EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4107433/2023

Hearing held in Glasgow on 7, 8, 9 and 10 May 2024

Employment Judge M Whitcombe
Tribunal Member Mrs P McColl
Tribunal Member Mr D Frew

Mrs Allison Shearer	**Claimant** **Represented by:** **Mr K McNerney (Counsel)**
South Lanarkshire Council	**Respondent** **Represented by:** **Mr S O'Neill (Solicitor)**

JUDGMENT

The unanimous judgment of the Tribunal is as follows.

(1) The complaint of disability discrimination succeeds.

a. The respondent failed to make reasonable adjustments for the claimant's disability; and

b. the respondent also discriminated against the claimant for a reason arising from disability.

(2) The complaint of unfair dismissal also succeeds.

(3) We will delay making an award of compensation until we have received written submissions on grossing up, but our other conclusions on remedy issues are set out below. Those submissions are required within 21 days of the date on which this judgment is sent to the parties.

REASONS

Introduction and background

1. This claim of unfair dismissal and disability discrimination arises from the claimant's dismissal for capability and the process leading to that dismissal. Our judgment and reasons are unanimous.

2. The claimant qualified as a teacher in 1987 and soon obtained her first position as an English teacher. She commenced employment with the respondent's predecessor local authority Strathclyde Regional Council in about November 1991 as a children's rights worker in Social Work Resources. She was transferred to the newly formed South Lanarkshire Council (the respondent) in about April 1996. The claimant was redeployed into teaching at her request in August 2010.

3. On 17 June 2022 the respondent required the claimant to move from Clydesdale Support Base in Carluke, where she had taught since 2015, to Kear Secondary School with effect from the start of the new school year in August 2022. The claimant was extremely concerned about the implications of that move and became ill. She commenced a period of absence from work because of work-related stress on 16 August 2022. Ultimately, the claimant was dismissed by a letter dated 22 September 2023 because she was not fit for work. By then she had more than 31 years' continuous service. Her appeal against dismissal was unsuccessful.

Claims and issues

4. We will refer to the Employment Rights Act 1996 as "ERA 1996" and the Equality Act 2010 as "EqA 2010".

5. A claim form (ET1) received by the Tribunal on 19 December 2023 identified claims of unfair dismissal and disability discrimination. The parties had also agreed a list of issues for the final hearing in accordance EJ Bradley's case management order of 15 February 2024. Those issues evolved further during the hearing and in submissions. By the time we reserved our judgment the important concessions and the agreed issues that we had to decide were as follows.

Unfair dismissal issues

6. It was agreed that the reason for dismissal was capability, which is a potentially fair reason for dismissal (s.98(2)(a) ERA 1996).

7. The decision to dismiss the claimant was alleged to have fallen outside the range of reasonable responses for the purposes of s.98(4) ERA 1996 for the following reasons.

    a. The respondent insisted that the claimant should work at Kear Secondary School from August 2022.
    b. The Headteacher Mr Govan gave that instruction wholly or partly because the claimant had refused to supervise vaping by a particular pupil at Clydesdale Support Base in Carluke.
    c. The respondent insisted that the claimant should work at Kear Secondary School even though the claimant had concerns about safety at that school, the move would exacerbate symptoms of the menopause and ran contrary to medical advice in Occupational Health reports dated 14 October 2022 and 27 February 2023.
    d. Two alternative positions offered to the claimant by Carole McKenzie at the final capability hearing on 18 September 2023 were not

reasonable alternatives, particularly given the basis on which they were offered.

e. The respondent took into account absences that were caused by its insistence that the claimant should work at Kear School, symptoms of the menopause and the time taken to deal with the claimant's grievance.

f. The respondent back-filled the post formerly filled by the claimant at Clydesdale Support Base with a supply teacher from August 2022, which was unreasonable in all the circumstances.

Disability discrimination issues

(a) Disability

8. It was agreed that the claimant was a disabled person for the purposes of s.6 EqA 2010 from 17 June 2022 until her dismissal on 18 September 2023 by reason of menopausal symptoms, stress, anxiety and depression.

(b) Knowledge

9. It was conceded during the hearing that the respondent had knowledge both of disability and also of the likelihood of disadvantage from 15 May 2023 onwards (s.15(2) EqA 2010 and Sch 8, part 3, para 20).

(c) Reasonable adjustments - provision, criterion or practice

10. It was agreed that the requirement that the claimant should work at Kear Secondary School with effect from August 2022 was a provision, criterion or practice for the purposes of s.20(3) EqA 2010.

(d) Reasonable adjustments - substantial disadvantage

11. It was conceded during the hearing that the above PCP put the claimant at a

substantial (in the sense of more than minor or trivial) disadvantage in comparison with people who were not disabled (ss.20(3) and 212(1) EqA 2010). That disadvantage was increased stress and anxiety, aggravated menopausal symptoms, sickness absence, capability proceedings and dismissal or the risk of dismissal.

(e) Adjustments

12. The sole live issues in relation to reasonable adjustments were therefore whether the respondent had taken such steps as it was reasonable to have to take to avoid the above disadvantage, in particular:

    a. allowing the claimant to continue or resume working at the Clydesdale Support Base;

    b. "offering alternative positions to [the one at Kear Secondary School], that the claimant could have performed given her work experience with the respondent, being a qualified teacher of English."

(f) Discrimination arising from disability

13. It was (quite properly) conceded that the claimant's dismissal constituted unfavourable treatment, that the reason for that treatment was claimant's absence and that the absence arose in consequence of the claimant's disability (s.15(1)(a) EqA 2010).

14. The sole live issue in relation to discrimination arising from disability was therefore whether for the purposes of s.15(1)(b) EqA 2010 the respondent could show that dismissal was a proportionate means of achieving its undisputed legitimate aims of:

    a. ensuring good levels of employee attendance;
    b. delivering education;

c. taking account of the negative impact on the respondent's resources of the claimant's continuing absence;
d. fair and consistent application of the respondent's absence policy.

Evidence

Documents

15. We were provided with an agreed joint file of documentary evidence running to 1091 pages. Only a small proportion of it was referred to by the representatives during the hearing and the key documents would probably have fitted comfortably into a file of 150 pages or so.

