood and anxiety as well as the effects of his medication. The unpredictable temperament was a reference to mood swings and tearfulness caused by the claimant's disability and anxiety about how he was being treated at work as a result.

205. There were a few examples of strict classroom management which were associated with the claimant's disability-related mood swings. Notwithstanding what Miss Dingle wrote in the investigation report, the claimant's appraisals suggest that excessively strict classroom management was not a problem prior to his disability.

206. Sleeping at work was also clearly due to the medication and sleep disruption caused by his anxiety. We understand that the claimant had no self-awareness that he was sleeping at work, but we believe this did happen because the OH reports and his own WhatsApp messages refer to exhaustion and sleep disruption, so it is very plausible that the witnesses saw what they thought they saw.

207. As the respondent accepts, the dismissal was unfavourable treatment.

208. We were therefore concerned with examining the respondent's defence. Could the respondent prove that dismissal was a proportionate means of achieving a legitimate aim?

209. The respondent had several aims. In relation to attendance, the respondent needed to be able to provide adequate cover for the claimant's

duties. In terms of reporting in, the aim was to know in time to arrange who should cover which class and to know whether the claimant's own classes needed covering. In terms of unpredictable temperament, classroom management, and sleeping at work, the aims were to ensure other staff and boys were not substantially disconcerted by the claimant's manner, to maintain satisfactory teaching standards and avoid parental complaints, particularly when they were paying fees for their children's education.

210. These are all legitimate aims. The question is whether dismissal was proportionate.

211. In terms of proportionality, the impact on the claimant of dismissing him was very severe, emotionally, financially and to his professional standing. The job was extremely important to the claimant and as he repeatedly said, he really loved the job and took pride in it. The claimant had 'poured heart and soul into teaching' for over 20 years prior to his dismissal. The dismissal shattered his confidence and self-esteem. From a mental health point of view, going into work was very important for him. As Miss Dingle stated in her second OH referral, 'he enjoys coming to work, the support, routine and sense of community that it offers him. He finds it very difficult not to be in work

212. We have to balance this against the employer's reasonable needs.

213. On the issue of proportionality, our major concern is that the respondent jumped straight to dismissal without following any of the earlier stages of any of their Policies, whether Capability, Absence or Disciplinary. Indeed, Mr Brereton said that, if the only issue had been the level of absence, he would have put in place a 30-day or 60-day programme to see if attendance improved and if it did not, he would then have gone on to follow the Absence procedures. The claimant was not given that extra opportunity.

214. In relation to the other four reasons for dismissal, these should have been addressed under a Policy, whether the Capability or the Absence, as they clearly arose from the claimant's mental health. It would have been inappropriate to deal with them as disciplinary matters as the respondent recognised. We understand that the respondent was trying to be supportive and that a heavy-handed approach would have been undesirable. However, at the end of the day, the respondent did dismiss the claimant. The respondent moved very quickly to what would have been the final stage of any of the Policies, without any prior formal warnings; without any formal meeting where he could have been represented; and after an Investigation Meeting which took place with no prior notice, which was not signalled as such, which was called informal, and which only addressed two of the five grounds for dismissal in any detail. This was compounded by the fact that the dismissal decision was made without hearing the claimant in person. He was also unable to bring a friend to the Appeal hearing.

215. Had the Capability Policy been followed, even at the informal stage, clear targets and review points would have been agreed. The claimant would have been told the informal stage under the Capability Policy was being followed.

At each formal Stage, he would have had the right to be accompanied to a formal meeting. He would have been given a warning with specific review dates, and he would have worked together with his manager to create a Performance Improvement Plan. None of this happened.

216. Where an OH report is obtained, the line manager and HR should discuss it with the employee and confirm the outcome in writing. This did not happen after the first OH report. The position that the respondent was going to take regarding, for example, absence triggers, was therefore left vague.

217. This failure to follow the Capability or Absence Policy meant that the impromptu decisions at certain points telling the claimant to remain away from work for his own benefit did not have a wider structure around them which would have given him certainty regarding his position.

218. In terms of substance, the respondent placed a lot of weight on the claimant's failure reliably to report in before 7.30 am or at least before 8 am. We can see that caused real difficulties for reasons we address elsewhere in our decision in relation to Issue 2.15.1. The claimant had been told repeatedly that he must report in. On the other hand, Miss Dingle had tolerated him reporting late on many occasions and had always been supportive in her WhatsApp messages. Therefore this is exactly an area where the claimant might have benefited from a formal approach under the Capability or Absence Policy.

219. Of the five reasons for dismissal, the evidence concerning the claimant's unpredictable temperament and the evidence concerning his overly strict classroom management was weak. These were not matters taken up with him in the investigation meeting – there is only a vague reference in a few lines in a 6 page set of minutes which were otherwise concerned with sleeping and with not reporting in. In the investigation report, a few examples are given, but our impression of that report is that there was a degree of exaggeration and fault-finding. The description of concerns about classroom management from 2017 – 2019 are inconsistent with the appraisals, which not only do not mention them, but are positively glowing in the very areas where the claimant was now being criticised. We were not shown any separate record of the concerns at that time or of them having been taken up with the claimant. We would have expected some form of disciplinary action if the actions were serious. As for the later examples, there is a level of evidence that the claimant became in the later months of his employment occasionally short-tempered in class. We cannot tell how serious this was because we were not shown any written complaints by parents or formal notes of oral complaints, and we have no surrounding details. The investigation report describes incidents of the children working in silence and other incidents of being shouted at, but there is no real detail which enables us to know how serious these incidents were. In any event, the description does not suggest they were the type of incidents which would lead straight to dismissal. If the respondent is to be believed that there were similar incidents in 2017 – 2019, they had only dealt with them then extremely informally. We therefore do not think there was enough substance on these matters to lead directly to

dismissal or even to be part of a combined reason for dismissal, given again the lack of any prior formal approach via warnings or via a Performance Improvement Plan.

