.

EMPLOYMENT TRIBUNALS

Claimant: Mrs Esther Brown

Respondent: Ministry of Defence

Heard at: Liverpool and Manchester

On: On: 20 – 24 March (in Liverpool), 24-28 April (in Manchester),15-17 August (without parties) and 1 December 2023 (in Manchester)

Before: Employment Judge Cookson
Mrs J Pennie
Ms C Doyle

REPRESENTATION:

Claimant: Mr Small (counsel)
Respondent: Ms Cummings (counsel)

REASONS

Introduction

1. The claimant works for the Ministry of Defence at the Supreme Headquarters Allied Powers Europe (SHAPE) school in Belgium. She has had a successful teaching career. She has been employed since 25 May 2009 by the MOD and is employed as a foundation stage leader.

2. ACAS conciliation was commenced on 5 March and the certificate was issued on 26 March 2021. The first claim was submitted on 23 April 2021. The second period of early conciliation was between 1 April and 22 May 2022. The second claim was issued on 10 June 2022.

3. In reaching our judgment we have considered

   a. The agreed bundle of documents prepared by the respondent ("the bundle") which runs to some 2700 pages and to which a small number of documents were added in the course of the hearing

   b. The evidence given in the witness statements and oral evidence from the claimant and her husband who also worked at the SHAPE school until June 2021 :

   c. The evidence in witness statements and oral evidence for the respondent from

      i. Mr Niedzwiedzki, Headteacher of SHAPE between June 2018 and March 2021;

      ii. Mr Andy Yeoman, Chief Education Officer for Defence Children Services, MOD;

      iii. Mr John Conaghan, at the relevant time Associate Investigator of CMP;

      iv. Mr Ian Ratcliffe Deputy Headteacher of SHAPE ;

      v. Mr Rowland Bucknill Assistant Chief Education Officer and previously headteacher of SHAPE.

      vi. Oral and written submissions given by counsel for both parties.

4. This was a case where the parties presented the tribunal with a very significant bundle of documents, but we were not taken to the vast majority of them. We reached our conclusions based only on documents which we were taken to in evidence or cross examination.

DIFFICULTIES WITH THIS CASE

5. Regretfully despite both parties being professionally represented throughout these proceedings, it was clear from the very start of the hearing that this case had initially been underlisted in light of the volume of legal issues the parties wished the tribunal to determine and the volume of witness evidence and documents. That resulted in the initial hearing having to be adjourned part heard. When we returned to complete evidence it again became clear that the parties had underestimated the time required for cross-examination. The tribunal did not feel at that stage it would have been in accordance to curtail cross examination, but this resulted in insufficient time being allowed for deliberations and further delay.

6. There was a very extensive list of legal issues. Assurances had been given to the tribunal that the parties had agree a list of issues during case management stages which had resulted in further case management hearings after the first being cancelled. The tribunal received similar assurances from counsel at the start of the hearing that the list of issues was settled and agreed, but that was far from clear at

the submissions stage. The difficulties we faced with the list of issues is discussed in the conclusions section.

THE LAW

Burden of Proof provisions

7. Section 136 of the Equality Act 2010 states:

"(1) This Section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to – (a) An Employment Tribunal."

8. Pre- Equality Act 2010 House of Lords decision of **Igen v Wong** [2005] IRLR 258 set out a two-stage test tribunals must apply when deciding discrimination claims. This two-stage approach was discussed in the Court of Appeal decision of **Madarassy v Normura International plc** [2007] EWCA 33, with guidance being provided by Mummery LJ. Since the Equality Act 2010 (although the burden of proof provisions differs in wording to the test set out in Igen), the Appellant Courts and EAT have repeatedly approved the application of the guidance set out by Mummery LJ in **Madarassy**. In summary the first stage is where the burden of proof first lies with the claimant who must prove on a balance of probabilities facts from which a Tribunal could conclude, in the absence of any other (non-discriminatory) explanation that the respondent had discriminated against him. If the claimant meets the burden and establishes a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), then the burden shifts, and the respondent must prove that it did not commit the act disproving the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment.

9. Tribunals must be careful, and the burden of proof provisions should not be applied in an overly mechanistic manner: see **Khan v The Home Office** [2008] EWCA Civ 578 (per Maurice Kay LJ at paragraph 12).

10. The approach laid down by section136 EqA requires careful attention where there is room for doubt as to the facts necessary to establish discrimination, but where the Tribunal is able to make positive findings on the evidence one way or another, the provisions of section136 does not come into the equation: see **Martin v**

Devonshire Solicitors [2011] ICR 352 (per Underhill J at paragraph 39), approved by the Supreme Court in **Hewage v Grampian Health Board** [2012] ICR 1054 (per Lord Hope at paragraph 32).