16. We were also provided with a helpful agreed chronology and cast list, both of which were ordered by EJ Bradley.

Witness evidence

17. We heard oral evidence from the following witnesses in the following order:
    a. Allison Shearer, the claimant;
    b. Stewart Miller, Depute Head Teacher of Kear Campus Secondary School with responsibility for the Kear Campus secondary bases and the claimant's line manager at all relevant times;
    c. Elaine Maxwell, HR Business Manager, Finance and Corporate Resources, who provided HR support to the elected members who heard the claimant's appeal against dismissal;
    d. Carole McKenzie, Executive Director of Education Resources, who took the decision to dismiss the claimant following a capability meeting on 18 September 2023.

18. As a result of the case management order of EJ Bradley, the witnesses gave their evidence in chief by reference to written statements, the accuracy of which were confirmed on oath or affirmation. None of the witnesses gave any

additional oral evidence in chief. The use of witness statements saved a great deal of time and expense, in accordance with the overriding objective.

19. EJ Bradley's order reminded the parties of the need to comply with the Practice Direction and Presidential Guidance applicable to the use of witness statements in Scotland.

    a. The claimant's witness statement was excessively long and detailed, running to 284 paragraphs and 88 pages. While it was impossible to fault the formal compliance with the Practice Direction and Guidance, we were less sure that the claimant's solicitor had complied with the spirit and substance of those documents, which is to capture the truly relevant evidence that the claimant would otherwise have given orally. The overriding objective and the need for proportionality appeared to have been forgotten. Helpfully, the claimant's counsel identified many paragraphs which we could properly disregard when pre-reading.

    b. The respondent's witness statements were much shorter, but they did not comply with the important requirements of the Practice Direction. No explanation was offered for that failure. The policy of the Practice Direction and Presidential Guidance is to ensure that witness statements are prepared and used in a way that offers their undoubted benefits without impairing the quality of the evidence and the fairness of the hearing. Compliance with the Practice Direction and Presidential Guidance is expected not out of pedantry, but rather because it safeguards the integrity of the process and furthers the overriding objective. At our direction the respondent's solicitor supplied updated statements during the hearing which did at least include a signature and a statement of truth, though they still fell some way short of full compliance. We were not asked to exclude any witness evidence or to give it less weight for those reasons.

Observations on the evidence

20. All of the witnesses were cross-examined. Having observed them closely in cross-examination, we formed the view that the claimant and Carole McKenzie both gave their evidence in a straightforward and persuasive manner. We thought that both were doing their best to help us, to the best of their recollection. That does not mean that we accepted their view of the facts in every respect.

21. In contrast, we had reservations about the evidence of Stewart Miller and Elaine Maxwell, both of whom appeared at times to strain to defend the respondent's position and to give some of their answers in a carefully calibrated manner. Stewart Maxwell's statement contained important errors regarding staff numbers at Clydesdale Base and Kear Secondary School, which he only corrected when the true position was put to him in cross examination. We found some of his answers evasive. For example, he denied that a certain teacher was teaching English at Clydesdale Base when that was precisely what her timetable said. He suggested that she was only "supporting learning" in English and was neither "teaching" nor "delivering". We did not find that distinction credible, especially since that teacher was the only one on the timetable teaching English. If she was not doing it, then no one was. Occasionally, Elaine Maxwell deflected pertinent questions, answering instead the question she would have preferred to have been asked. We were not always confident that Stewart Miller and Elaine Maxwell were giving us their unvarnished and unfiltered recollection of the facts.

22. It was surprising that Elaine Maxwell was put forward as a witness who could explain the reasoning of the appeal panel, given that she was not a decision maker and that her role was to provide HR support only. As she accepted, her evidence of the reasoning of the panel was necessarily hearsay. None of the appeal decision makers were called to give evidence.

23. It was also striking that the Headteacher Neil Govan was not called to give evidence at all, even though his decision to transfer the claimant from one

site to another lay at the heart of the case. Overall, we were not satisfied that the respondent had called the "best evidence" available to them, and which would have helped us to decide the key issues fairly.

24. None of the witnesses called by the respondent had thought at the relevant times that the claimant was, or was likely to be, a disabled person. That is certainly not fatal to the respondent's case, since an employer might comply with a duty to make reasonable adjustments without having known that the duty arose. Elaine Maxwell did not accept that a different approach might be required to workplace adjustments or capability proceedings when dealing with a disabled employee, since she believed that the respondent applied the same high standards of treatment and made reasonable adjustments whether the duty to do so arose under EqA 2010 or not. Mr Miller similarly thought that he had made all reasonable adjustments even though he did not think that he was managing a disabled person.

Relevant facts

25. We made the following relevant findings of fact. Where facts were disputed, we made our findings on "the balance of probabilities", in other words the "more likely than not" basis applicable in almost all civil litigation. If it appeared to us that a fact was more likely to be true than untrue, then for the purposes of this judgment it was deemed to be true. If a fact appeared more likely to be untrue than true, then for the purposes of this judgment it was deemed to be untrue.

Kear Secondary School and its associated "Bases"

26. In the period relevant to this claim, the respondent's service to children with Social, Educational and Behavioural Needs was spread across several primary and secondary base support sites. There was one overarching organisation known as Kear Campus. The main school was Kear Secondary School. The wider "campus" comprised 4 secondary support bases located

within 4 secondary schools. Those schools were: (a) Cathkin High School, (b) St Andrew's and St Bride's Secondary School in East Kilbride, (c) Hamilton Grammar School and (d) Lesmahagow High School. The latter base was moved in 2019 from Lesmahagow High School to a community centre in Carluke. There were also two primary support bases at Whithorn Centre Base in Hamilton and David Livingstone Base in Blantyre. The main Kear Secondary School was also based in Blantyre.

27. The four secondary support bases each had either three or four teaching staff and offered part-time placements to support up to 12 pupils. Most of those pupils continued to attend mainstream school part-time but were taught English, Maths and Health and Wellbeing in the secondary support base.