220. Finally, as we have said, dismissal took place without having heard the claimant's voice either in-person or in written submissions. The claimant wanted to be heard in person. That was a reasonable desire given what was at stake and his mental health. Given his length of service and the circumstances we have outlined in relation to Issue 2.15.2, there was a failure to make the reasonable adjustment of postponing and rescheduling the 1 July 2022 meeting. There was also, for the reason we have outlined in relation to Issue 2.15.4, a failure to make the reasonable adjustment of allowing him to bring a friend to the Appeal hearing.

221. If the respondent had followed any of their formal Policies, the claimant would have been absolutely clear about the boundaries regarding his conduct and his attendance levels and would have been given a fair opportunity to improve before his job became at risk. For him, the lack of clarity throughout regarding what was expected caused him great anxiety.

222. We have given credit for the fact that the respondent obtained three OH reports and that it did make a number of reasonable adjustments, although not necessarily all matters which had been recommended. However, this does not compensate for the matters we have set out above.

223. For all these reasons, we believe that the respondent has not shown that dismissal at this point was a proportionate means of achieving a legitimate aim and the claim that dismissal was discrimination arising from disability contrary to section 15 of the Equality Act 2010 is upheld.

Issue 2.19

224. It was agreed with the parties that as part of the remedy hearing, we would assess the chances of a fair or non-discriminatory dismissal in any event.

225. We are envisaging what would have happened if the respondent had followed some form of structured Capability or Absence process, and also if the claimant had had the opportunity to talk through the 5 reasons with Mr Brereton. If the respondent had gone through an appropriate process including postponing the capability hearing at least once, our estimate is that the claimant would not have come to the point of dismissal for a further 6 months, ie until 1 January 2023.

226. After that, we consider there would have been a 50% chance that he would still have been dismissed because his attendance or behaviour would not have sufficiently improved. The reason we think there was a 50-50 chance is because, on the one hand, the claimant was still unwell at the time of the appeal hearing with no obvious sign of improvement. On the other hand, by then he had been dismissed and matters had not been well handled

by the respondent, which may well have caused or contributed to why he was still unwell. There is no evidence that the claimant had an underlying mental health condition affecting his ability to function prior to his relationship breakdown which is a specific event. The third OH report said that (by then) it was the ongoing stressors with the school which were impairing his recovery. We are estimating a 50% chance that proper handling by the school would have removed those stressors by that time.

Unfair dismissal: Issues 2.1 – 2.5

227. The reason for dismissal was capability, ie the claimant's absence record together with the four matters of conduct as listed above.

228. For the unfair dismissal claim, we have to look through the eyes of the respondent's decision-makers and apply the band of reasonable responses test. This is different from the approach for disability discrimination, although we ended up with the same conclusions.

229. The respondent did not follow a fair procedure. No reasonable employer would have failed in the circumstances to postpone the hearing on 1 July 2022 and no reasonable employer would have failed to allow a friend to be brought to the appeal hearing.

230. The claimant was an employee of 15 years. Until these events, he had a good attendance record. His last two appraisals, albeit a few years old, were glowing. Mr Brereton told us he was 'desperate' to hear the claimant's voice. He therefore realised its importance. Only 5 and a half weeks had passed since the first proposed hearing date. No reasonable employer would have refused at least one more postponement.

231. No reasonable employer would have refused to allow the claimant to bring a friend to the Appeal hearing. The respondent knew the claimant was suffering from extreme anxiety. The 3rd OH report had said he should be able to bring a representative. While the respondent may have read that to mean a trade union representative or work colleague would be sufficient, the claimant explained at the Appeal hearing that he had been unable to find someone. Ms Gajjar had failed to engage with his written request prior to the Appeal hearing to bring a friend and at the hearing itself, Ms Francis just moved on.

232. The dismissal was also unfair because no reasonable employer would have dismissed without following any formal stages of the Absence or Capability Policy.

233. Matters were made worse because the claimant, who had anxiety, was given no forewarning of the investigation meeting or what would then be discussed. He was called into the meeting without notice and he was told it was informal. He did not know that it would lead to an investigation report which would in turn be relied on for formal action potentially leading to his dismissal.

234. A reasonable employer would have appreciated that this was an employee who, because of his mental health, was having difficulty focusing on the issues and maintaining an even keel. This is why structure was so important. Handling the matter for so long via supportive text messages and ad hoc meetings, albeit having obtained the OH reports, was not giving the claimant a clear enough message about what was expected, how much latitude he would be given, and the potential consequences. The respondent's approach was well-meaning, but given that it ended in a swift acceleration to dismissal, it was unfair. This was not a very small employer. The respondent was part of a Group with HR professionals locally and at Head Office level, and Policies which were checked annually by lawyers

235. In the circumstances, it was not reasonable to treat the reason as sufficient reason to dismiss the claimant.

236. Regarding whether the claimant would have been fairly dismissed in any event, we consider for the same reasons as in the discrimination claim, that there is a 50% chance that the claimant could fairly have been dismissed 6 months after 1 July 2022.

Employment Judge Lewis

Dated: …22 April 2024……..

Judgment and Reasons sent to the parties on:

8 May 2024

……

M PARRIS

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For the Tribunal Office