11. It is, however, not necessary in every case for the Tribunal to specifically identify a two-stage process. There is nothing wrong in principle in the Tribunal focusing on the issue of the reason why. As the Employment Appeal Tribunal ("EAT") pointed out in **Laing v Manchester City Council** [2006] IRLR 748 "If the tribunal acts on the principle that the burden of proof may have shifted and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever".

Disability

12. The definition of a disabled person is set out in section 6 of the Equality Act 2010 which provides that "a person (P) has a disability if he has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities".

13. This definition is supplemented by the provisions of Schedule 1 and the "Guidance on matters to be taken into account in determining questions relating to the definition of disability" issued by in April 2011 (the Guidance).

14. The time at which to assess whether a person has a disability is the date of the alleged discriminatory act. The word 'substantial' has been defined in the Guidance as being "more than minor or trivial" reflecting "the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people."

15. Paragraph 2 of Schedule 1 provides that:

"(1) The effect of an impairment is long-term if—

(a) it has lasted at least 12 months;

(b) the period for which it lasts is likely to be at least 12 months; or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

16. In considering whether an effect is likely to recur for the purpose of paragraph 2(2) the House of Lords has determined that likely means "could well happen" rather than "more likely than not" **SCA Packaging Ltd v Boyle** [2009] IRLR 746.

17. Paragraph 6 of Schedule 1 provides that in considering whether or not an impairment had a substantial adverse effect on the ability of a person to carry out normal day to day activities, the effects of medical treatment should be ignored, and it is necessary to consider the normal day to day activities which the individual will

not be able to undertake without the medical treatment. The focus is on the things that the claimant cannot do or can only do with difficulty rather than on the things that she can do. When assessing the effect of an impairment, the comparison is between the way the claimant carries out the activity in question and how she would carry it out if not so impaired,

18. In **Paterson v Commissioner of Police and the Metropolis** 2007 ICR 522 the Employment Appeal Tribunal concluded that "normal day-to-day activities" must be interpreted as including activities relevant to professional life following the European Court of Justice decision in **Chacon Navas v Eurest Colectividades SA**.

Harassment

19. Section 26, EQA 2010 sets out the legislative framework for harassment:

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B […..]

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

20. In **Richmond Pharmacology v Dhaliwal** [2009] ICR 724 the EAT stressed that the Tribunal should identify the three elements that must be satisfied to find an employer liable for harassment: (a) Did the employer engage in unwanted conduct, (b) Did the conduct in question have the purpose or effect of violating the employee's dignity or creating an adverse environment for him/her, (c) Was that conduct on the grounds of the employee's protected characteristic?

21. In a case of harassment, a decision of fact must be sensitive to all the circumstances. Context is all-important. For example the fact the conduct is not directed to a claimant herself would be a relevant consideration, although this does not necessarily prevent conduct amounting to harassment and will not do so in many cases.

22. **Richmond Pharmacology v Dhaliwal** confirmed that not every comment that is slanted towards a person's protected characteristic constitutes violation of a

person's dignity etc. Tribunals must not encourage a culture of hypersensitivity by imposing liability on every unfortunate phrase.

23. Mrs Justice Slade's comments on how a Tribunal should approach the words "related to the protected characteristic" are helpful in the EAT decision of **Bakkali v Greater Manchester (South) t/a Stage Coach Manchester** [2018] IRLR 906, [2018] ICR 1481 (EAT). She says, whilst it is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant – "related to" such a characteristic includes a wider category of conduct and as such requires a broader enquiry when making a decision (see paragraph 31)

24. Tribunals must not devalue the significance of the meaning of the words used in the statute (i.e., intimidating, hostile, degrading etc.). They are an important control to prevent trivial acts causing minor upset being caught in the concept of harassment. Being upset is far from attracting the epithets required to constitute harassment. It is not enough for an individual to feel uncomfortable to be said to have had their dignity violated or the necessary environment created. (**Grant v Land Registry** [2011] IRLR 748).

25. Considering whether there has been harassment includes both a subjective and objective element. Underhill J in **Pemberton v Inwood** [2018] EWCA Civ 564 summarised the position as follows: *"In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))"*

26. Section 212(1) EqA says "detriment does not, subject to subsection (5include conduct which amounts to harassment."

27. Section 212(5) EqA says "Where this Act disapplies a prohibition on harassment in relation to a specified protected characteristic, the disapplication does not prevent conduct relating to that characteristic from amounting to a detriment for the purposes of discrimination within section 13 because of that characteristic."