28. The main Kear Secondary School in Blantyre was staffed and resourced for up to 60 secondary aged pupils with more significant behavioural difficulties who could not maintain a placement either in a mainstream secondary school or in a secondary support base. However, in practice attendance levels ranged from 6 to just over 20 pupils. The placements were full-time, and the curriculum was more diverse than that taught at the bases. The pupils were those most likely to exhibit distressed behaviour through violence, causing damage to property or attending under the influence of drugs, alcohol or other substances. There were over 20 teachers and additional support staff. The police were called to the school regularly to deal with assaults, violence and vandalism. The turnover of teaching and support staff was high.

29. The claimant worked in the Clydesdale Secondary Support Base as an English teacher and support teacher on a permanent basis from 2015 until June 2022. Groups were limited to 6 pupils with no more than 12 pupils in the base at any one session. The claimant taught English to SQA Higher level and taught Mathematics and Health and Wellbeing to SQA level National 5. Although English was her main subject she was fully capable of teaching other subjects and did so.

Vaping

30. On 31 May 2022 the headteacher Neil Govan met with staff at Clydesdale Support Base to discuss arrangements for a pupil who wanted to vape in every one of the 7 periods in the school day. Mr Govan suggested that supervising that pupil's vaping was an aspect of the duty of care owed by teaching staff to pupils. The claimant objected to supervising the vaping, because she thought that it presented a risk of injury given that the pupil had asthma and that other strategies for relieving anxiety should be pursued as an alternative to underage vaping. The meeting concluded on the basis that Mr Govan acknowledged that he could not make staff supervise the pupil's vaping, but he wished them to do so. The claimant thought that Mr Govan appeared angry and frustrated at her response.

The instruction to move to Kear Secondary School in Blantyre

31. On 17 June 2022 Neil Govan visited the Clydesdale Secondary Support Base in Carluke and informed the claimant that he had decided to move her from that location to Kear Secondary School in Blantyre from August 2022 because she was needed as an English teacher there. The claimant said that she would have to think about it over the weekend.

32. At that time the claimant was taking prescribed medication for high blood pressure, anxiety, low mood and menopausal symptoms. The prospect of moving to Kear School in Blantyre made the claimant extremely anxious. She believed that there were high levels of violence and injuries to teaching staff at that school, that management were ineffective and authoritarian, and that there was a culture of blaming staff for being assaulted. The claimant felt that it was inevitable that she would be assaulted, that she would not be supported when it happened and that she would be blamed for the incident. She was concerned that her high blood pressure would worsen and that her levels of anxiety and low mood could become difficult to manage.

33. Over the following weeks the claimant had regular nightmares and disrupted sleep. She found it difficult to think about anything except the move to Kear

School. A planned reduction in the prescribed dose of fluoxetine was deferred because the claimant's levels of stress and anxiety were too high. The symptoms of the menopause also worsened.

The claimant's response

34. The claimant emailed Neil Govan on 21 June 2022 setting out reasoned objections to the move, including her health and medical history, and asked for the decision to be reconsidered. Neil Govan replied concisely without engaging with the detail of the claimant's objections, saying that he thought that the claimant's skills were best utilised at Kear School. He denied any connection with the vaping issue and said that no other teachers had been asked to undertake the role at Kear School.

35. On 23 June 2022 the claimant emailed her line manager Stewart Miller to similar effect, explaining that the move would probably adversely affect her health and expressing a desire to discuss other employment options. The claimant specifically requested a return to work at Clydesdale Support Base on 15 August 2022 while matters were explored further. Mr Miller did not reply.

36. Similarly, but separately, the claimant attempted to negotiate a return to Clydesdale Support Base with Neil Govan, pending a referral to Occupational Health, but he refused. The claimant believed that she could have worked in any of the other 3 secondary support bases in Cathkin, Hamilton or East Kilbride. She also believed that she could also have worked in other parts of the Additional Support Needs provision across the respondent's area, such as the ASN base at Duncanrig Secondary School in East Kilbride or one of the Extended Learning Teams, and that she could have provided Behaviour Support in any of the 18 Secondary Schools across the authority.

Confidential menopause discussion

37. On 15 August 2022 the claimant had a Confidential Menopause Discussion with Fiona Cameron (Deputy Headteacher) and Linda Mulvey (HR). The

claimant explained the full extent of her symptoms, which included (but which were not limited to) worsened feelings of anxiety and low mood. The claimant also explained that she valued being at Clydesdale Support Base because it was a settled workplace with supportive colleagues, and that violent incidents, assaults and a lack of support at Kear School would be detrimental to her health. Fiona Cameron disputed that view of the school and asserted that reports of violent incidents were reducing. The claimant replied that staff were discouraged from reporting incidents. Linda Mulvey confirmed that the claimant would have to move to Kear School and that she would not be permitted to remain at Clydesdale Support Base pending the outcome of an Occupational Health referral. Neil Govan reiterated that stance a short time later.

"Backfilling" at Clydesdale Support Base

38. The respondent appointed a supply teacher qualified to teach in primary schools to cover the work formerly done by the claimant at Clydesdale Secondary Support Base. That teacher taught English and continues to do so. She continued to be engaged on a supply basis at the time of this hearing. Her post is now funded in a different manner, but neither side suggested that the source of funding had any bearing on the issues we must decide.

Sickness absence, first OH report and Stress Risk Assessment

39. The claimant commenced sickness absence on 16 August 2022, initially on a self-certified basis. The fit notes attributed absence to "work related stress and anxiety". An "Attendance Support Meeting" took place on 7 October 2022 with Stewart Miller, Linda Mulvey and the claimant's union representative. The claimant explained that the reason for not being able to return to work was the move to Kear School, coupled with additional stress caused by a High Court witness citation.

40. An OH referral resulted in an appointment on 14 October 2022. It took the

form of a telephone assessment by an OH Therapist lasting around 1 hour. The report records that the cause of the work-related stress was the instruction to move from the Clydesdale Base to Kear School and the fear of violence and a lack of support. The claimant was experiencing significantly reduced mood, motivation, concentration and self-confidence.

41. The therapist's view was, "*Should she be moved to this new post it is my opinion there is the potential it could negatively impact psychological health. It is Alison's wish to remain within her current work location and if this is feasible I consider that likely to support her wellbeing. However, I note you have advised that this is required due to service requirements.*" The report also noted the claimant's view that her menopausal symptoms had been exacerbated since being advised of the move to Kear School. The report recommended a Stress Risk Assessment to identify workplace concerns.

42. The claimant duly completed a stress risk assessment which reflected the concerns already outlined above. It was sent to the Head Teacher Neil Govan. He was disinclined to engage with it, writing to his Deputy Headteacher Stewart Miller in the following terms, "*I've dipped in and out of this and generally feel not inclined to engage with discussion on each point, nor do I think you should…".* He thought that the claimant's perception of management was "flawed" and that almost all the points made in the Stress Risk Assessment were "*in the territory of managerial judgement* [sic] – *yours mine and Nic's*". The email concludes, "*This may not be what you're looking for but it's the best I can (well, will) do as I don't feel inclined to respond to each point.*" While we appreciate that the above email was intended neither for the claimant's eyes nor ours, it is revealing. We find it to be a dismissive, intransigent and unhelpful response.

43. A further "Attendance Support Meeting" was held on 4 November 2022.

Grievance process

44. The claimant submitted a formal grievance on 15 November 2022. It included broadly similar points to those which are now advanced in this claim.

Meanwhile, a third Attendance Support Meeting took place on 8 December 2022.

45. A grievance meeting took place on 14 December 2022. The stage 2 outcome letter was issued on 13 January 2023. It acknowledged that the proposal to work at Kear School had made the claimant very anxious but adopted Mr Govan's view that "*there is still a demand for an English teacher and…you were the best individual to take up this role*." The conclusion was that there were sound business reasons why the claimant was selected to work at Kear Secondary School.

46. The claimant felt that the grievance decision was based on false, inaccurate, incomplete and outdated information, and that the investigation had been a "whitewash". She appealed on 26 January 2023.

47. Meanwhile, a fourth Attendance Support Meeting took place on 6 February 2023.

Second OH Referral

48. Dr Mohamed Ashraf Hassan, Speciality Doctor in Occupational Medicine, reported on 27 February 2023. His opinion was that "*a successful return is unlikely until a resolution is reached that allows for an improvement in her mental health.*" He considered it unlikely that the claimant met the definition of disability in EqA 2010, subject to the usual caveat that it is a legal issue rather than a medical one. Symptoms were likely to resolve once the "*known trigger*" was addressed. A return to Kear Secondary School was not "*feasible in the near future, as it is likely to further impact her mental health. I recommend exploring options for a mutually agreeable way forward between the employee and management, in accordance with the organization's policies. This could involve redeployment, if possible, or finding alternative roles in a more suitable setting.*"

Further grievance process & temporary return to work

49. On 3 March 2023 the claimant's grievance appeal took place and the outcome was announced the same day. The appeal was rejected.

50. The claimant agreed to a phased return to work in a temporary location until the final stage of the grievance process had been concluded. Ultimately, she carried out non-teaching duties from home, compiling lesson resources. It was common ground at this hearing that there was no reasonable possibility of a permanent role of that sort and that it could only ever have been temporary. However, it did demonstrate that the claimant was able to return to work in alternative locations.

51. Matters proceeded to stage 4 and the grievance was ultimately rejected by the Grievance and Disputes Committee following a hearing on 10 May 2023. It is not necessary for present purposes to go into any further detail. The grievance process having been concluded, the claimant was required to report for work at Kear Secondary School. On 15 May 2023 the claimant recommenced long-term sickness absence.

Formal capability hearing 18 September 2023

52. On 12 June 2023 the claimant was invited to a formal capability hearing. The meeting was initially fixed for 26 June 2023 but was postponed on 20 June 2023 by the Chair, Carole McKenzie, Executive Director. Eventually, the meeting was rescheduled for 18 September 2023.

53. During the capability hearing on Monday 18 September 2023 Carole McKenzie offered the claimant two alternative posts:

    a. permanent area cover, which the claimant regarded as a form of supply teaching in that it entailed covering for other teachers who were absent at a variety of schools; and

b. a post based at Sanderson High School, a special school for pupils with severe and complex needs and disabilities.

54. At the capability hearing, Carole McKenzie made it clear to the claimant that she would have to choose one of those posts by no later than Friday 22 September 2023, otherwise her employment would be terminated. That gave the claimant just 4 working days in which to make a career changing decision. The claimant regarded that as an unreasonable and unfair ultimatum.

55. The claimant refused both posts because she regarded them as unsuitable for her. Her reasoning, which we accept, was as follows.

a. The permanent area cover role nominally involved teaching English, which was the claimant's main subject, but she could have been teaching at different schools every day, covering for teachers of any secondary school subjects. The claimant regarded it as a chaotic and unstable way to teach which was inappropriate given her physical and mental health issues. She thought that she needed more stability and predictability, and that the proposal was likely to exacerbate her feelings of stress and anxiety.

b. The Sanderson High School role entailed working in an environment different from any in which the claimant had previously worked. It was not simply a question of additional support needs. The needs of the pupils at that school were "severe and profound learning needs" and it was an entirely different and very specialised learning environment. The claimant had never previously worked in a special school and did not think that she had the skills or training to undertake such a post responsibly.

56. On 26 September 2023 the claimant received a letter terminating her employment on grounds of capability with effect from 22 September 2023. The claimant appealed the decision to dismiss her but her appeal to the

Appeals Committee was unsuccessful following a hearing before three Councillors on 22 January 2024.

Legal principles

Unfair dismissal

The reason for dismissal

57. The respondent has the burden of proving a potentially fair reason for dismissal. In this case it is agreed between the parties that the reason for dismissal related to the claimant's capability, in the sense of ill health, and that it therefore fell within section 98(2)(a) ERA 1996.

Fairness – general principles

58. Where the employer has proved a potentially fair reason for dismissal, the test of fairness and reasonableness derives from s.98(4) ERA 1996:

…the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

59. Prior to a change effected by the Employment Act 1980, the employer also had the burden of proving fairness, and some of the older authorities must be read with that in mind. The test of fairness now contained in s.98(4) ERA 1996 does not impose any burden of proof on either party.

60. Whether the employer acted reasonably is a question of fact, not law, and tribunals have a wide discretion to base their decisions on the facts of the case before them and on good industrial relations practice, without regard to a lawyer's technicalities (***UCATT v Brain*** [1981] ICR 542, CA). The reference to "*equity and the substantial merits of the case*" shows that the word "*reasonably*" is to be construed widely (Lord Simon in ***Devis v Atkins*** [1977] ICR 662, HL).