28. Section 212 EqA means that an action that is complained of must be either direct discrimination or harassment, but it cannot be both. Equally such an action cannot be both harassment and victimisation. It must be one or the other. This is because the definition of detriment excludes conduct which amounts to harassment.

Direct discrimination – s13 EqA

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

29. There are two parts of direct discrimination: (a) the less favourable treatment and (b) the reason for that treatment. Sometimes however it is difficult to separate

these two issues so neatly. The Tribunal can decide what the reason for any treatment was first: if the reason is the protected characteristic, then it is likely that the claim will succeed – **Shamoon v Constable of the Royal Ulster Constabulary** [2003] UKHL 11.

"Because of": reason for less favourable treatment

30. In terms of the required link between the claimant's protected characteristic and the less favourable treatment she alleges, the two must be " inextricably linked" - **Jyske Finands A/S v Ligebehandlingsnaevnet acting on behalf of Huskic**: ECLI:EU:C:2017:278.

31. The test is not the "but for" test, in other words it is not sufficient that, but for the protected characteristic, the treatment would not have occurred – **James v Eastleigh Borough Council** [1990] IRLR 288.

32. The correct approach is to determine whether the protected characteristic, here sex and or disability, had a "significant influence" on the treatment – **Nagarajan v London Regional Transport** [1999] IRLR 572. The ultimate question to ask is "what was the reason why the alleged perpetrator acted as they did? What, consciously or unconsciously, was the reason?" - **Chief Constable of West Yorkshire Police v Khan** [2001] UKHL 48. This is a question of fact for the Tribunal to determine, and is a different question to the question of motivation, which is irrelevant. The Tribunal can draw inferences from the behaviour of the alleged perpetrator as well as taking surrounding circumstances into account.

33. If there is more than one reason for the treatment complained of, the question is whether the protected characteristic relied upon was an effective cause of the treatment – **O'Neill v Governors of ST Thomas More Roman Catholic Voluntary Aided Upper School** [1996] IRLR 372.

Discrimination arising from disability – s15 EqA

34. S15 EqA provides:

"(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

35. Under this section, no comparators required. The question is simply whether unfavourable treatment suffered by the claimant: in this context unfavourable treatment requires the Tribunal to consider whether a claimant has been disadvantaged. this requires an assessment against "an objective sense of that

which is adverse as compared to that which is beneficial" - **T-System Ltd v Lewis** UKEAT/0042/15.

Because of something arising in consequence

36. First, it is necessary for the tribunal to identify the "something" that is said to be the cause of the alleged unfavourable treatment. Second, it is necessary for that "something" to have arisen in consequence of the claimant's disability.

37. These are the two causal steps that are required by s15 EqA. The Tribunal must determine what, consciously or unconsciously, acted on the mind of the alleged perpetrator. The relevant test is whether the "something" had a significant influence, or was an effective cause, of the unfavourable treatment – **Pnaiser v NHS England** [2016] IRLR 170. Motive is irrelevant under s15.

Respondent's knowledge

38. Under s15, the sole requirement of knowledge on the part of the respondent is knowledge of the claimant's disability. It is not necessary for the respondent to know that the "something" arose from that disability.

Objective justification

39. In practice, the outcome of many claims under S.15 EqA turns on the question of whether the unfavourable treatment can be justified as 'a proportionate means of achieving a legitimate aim'. The EHRC Employment Code sets out guidance on this that largely reflects case law on the objective justification defence to a claim of indirect discrimination under S.19 EqA, which is worded identically in this regard.

40. A legitimate aim for the purposes of S.15 should not be discriminatory in itself and should represent a real, objective consideration. Although business needs and economic efficiency may be legitimate aims but as the EHRC Employment Code states, an employer who simply tries to reduce costs cannot expect to satisfy the test (see para 4.29).

41. As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see para 4.31). An employment tribunal hearing a S.15 claim will be expected to undertake a critical evaluation on the question of objective justification, weighing the needs of the employer against the discriminatory impact on the employee. The tribunal must carry out its own assessment on this matter, this is not simply a question of whether the employer acted reasonably.

Indirect discrimination – s19 EqA

42. S19 EqA provides:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

Provision, criterion or practice

43. The terms "provision, criterion or practice" ("PCP") are not defined within the legislation, and are to be given their ordinary meaning; they are broad and overlapping terms and should not be narrowly construed – **Ishola v Transport for London** [2020] EWCA Civ 112. A PCP can cover informal as well as formal arrangements.

44. The finding of a PCP is a matter of fact for the Tribunal – **Jones v University of Manchester** [1993] IRLR 218.

Application of PCP

45. The effect of a seemingly neutral PCP on persons who do not share the claimant's protected characteristic must be considered, regardless of whether the PCP is indeed applied to others or not. According to Baroness Hale in **Chief Constable of West Yorkshire Police and anor v Homer** 2012 ICR 704, SC, the purpose of this legislation is to *'level the playing field' by requiring the employer to justify 'requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic'*.

Particular disadvantage

46. There is no need for the disadvantage suffered by the claimant to be "serious, obvious and particularly significant" - **McNeil v Revenue and Customs Commissioners** [2019] EWCA Civ 1112. it is sufficient for the claimant, because of their protected characteristic, to be disadvantaged in some form.

47. It is not necessary for every person who shares the claimant's protected characteristic to suffer the particular disadvantage relied upon by claimant. Neither is it necessary for a claimant to produce statistical evidence demonstrating a particular disadvantage.

48. However the burden lies with the claimant to establish the first, second and third elements of the statutory definition of indirect discrimination. The relationship between the four elements of an indirect discrimination claim and S.136 was considered by the EAT in **Dziedziak v Future Electronics Ltd** EAT 0271/11, a claim of indirect sex discrimination. There, Mr Justice Langstaff, then President of the EAT, stated: *'In this case the matters that would have to be established before there could be any reversal of the burden of proof would be, first, that there was a provision, criterion or practice, secondly, that it disadvantaged women generally, and thirdly, that what was a disadvantage to the general created a particular disadvantage to the individual who was claiming. Only then would the employer be required to justify the provision, criterion or practice, and in that sense the provision as to reversal of the burden of proof makes sense; that is, a burden is on the employer to provide both explanation and justification*'.

Failure to make reasonable adjustments – ss20/21 EqA

49. Ss20/21 EqA provide:

20(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements. (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

21(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

50. The first requirement of this claim is that there must be a PCP. This matter is covered above, under indirect discrimination.

Substantial disadvantage

51. There is no requirement under ss20/21 for a comparator to be considered regarding the alleged disadvantage suffered – **Sheikholeslami v University of Edinburgh** [2018] IRLR 1090: *''It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and*

those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question"

For this reason also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances."

52. "Substantial" means more than minor or trivial.

53. The case of **Environment Agency v Rowan** [2008] I.C.R. 218 clarifies how we should apply these provisions. We must identify

a. the PCP applied on behalf of the employer;

b. the identity of non-disabled comparators (where appropriate); and

c. the nature and extent of the substantial disadvantage allegedly suffered by the claimant. Without going through that process, a Tribunal will be unable to decide if any proposed adjustment is reasonable.

Reasonableness of adjustments

54. The ECHR Code of Practice on Employment (2011) sets out various factors that may be relevant when considering the reasonableness of any proposed adjustments:

a. "whether taking any particular steps would be effective in preventing the substantial disadvantage;

b. the practicability of the step;

c. the financial and other costs of making the adjustment and the extent of any disruption caused;

d. the extent of the employer's financial or other resources;

e. the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

f. *the type and size of the employer."*

55. There is no requirement that adjustment suggested by a claimant should remove the substantial disadvantage in its entirety – **Noor v Foreign and Commonwealth Office** [2011] ICR 695. The statute states that the reasonable adjustment should "avoid" the disadvantage. Therefore, a respondent will not avoid liability solely by demonstrating that the disadvantage would have been suffered even with the adjustment. If the adjustment would have acted to avoid the disadvantage, that is sufficient for liability to attach under ss20/21.

56. Carrying out an occupational health assessment cannot, in of itself, be a reasonable adjustment. This has been considered a number of times in cases

before the EAT. In **Smith v Salford NHS Primary Care Trust** UKEAT 0507/10/JOJ where the EAT had held that: *"Adjustments that do not have the effect of alleviating the disabled person's substantial disadvantage… are not reasonable adjustments within the meaning of the Act. Matters such as consultations and trials, exploratory investigations and the like do not qualify".*

57. In **Rider v Leeds City Council** UKEAT/0243/11/LA where the EAT held that the carrying out of an assessment as to what reasonable adjustments might be made in respect of a disabled employee was not, of itself, capable of amounting to a reasonable adjustment.