61. It is well-established at Court of Appeal, Court of Session and EAT level that a tribunal must not substitute its own view for that of the hypothetical reasonable employer. The law recognises that different reasonable employers might respond in a range of reasonable ways to a given situation. The correct approach is for the tribunal to assess the reasonableness of the decision to dismiss by reference to a band, or range, of reasonable responses (see e.g. ***Iceland Frozen Foods Ltd v Jones*** [1983] ICR 17, endorsed in many cases including ***Foley v Post Office*** [2000] ICR 1283, CA, which ended a brief but important challenge to the previous orthodoxy).

62. The process must always be conducted by reference to the objective standards of the hypothetical reasonable employer (Mummery LJ in ***Foley*** at 1293 B). If *no* reasonable employer would have dismissed, then the dismissal is unfair. If *some* reasonable employers would have dismissed, then the dismissal is fair.

63. The "range of reasonable responses" test applies not only to the selection of sanction or the ultimate decision to dismiss, but also to the procedure by which that decision was reached (***J Sainsbury plc v Hitt*** [2003] ICR 111, CA).

64. Reasonableness is assessed on the basis of facts or beliefs known to the employer at the time of dismissal, which for these purposes will normally include any internal appeal process (***O'Brien v Bolton St Catherine's***

Academy [2017] ICR 737, CA, ***West Midlands Co-operative Society Ltd v Tipton*** [1986] ICR 192, HL).

Fairness – capability cases – long term sickness

65. It is essential to consider whether the employer can reasonably be expected to wait any longer for the employee to return (***Spencer v Paragon Wallpapers Ltd*** [1977] ICR 301, EAT, ***S v Dundee City Council*** [2014] IRLR 131, CS). Factors relevant to that balancing exercise will often include:

    a. whether other staff are available to carry out the absent employee's work;
    b. the nature of the illness;
    c. the likely length of absence;
    d. the cost of continuing to employ the claimant;
    e. the size of the employing organisation;
    f. balanced against all of that, the unsatisfactory situation of having an employee on very lengthy sick leave.

66. A fair procedure will almost always require consultation with the employee, a thorough medical investigation to establish the nature of the illness or injury and a prognosis, and consideration of other options. Those other options might well include alternative employment within the employer's business.

Contributory fault

67. There are two relevant statutory provisions.

    a. Section 122(2) ERA 1996 provides that where the tribunal considers that any conduct of the claimant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the *basic award* to any extent, the tribunal shall reduce or further reduce that amount accordingly.

b. Section 123(6) ERA 1996 provides that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the *compensatory award* by such proportion as it considers just and equitable having regard to that finding.

68. The language of section 122(2) is therefore less restrictive than that of section 123(6), which requires causation before any reduction can be made. When applying section 122(2), the tribunal must identify the conduct which is said to give rise to possible contributory fault, decide whether that conduct is culpable or blameworthy and decide whether it is just and equitable to reduce the amount of the basic award to any extent (***Steen v ASP Packaging Ltd*** [2014] ICR 56, EAT).

69. Reductions in the compensatory award depend on findings that the conduct was culpable or blameworthy, that the conduct caused or contributed to the dismissal, and that it would be just and equitable to reduce the award by the proportion specified (***Nelson v BBC (No.2)*** [1980] ICR 110, CA). Any reduction must be based on our own findings and view of the conduct concerned, so there is no deference to the respondent's view or to any hypothetical reasonable range of views on those questions (***London Ambulance Service NHS Trust v Small*** [2009] IRLR 563, CA).

"***Polkey***" reductions

70. The question whether a fair and reasonable procedure would have made any difference to the outcome is reflected in compensation rather than the finding of fairness or unfairness under s.98(4) ERA 1996 (***Polkey v AE Dayton Services Ltd*** [1988] ICR 142, HL).

71. Importantly, the issue is what the respondent would have done, and not what a hypothetical fair employer would have done (***Hill v Governing Body of Great Tey Primary School*** [2013] ICR 691, EAT).

72. The tribunal must draw on its industrial experience and construct, from evidence rather than speculation, a working hypothesis about what would have occurred if the employer had behaved differently and fairly (***Gover v Propertycare Ltd*** [2006] ICR 1073, CA, Buxton LJ, approving the analysis of HHJ McMullen QC in the EAT). However, any assessment of future loss is by way of prediction and therefore involves a speculative element, so tribunals are neither expected nor allowed to opt out of their duty merely because the task is difficult and may involve some speculation (***Thornett v Scope*** [2007] ICR 236, CA).

73. In ***Software 2000 Ltd v Andrews*** [2007] ICR 825, EAT, Elias P reconciled the authorities in the following way.

    a. There will be circumstances in which the nature of the evidence is so unreliable that a tribunal might reasonably decide that no sensible prediction can properly be made, and that the attempt to reconstruct "what might have been" is riddled with too much uncertainty.
    b. However, the tribunal must have regard to any material and reliable evidence even if there are limits to the extent to which the tribunal can confidently predict what might have been. A degree of uncertainty is an inevitable feature of the exercise, and an element of speculation is not a reason for refusing to have regard to that evidence.
    c. Put another way, the issue is not whether the jigsaw can be completed, but rather whether there are sufficient pieces for some conclusions to be drawn.

74. Similarly, in ***Contract Bottling Ltd v Cave*** [2015] ICR 146, EAT, Langstaff P emphasised that the exercise would necessarily involve imponderables, but that did not mean that the Tribunal should not grapple with the issues as far as it could.

Disability discrimination – reasonable adjustments

75. Since the only live issue is the reasonableness of certain proposed adjustments, it is not necessary to set out the full direction often derived from cases such as ***Environment Agency v Rowan*** [2008] IRLR 20, EAT and ***SSWP v Higgins*** [2014] ICR 341, EAT.

76. The burden of proof is on the respondent at this stage of the analysis (***Project Management v Latif*** [2007] IRLR 579, EAT).