Respondent's knowledge

58. The knowledge required of respondents under ss20/21 is that they are aware that (a) the claimant is disabled and (b) that the claimant would likely be placed at the substantial disadvantage in question. The issue of knowledge covers both constructive and actual knowledge. In other words, as set out in **Eastern and Coastal Kent Primary Care Trust v Grey** [2009] IRLR 429, at para 11, a respondent will escape liability if it:

"(i) does not know that the disabled person has a disability;

(ii) does not know that the disabled person is likely to be at a substantial disadvantage compared with persons who are not disabled;

(iii) could not reasonably be expected to know that the disabled person had a disability; and

(iv) could not reasonably be expected to know that the disabled person is likely to be placed at a substantial disadvantage in comparison with persons who are not disabled."

FINDINGS OF FACT

59. We have made our findings of fact in this case on the basis of the material before us taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. We have resolved such conflicts of evidence as arose on the balance of probabilities and taking into account our assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts.

60. We have not made findings of fact about every matter referred to in evidence before us but only those matters which we concluded were relevant to the legal issues to be determined.

61. The claimant is employed at SHAPE school in Belgium. She has had a successful teaching career. She has been employed since 25 May 2009 by the MOD and is employed as a foundation stage leader.

62. The foundation stage children are taught in a separate building to the main school although it is connected to the main building through a corridor. It has a garden area which is used for a forest school some of the time.

63. As foundation stage leader the claimant was part of the senior leadership team. Her responsibilities included leading foundation stage one (FS1) teaching for three- to five-year-old children and line managing the FS2 Teacher and "key workers" (the terms used at the school for Learning Support Assistants supporting this age group). In 2019 the claimant took on the additional responsibility of leading the Extended Daycare Centre. The Extended Daycare Centre (EDC) included running the afternoon session for nursery age (3 to 4 year old) children. At this time Mr Ratcliff temporarily took on the supervision responsibilities. As foundation stage leader the claimant was also responsible for assessment across the foundation stage and had subject lead responsibilities for science and mathematics.

64. Mr Bucknill was previously the headteacher of SHAPE and the claimant reports having a good working relationship with him. In 2017 Mr Niedzwezki was appointed. He was in post for much of the relevant time for this case, leaving in April 2021. A new deputy headteacher, Mr Ian Ratcliff was appointed in October 2018.

65. In 2016 and 2017 the claimant experienced some heavy bleeding (menorrhagia) during menstrual periods. There was no diagnosis of perimenopause. In June 2017 the claimant made the business manager, Nina Harris, aware of an incident when the bleeding had been so heavy it had shown through her clothes and the claimant had been forced to abandon a home visit. Ms Harris did not give oral evidence to the tribunal but we were provided with an email which confirms that she aware of the claimant's experiencing two flooding incidents and that the claimant has shown signs of being emotional and irritable which had caused her to raise concerns with Mr Niedzwiedzki, although that was disputed by him. Ms Harris left SHAPE in December 2018.

66. It is relevant to record in this context one of the concerns for the Tribunal when we made our findings in this case was the inconsistencies in the description of events on the claimant's witness statement and the contemporaneous documentary evidence. For example in her main witness statement the claimant said this (about summer 2018) *"The additional duties meant more physically demanding work for me, trying to develop the garden and set up areas of learning. Physically and emotionally, this led to a deterioration in my health as my perimenopause took hold in summer 2018 with daily bleeding and huge flooding incidents in school and even on the way to home visits. I started to struggle. Even after the implant in May 2018 things were hard. The school business manager was aware of these issues."*

67. However Ms Harris in her email refers to only two specific incidents in May/June 2017. If Mrs Harris had been aware of the claimant experiencing "daily bleeding and huge flooding incidents" we find it implausible she would only have referred to this happening twice and that there is no corroboration of such extensive symptoms in the claimant's medical records. Mrs Harris does not appear to have been aware of continuing issues after the operation in 2018. In the claimant's own witness statement about her disability the only specific impact described by the claimant of heavy bleeding is that *"in June 2017, the Claimant was due to meet a*

new family in their home but had an episode of heavy bleeding which resulted in the school business manager needing to rearrange the appointment at very short notice."

68. The claimant was treated for a Bartholin's cyst in March 2018 and the claimant was referred to a Gynaecology clinic in December 2018 but there is no reference to perimenopause or menopause in the notes from the clinic. The clinic only raised the possibility of menopause, for the first time in 2020.

69. We also had concerns about the claimant's evidence about her asthma. The claimant told us that she was admitted to hospital after an asthma attack but then conceded in cross examination that the medical evidence suggests her breathing difficulties were caused by bronchitis.

70. The Tribunal reached the conclusion the claimant's evidence in her witness statement was somewhat exaggerated on occasion and she was not a wholly reliable witness. Her evidence was at times somewhat self-serving. This conclusion significantly affected the weight we could attach to her witness where there was a conflict between the claimant's evidence and that of the respondent's witnesses and that is reflected in these findings of fact.

71. In the summer of 2018 Mr Niedzwiedzki decided that the Forest School should be located in the FS1 garden area. The claimant appears to have been dissatisfied with that and she gave us evidence about various complaints she had about the garden and the resources provided to her for the garden. We do not find it necessary to make findings about the detail of that, but what is clear is that the relationship between the claimant and Mr Niedzwiedzki became increasingly difficult from around this time onwards.

72. In August 2018 the MOD Schools Health and Safety Officer completed a risk assessment on stress for the school, which was emailed to all staff. The claimant felt that the recommendations for stress were not being applied to her, but she does not suggest that she made anyone aware that she was unhappy about this.

73. Things did not improve when the school reopened after the summer recess in 2018. In October 2018 Mr Niedzwiedzki proposed a structural reorganisation which seems to have led to further tension.

74. In November 2018 the claimant describes herself as having a breakdown. On 5 November there was meeting between the claimant and Mr Niedzwiedzki. He was concerned about the claimant had reacted earlier that day to changes in the child/adult rations in FS1. He had also received reports of tension between the claimant and members of her team. Mr Niedzwiedzki's notes made at the time that record that the claimant was "angry and upset" and that the claimant told Mr Niedzwiedzki she was feeling overwhelmed and stressed and that she was seeking medical help. There is no suggestion from the claimant that she referred to peri-menopause or anxiety or depression at the time.

75. Mr Niedzwiedzki discussed referring the claimant to Occupational Health. He had not done such a referral before because he was new to the role of headteacher

and although he tried to make a referral it seems that the request was made incorrectly and was not picked up by the central administrative team. That occupational health referral would in fact be taken forward for a considerable period of time.

76. The claimant took a short period of time off work due to stress between 19 and 21 November 2018. There was a formal return to work meeting on 3 December 2018 when the claimant told the school she had been prescribed anti-depressants.

77. On 22 January 2019, Kay Turner, a MOD Schools Early Year Advisor visited the school. In her statement the claimant made much of the comments made by Ms Turner about the garden space although to the panel the comments do not appear to be overly critical. Ms Turner made some observations about storage in the garden area and the amount of time that was being spent by staff bringing resources in and out of the classroom, but the panel struggled to see why the claimant seemed to place so much weight on this evidence. We did not find it evidence from which we could draw inferences of discrimination.

78. In late January 2019 the claimant says that she had a severe asthma attack at school and was taken to hospital and took some time off work. In her witness statement the claimant blames the conditions in the garden for her asthma getting worse. There is no doubt there was an incident when the claimant experienced breathing difficulties while she was at work. However, in cross-examination she conceded that the medical evidence shows that she had bronchitis and her GP notes do not cite asthma as being a cause of the incident.

79. In May 2019 Mr Niedzwiedzki was finally told what the correct process was for making an occupational health (OH) referral. He gave evidence that he had tried in the meantime to find out what the delay was from the previous November which had been to send emails to a group email address although it was unclear why he had not simply phoned an appropriate manager in the HR team. The claimant had not questioned what was happening with the referral in the intervening time and it seems that the outstanding referral had largely overlooked. Mr Niedzwiedzki submitted the correct form on 2 May 2019. The OH referral form filled in by Mr Niedzwiedzki in May 2019 says that *"Esther has found aspects of her work cause her significant levels of stress and reference is made to behaviour which presents very clear and deep distress and upset".*

80. In June 2019, the Early Years Centre Manager left and it was decided that the claimant should take over that role. Adjustments were made to the claimant's other workload. She was not required to produce a Foundation Stage action plan or report and she was allocated two key workers were well thought of, Jenny Gow and Sarah Roberts. Sarah Roberts was Level 4 qualified (advanced level). Mr Ratcliff took over the supervision of FS2 and the claimant was allocated specific time out of class to use software called "Tapestry" for recording classroom assessment and observation. The claimant's teaching timetable was also significantly reduced to 55 percent with no teaching responsibilities in the afternoon. This compared to other Key Stage Leaders who had teaching commitments set at around 85 percent.

81. At around this time Mr Niedzwiedzki arranged for the claimant's husband to spend around 90 minutes in the foundation stage one (FS1) area with the claimant in the mornings. There was dispute abut whether this was support put in place for the claimant or whether Mr Brown's support was required because of the number of children without English as a first language at that time. The tribunal accepted that the Mr Brown was not sent to FS1 purely to assist the claimant but his presence did provide additional support to her in addition to that provided by the keyworkers.