77. Reasonableness is to be determined objectively (confirmed by too many cases to list, but a classic passage appears in ***Smith v Churchills Stairlifts plc*** [2006] ICR 524, CA, paragraphs 44-45). To achieve substantive equality and to assist with integration into the working environment a degree of affirmative action or *more favourable treatment* of the disabled employee may be necessary (***Archibald v Fife Council*** [2004] ICR 954, HL).

78. We have considered paragraph 6.23 of the Code of Practice, which largely replicates the former s.18B of the Disability Discrimination Act 1995. We need to assess the extent to which the step would prevent the effect in relation to which the duty is imposed. The extent to which it is practicable for the employer to take that step is also important. So are the financial and other costs of taking it, including disruption of other activities. The extent of the employer's financial and other resources must be borne in mind. So must the availability of financial or other assistance, if any. Finally, the nature of the employer's activities and the size of the undertaking are relevant.

79. So far as cost is concerned, there is no objective measure by which the disadvantage to the employee of not making the adjustment can be balanced against the cost to the employer. Ultimately, it is an "industrial jury" question (***Cordell v FCO*** [2012] ICR 280, EAT).

80. An adjustment does not have to be wholly effective, or certain to make any positive difference, to be reasonable. A prospect that the adjustment would

prevent the relevant disadvantage may be sufficient, it is all part of the overall assessment of reasonableness (***Leeds Teaching Hospitals NHS Trust v Fowler*** (UKEAT/0552/10), ***Griffiths v SSWP*** [2017] ICR 160, CA).

Disability discrimination – s.15 - justification

81. The sole live issue is that arising under s.15(1)(b) EqA 2010, namely whether the respondent can show that the unfavourable treatment was a proportionate means of achieving the aims set out in the list of issues.

82. Our approach to this question must be objective. There is no dispute that the aims are lawful, not discriminatory in themselves and that they represent real, objective considerations. The measure adopted does not have to be the *only* way of achieving the aims, but it will not be proportionate if less discriminatory measures could have been taken to achieve the same objective just as well. We must strike a balance between the discriminatory effect of the unfavourable treatment and the reasonable needs of the employer.

83. We think that the following principles can be derived from the judgment of Balcombe LJ in ***Hampson v DES*** [1989] ICR 179, CA. Although overruled on other grounds in the House of Lords, the principles in Balcombe LJ's judgment have been widely applied since, including by the Supreme Court in ***Homer*** [2012] ICR 704 and ***Seldon*** [2012] ICR 716.

a. The objective justification test requires a critical evaluation of whether the employer's reasons demonstrated a real need to take the action in question.
b. If there was such a need, there must be consideration of the seriousness of the impact of the treatment on the claimant, and an evaluation of whether the former was sufficient to outweigh the latter.
c. The legitimate aim must be weighed against the discriminatory effect of the treatment. To be proportionate a measure must be both an appropriate means of achieving the legitimate aim and reasonably necessary to do so.

d. The employer is not required to prove that there was no other way of achieving its objectives, but something more is required than might be sufficient to satisfy a 'range of reasonable responses' test.

Reasoning and conclusions - liability

Reasonable adjustments

(1) Allowing the claimant to continue or resume working at the Clydesdale Support Base

84. We find that it would have been reasonable for the respondent to have made the above adjustment for the following reasons.

85. It is important to note the context in which the duty to make reasonable adjustments arose. The claimant's aggravated symptoms and sickness absence were inextricably linked to the instruction that she should move to work at Kear Secondary School. That link was well-established by evidence. Not only was it the claimant's own position, which we find to be credible and which we accept, but the same link was made by the occupational health evidence in the respondent's possession. The overwhelming likelihood was that the claimant's absence would end if she were allowed to work at any other suitable location in any other suitable role.

86. The proposed adjustment would certainly have alleviated the disadvantage faced by the claimant because of the combination of the PCP and her disability, because it would have removed the prospect which the claimant found so distressing. As Dr Hassan put it, symptoms were likely to resolve if and when the "*known trigger*" were addressed. The adjustment would certainly have been beneficial and efficacious, the question is whether there were other factors which nevertheless rendered it unreasonable.

87. We do not think that the respondent has proved any such factors. It has not

been suggested that it would have been necessary for the respondent to hire additional staff to make the proposed adjustment for the claimant, or that financial costs would have been increased for any other reason. It was all a question of deployment of existing resources, either among the Kear group of schools and bases, or more widely across the respondent's secondary schools. On the balance of probabilities, we find that an alternative teacher to cover the need for an English teacher at Kear Secondary School could reasonably have been found, and that it was not reasonably necessary for that teacher to be the claimant.

88. There were many other reasonable ways of covering the need for an English teacher at Kear Secondary School, as the steps taken to cover the claimant's sickness absence demonstrated.

a. Initially, a principal teacher at Kear Secondary School covered the claimant's absence from that school.
b. After Christmas 2022-2023 the respondent was able to use a newly hired "BGE" (Broad General Education) Teacher, coincidentally qualified to teach English, to cover the claimant's absence from Kear School, and there was neither any suggestion that standards of education suffered nor any suggestion that similar cover would not have been reasonable in the future.
c. We reject Mr Miller's suggestion that no one was qualified to teach English to levels S4-S6 in those circumstances and note that he was content for someone qualified to teach in Primary Schools to teach S4 and S6 classes at Clydesdale in the claimant's absence. The respondent was flexible about strict qualifications to teach at S4-S6 level when it wished to be.
d. The teacher whose maternity leave had created the need for an English teacher at Kear Secondary School (which the respondent chose to meet by redeploying the claimant) was back at work and available, at least on an 0.8 basis, prior to the claimant's dismissal. That was another reasonable option, especially since with little effort it should have been possible to compress the English timetable into 4

days each week. Alternatively, the classes could have been split between that returning teacher working 0.8 and another teacher of the respondent's choosing. We think that these represent reasonable options, in the absence of cogent evidence to the contrary.

e. At the time of the claimant's dismissal, there were 5 English teachers within the Kear group of schools, or 6 including the claimant. We heard no persuasive evidence from the respondent to explain why one of the other 5 could not have been redeployed to cover the need at Kear School instead of the claimant. The other 5 were the principal teacher at Kear School (available 0.8), a full time English teacher hired to replace the BGE teacher referred to above in May 2023, a teacher who taught 0.6 in East Kilbride, a full-time teacher at Cathkin, and the teacher whose maternity leave created the initial need at Kear School. By then, she had returned in March 2023 on an 0.8 basis teaching Media Studies across several sites, but remained skilled and qualified to teach English. Mr Miller admitted that he was only able to "speculate" that Mr Govan had considered those alternative possibilities and ruled them out. In those circumstances Mr Miller was understandably unable to explain Mr Govan's rationale, if any.