82. Unfortunately in light of the previous delays and despite the fact the correct form had been followed in, the OH referral was still not progressed. Documents in the bundle suggest Mr Niedzwiedzki did make some attempts to follow this up before the summer break but for whatever reason no contact was made with the claimant to arrange an assessment. The Tribunal Panel found it surprising the referral was to actioned by the MOD's HR team and we received no explanation for their lack of cation.

83. After school restarted in the late summer there was a particular incident at a senior leadership meeting in September 2019. Mr Niedzwiedzki described the claimant as having derailed that meeting. The claimant says that she was concerned that the meeting, which was about assessment, did not make any reference to the early year foundation stages and she had subsequently sent what the claimant called "a passionate statement" to Mr Niedzwiedzki about the importance of early years because, she says, she was worried standards were falling across the board.

84. When the claimant met Mr Niedzwiedzki the following day he expressed some concerns about the claimant's mental health. However the claimant told the head that *"there is no need to have any undue concern regarding my emotional/mental well-being. I did suffer from stress last year which [was] dealt with openly. I do not believe every time I exhibit stress it is a reflection of any deeper issue"*.

85. It is clear to the tribunal that by this time Mr Niedzwiedzki was concerned there might be an underlying issue which was more than just serious stress, but at this point he was faced with a senior member of staff denying that she had any underlying condition. We found that to be significant as explained in our conclusions The claimant had been to see her GP at around this time. The GP notes that the claimant's mood was low but stable with no sign of anxiety and the low mood was linked to her daughter going to university, in other words an apparent short term reaction of life events.

86. On 20 November 2019 there was a training session in the school on the subject of 'Issue Resolution'. Both the claimant and Mr Ratcliff attended. The training session included a leadership coaching model involving roleplay during which the trainer played the role of the coach, and the individual was the person being coached. During the roleplay the claimant said she made suggestions about how communication could be improved. Mr Ratcliff who was observing describes it rather differently and says that claimant used it as opportunity to criticise him in very negative terms. When Mr Niedzwiedzki came to look into matters, the trainer largely supported Mr Ratcliff's account. The panel accepted that both Mr Niedzwiedzki and

Mr Ratcliff felt that the claimant's behaviour had been inappropriate but the claimant does not accept that she had anything wrong.

87. Mr Niedzwiedzki spoke to the claimant about what had happened, and he wrote to her to summarise the discussion. The letter makes clear he had concerns about the claimant's way of communicating and lack of appreciation of how her behaviour could impact on others and also raise concerns about she received feedback. The letter says this *"We did not discuss Occupational Health. Some time ago, we agreed for me to refer you to Occupational Health. Evidently, this has not materialised. At any point, please let me know if you feel Occupational Health would be useful to support you and I will explore further"*. That is somewhat curious given there was an outstanding referral which was supposedly being processed and suggests by this time the referral made in May had rather been forgotten. The letter also confirms that Mr Niedzwiedzki would review the claimant's performance up to the end of January.

88. Things seemed to improve somewhat over the next few months. The claimant's GP notes record that in January she was seemed to be coping reasonably well. On 3 February 2020, Mr Niedzwiedzki wrote to the claimant to confirm there had been no reoccurrence of concerns in the review period and there was no need for that to be continued.

89. In February 2020 the gynaecology clinic suggested to the claimant's GP that she may be experiencing the menopause.

90. This letter was sent against the backdrop if the growing pandemic. In March 2020 the school largely closed and teaching moved online for most children. The claimant and her husband informed Mr Niedzwiedzki that they had conditions which might make them more vulnerable and it was at this time that Mr Ratcliff first learnt the claimant had asthma.

Reopening of the school post-covid

91. A decision was taken to reopen the SHAPE school at the start of the new term in August 2020. There was some confusion at the time about precisely what covid measures would be required and whether the school would have to comply with Belgian or UK guidance.

92. A cleaning regime was introduced with social distancing and requirements for ventilation and hand washing and sanitising. Contractors were due to undertake deep cleaning of the school prior to reopening but due to a miscommunication over dates the cleaning was not done in time for the staff inset days. It seems the claimant had chosen to come in slightly before other staff to do some work in the garden, but there was no suggestion this was on any sort of instruction from the respondent.