89. Looking at the problem more widely, the respondent employed 100-150 English teachers across all its secondary schools and about 3500 teachers in total. We find that an alternative candidate to teach English at Kear Secondary School could also reasonably have been found from among that pool if a reasonable examination of their willingness, circumstances and any objections to transfer had been carried out. It was a large pool.

90. The need for a teacher of English at the Clydesdale base continued to exist. The claimant was a suitable candidate to meet that need because she not only taught English, but also the other subjects taught at the base. The person used to backfill that need while the claimant was nominally moved to Kear School was inherently movable. She was a supply teacher and continued to be a supply teacher at the date of the claimant's dismissal. Her primary school qualification was apparently no obstacle to teaching in a secondary school

environment, so she could have been redeployed in several ways.

91. We do not think that a potential breakdown of the relationship between the claimant and the head teacher Mr Govan was an obstacle to her return to Clydesdale, as Ms Maxwell suggested in her evidence. That was not a suggestion made by Mr Miller, who would have been the claimant's immediate line manager had she returned to Clydesdale. We find that the relationship between the claimant and Mr Govan was entirely reparable if the respondent recognised corporately that the claimant was a disabled person and if Mr Govan displayed a greater willingness to be flexible and to engage with the detail of the claimant's concerns.

92. For all those reasons, we find that it would have been reasonable for the respondent to have allowed the claimant to continue at, or return to, the Clydesdale hub.

(2) offering alternative positions to [the one at Kear Secondary School], that the claimant could have performed given her work experience with the respondent, being a qualified teacher of English.

93. Once again, the proposed adjustment would clearly have alleviated the disadvantage faced by the claimant, the question is whether the respondent could reasonably have made it.

94. We think that it is necessarily implicit in this potential adjustment that there should be a reasonable period of search, otherwise the results would depend on the vagaries of the internal vacancy list on any particular day. Vacancies arise throughout the school year, but there is a definite recruitment season which takes place from about Easter each year, with a view to filling vacancies with effect from the start of the new school year in August. A reasonable search would include that period.

95. If a reasonable search were to have been carried out, we think it is likely to have produced suitable alternative roles for the claimant. We note that Ms

McKenzie was able to find two possibilities by carrying out a one-off search on a single day, although those vacancies were not in fact suitable for the claimant's circumstances. Certainly, there was enough of a chance of success for it to have been a reasonable step, especially given the claimant's long service, highly regarded abilities and unblemished record. The retention of the claimant within the respondent's organisation was in the interests of both parties if it could be achieved within a reasonable period. The respondent operated 18 mainstream secondary schools each having around 7-9 English teachers as well as numerous other educational facilities. The claimant could have taught at most of them. The chances that a suitable vacancy would have arisen were good.

96. For those reasons, we think that this adjustment would also have been reasonable.

Discrimination arising from disability

97. The respondent has failed to demonstrate that the claimant's dismissal was a proportionate means of achieving the undoubtedly legitimate aims listed above. Dismissal was not proportionate to those aims because other, less detrimental measures would have served to achieve those aims no less effectively.

    a. It would have been proportionate simply to return the claimant to Clydesdale and to cover the need at Kear Secondary School in another way.
    b. If dismissal were ever to have become an appropriate and reasonably necessary means of achieving the aims, then it would only be proportionate if the respondent had first carried out a reasonable search for alternative employment. It did not do so.

98. For those reasons we find that the impact of dismissal on the claimant far outweighed the achievement of the respondent's reasonable needs. Dismissal was disproportionate to the aims in all the circumstances. It follows that the respondent has failed to make out the defence in s.15(1)(b) EqA 2010

and the claim for discrimination arising from disability succeeds.

Unfair dismissal

99. The complaint of unfair dismissal also succeeds. The decision to dismiss the claimant fell outside the range of responses that might have been adopted by a reasonable employer.

100. No reasonable employer would have insisted that the claimant teach at Kear Secondary School given the effect of that proposal on the claimant's health, the fact that the needs of Kear Secondary School could reasonably have been met in other ways, and the fact that the teaching of English at Clydesdale base was being carried out by a teacher engaged on a temporary basis.

101. However, we do not accept the claimant's additional argument that transfer to Kear School was a "punishment beating" for refusing to supervise vaping. There is no evidence to support that other than an inference drawn from the chronology. It is not an additional factor which took dismissal outside the reasonable range.

102. Additionally, no reasonable employer would have dismissed the claimant without first carrying out a reasonable search for alternative employment. We find that a reasonable search would have included at least the busy recruitment period running from Easter until the start of August. The two alternative vacancies offered to the claimant were not reasonable for the reasons given by the claimant, which we accept. The very short period given to the claimant to consider them was in any event unreasonable and offered insufficient time for reflection and further enquiries.

Reasoning and conclusions - remedy

Unfair dismissal - basic award

103. We have calculated this in accordance with s.119 ERA 1996. The claimant

had 31 years' continuous service, of which the most recent 20 can be used to calculate the basic award (s.119(3) ERA 1996). The claimant was 59 at the effective date of termination on 22 September 2023. She is therefore entitled to 1.5 weeks' pay for 18 of those years and 2 weeks' pay for the remaining two reckonable years. That makes 29 weeks' pay at the capped rate of £643 for each of those weeks. The total basic award is therefore **£18,647**.

Unfair dismissal - loss of statutory rights

104. We award **£500**. The figure of £350 claimed in the Schedule of Loss is one that was commonly awarded 20 or more years ago. If it were properly updated for inflation then it would now be worth something approaching £700 but, for whatever reason, awards for loss of statutory rights never seem to keep pace with inflation. We nevertheless regard £500 as being a just and appropriate figure, commonly awarded by ETs all over the UK without any apparent disapproval by the EAT.

Unfair dismissal - contributory fault

105. We reject the argument that the claimant's refusal of the two posts offered to her amounted to contributory fault, such as might justify a reduction in compensation. We do not accept that her conduct was blameworthy at all in that respect. The roles were not suitable alternatives for the reasons given by the claimant, which we accept. It would not be just or equitable to reduce either the basic or the compensatory awards for unfair dismissal on that basis.

*"**Polkey**" reduction*

106. If the respondent had acted reasonably, then the claimant would not have been dismissed. She would still be working, either at the Clydesdale Base or else at another school controlled by the respondent. Therefore, we make no "***Polkey***" reduction to reflect the chance of dismissal if the respondent had followed a fair procedure.

Financial losses

107. We award financial loss as compensation for unlawful discrimination rather than as a compensatory award for unfair dismissal. Consequently, it is uncapped and attracts interest. Recoupment does not apply. Instead, credit must be given for benefits received.

108. The respondent did not dispute the calculation of loss of earnings and pension loss in the claimant's Schedule of Loss. The respondent's argument was that the claimant had failed to mitigate her loss and that with reasonable efforts she could extinguish her losses fully by 3-5 months after this hearing.

109. The claimant is a talented, experienced and successful teacher of English. It is within the industrial experience of the Tribunal that English teachers are usually in high demand, and that they are certainly in demand at the moment. We also note that the claimant lives in Clarkston and could reasonably seek work with several different local authorities within a similar commute to that undertaken when working for the respondent at Carluke. Carluke is about 25 miles or 40 minutes by road from Clarkston. We think that the claimant's reasonable job search area would include local authorities both north and south of the Clyde, including the very large Glasgow City Council, East Dunbartonshire, East Renfrewshire, North Lanarkshire, Renfrewshire, South Lanarkshire and West Dunbartonshire. On that basis, and assuming reasonable efforts, we think that the claimant's losses are likely to be extinguished fully by August 2024, in other words the start of the next school year. In a change to her original evidence, the claimant's submissions were made on the basis that she will shortly start looking for work. There are various possibilities. She might be able to mitigate her losses partially with supply work, invigilation or marking scripts before August. On the other hand, she might not secure a full-time post by August 2024, though we think it is likely. Overall, we think that compensating the claimant for losses up to early August 2024 represents fair compensation.

110. On that basis, we calculate financial losses as follows.

a. Loss of earnings to the date of hearing **£22,742.34** (as per the unchallenged calculation in the schedule of loss).
b. Future loss of earnings **£9,125.39** (13 weeks at £702.03, the unchallenged weekly rate set out in the schedule of loss).
c. Pension loss to the date of hearing **£2,922.78** (the unchallenged figure in the schedule of loss).
d. Future pension loss **£1,176.51** (13 weeks at £90.50, the unchallenged rate derived from the schedule of loss).

111. The claimant does not need to give credit for sums drawn earlier than planned from her occupational pensions. One way or the other, it is her money, just taken earlier. She does however need to give credit for state benefits totalling £2,299.60 and notice pay of £8,319.12, totalling **£10,618.72**.

112. Net financial loss to the date of the hearing was therefore **£15,046.40**. The total future loss, including pension loss, is **£10,301.90**.

113. Interest accrues on losses to the date of hearing at the rate of 8% from the midpoint of the period of loss. We calculate that as 115 days at 8% p.a., so interest on financial losses to the date of the hearing is **£379.25**.

Compensation for injury to feelings

114. We have applied the Joint Presidential Guidance, which indicates a lower band of £1,100 to £11,200 and a middle band of £11,200 to £33,700 for cases presented after 6 April 2023 but before 6 April 2024. Neither side submitted that this was an upper band case.

115. The claimant says that her dismissal caused a deterioration in her mental health and an exacerbation of her low mood. She also described an adverse effect on her self-confidence and self-esteem. We found her to be an honest

witness and we accept her account of those effects. The effect of the discriminatory acts on the claimant's health and feelings was serious and has continued for around 8 months so far. The claimant initially felt that she was no longer well enough to look for or to maintain another post. However, that position was never supported by medical evidence and, happily, the claimant now feels well enough to look for work.

116. It is likely that the claimant will gain a sense of vindication and some closure from a public judgment in her favour and an award of compensation. We think that the injury caused to the claimant's feelings by the discriminatory acts will rapidly reduce following this judgment and that the claimant will be able to move on, especially once she regains employment as a teacher.

117. This case belongs in the middle band of compensation, though towards the lower end of that band. We think that **£15,000** represents appropriate compensation, putting the injury to feelings into money's worth, so far as that is possible.

118. Interest runs at 8% from the date of the discriminatory act which began to cause injury to feelings. That pre-dates dismissal, and began in mid-May 2023, the date from which knowledge is conceded. We therefore award a year of interest on compensation for injury to feelings at the rate of 8%, making **£1,200**.

Summary of compensation awarded (before grossing up)

119. The breakdown is as follows.

a. Basic award of compensation for unfair dismissal **£18,647**.
b. Compensatory award for unfair dismissal, limited to loss of statutory rights, **£500**.
c. Compensation for unlawful discrimination **£41,927.55**, comprised of:
    i. Net financial losses to the date of hearing (including pension loss) **£15,046.40**.
    ii. Interest on the above **£379.25**.

iii. Future loss of earnings **£9,125.39**.

iv. Future pension loss **£1,176.51**.

v. Compensation for injury to feelings **£15,000**.

vi. Interest on the above **£1,200**.

120. That makes a total award of **£61,074.55**, which must be grossed up to reflect the incidence of tax. Neither side made submissions on that important question and the calculation in the schedule of loss requires further explanation, since we would have expected some reference to the personal allowance and the other income received by the claimant in the relevant tax year.

121. Any failing is ours. We should have ensured that appropriate submissions were made by the representatives at the hearing and we think that fairness now requires those submissions. In those circumstances the parties are required to make written submissions limited to 3 sides of A4 on the issue of grossing up (only), preferably including a table, by no later than 21 days after the date on which this judgment is sent to them. If the parties reach agreement on that issue then they might prefer simply to send in a draft consent judgment on remedy by the same deadline.

Employment Judge: **M Whitcombe**
Date of Judgment: **31 May 2024**
Entered in register: **31 May 2024**
and copied to parties