93. The claimant returned to the school and found the Early Years Centre had not been deep cleaned. She described the classrooms as being very dusty and gave evidence that she was required to undertake the cleaning herself. Mr Niedzwiedzki's told us that there was no intention that teachers would do the deep

cleaning and the only reason it has not been done was the mistake with the contractors. We accept that. We also accept that as soon as he learnt that cleaning had not been done, Mr Niedzwiedzki took steps to ensure that the contractors were brought in as quickly as possible. We accept his evidence that the claimant did not express concerns about undertaking the cleaning and he was not particularly concerned because she had the key workers to help her.

94. There was a heatwave at the time and it is common ground that temperatures in the school were very high. The Belgian government guidance at the time required air conditioning to be switched off to prevent circulation of covid. Fans were available within the school and windows and doors opened, although the claimant says that some windows had been painted shut. It was common ground that for several days it was still stifling hot in the Early Years Centre. Mr Niedzwiedzki contacted the Directorate for urgent guidance. However there were concerns about the potential conflict with Belgian law. Mr Niedzwiedzki was required to meet with the Director Generale, SHAPE International School Common Services on 24 August 2020 and put in a formal written request. During the first few days of the school re-opening the temperatures were unbearably hot but by 21 August the temperature had started to cool. By 25 August Mr Niedzwiedzki had been able to secure agreement for the air-conditioning to be switched on.

95. As the keyworkers had returned to work, the claimant had become concerned that one of them had travelled to red zone country with her family and that her children might have covid. She reported those concerns to Mr Ratcliff and Mr Ratcliff investigated further. Subsequently concerns were raised by the key worker's husband, who is an RAF Wing Commander, that the claimant's husband was spreading false rumours that the family had breached covid travel restrictions. Mr Ratcliff sent an email to staff instructing to them to stop circulating these rumours. It seems the claimant believed that email was directed at her and that led to a rather confrontational meeting between the claimant and Mr Ratcliff on 21 August 2020.

96. It is common ground between the claimant and Mr Ratcliff that the meeting happened in the late afternoon. The claimant says she stood by the door, Mr Ratcliff told us that the claimant came into the room, came closer to him than allowed by social distancing guidance at the time and shouted at him when she was very close. The claimant denied that but it was accepted by the claimant that she had removed her face mask and that raised her voice because she was upset.

97. The tribunal panel accepted that the evidence of Mr Ratcliffe about what happened which was consistent with the contemporaneous evidence. We found Mr Ratcliff's account to be credible. We accepted that he had perceived that the incident to be particularly serious because the claimant had come closer to him than social distancing guidelines allowed and shouted at him without her face mask on and this had particularly upset him because of his personal covid vulnerability

98. There was then a meeting on 31 August with Mr Niedzwiedzki to discuss the confrontation with Mr Ratcliff. That meeting which led to the claimant being given an informal disciplinary warning. This was later escalated to be part of the formal disciplinary action subsequently taken against the claimant. A letter was sent to the claimant confirming the informal warning and also records this *"I asked if any side*

issues we could support you with. You responded by saying besides frustrations you shared, nothing else you could think of".

99. Matters continued to escalate over the following weeks. The key workers raised concerns with Mr Ratcliff about they were being managed by the claimant which he took to Mr Niedzwiedzki.

100. On 16 September 2020, Mr Niedzwiedzki undertook an observation of the claimant teaching and gave her feedback about that and ways in which Mr Niedzwiedzki felt the teaching could be improved. The claimant relates the feedback to her disabilities and alleges that this was intended to harass her. The claimant became very emotional and upset. Mr Niedzwiedzki subsequently wrote to the claimant about their meeting on 21 September 2020 and our findings and conclusions about that letter are referred to in the conclusions section below.

101. Mr Niedzwiedzki also decided that he should raise the keyworkers concerns and a meeting was arranged for 22 October 2020. Mr Niedzwiedzki told us he prepared a script for the meeting but intended it to be an informal meeting to discuss how he could support the claimant in repairing her relationship with the key workers which seemed to be breaking down.

102. The meeting was followed up with a letter. Mr Niedzwiedzki's evidence was that he tried to be diplomatic and wished to give the claimant the opportunity to consider her behaviour and address the concerns of her team herself if she felt that she could. The claimant was very upset by the meeting but the panel accepted that the claimant did not communicate that to Mr Niedzwiedzki and she followed the suggestion made to her about discussing matters with the key workers directly.

103. On 20 November 2020, one the keyworkers approached Mr Niedzwiedzki to raise further concerns about how the claimant had conducted the meeting which Mr Niedzwiedzki had suggested which had made the keyworkers feel uncomfortable.

104. A further meeting was arranged between Mr Niedzwiedzki and the claimant for 1 December 2020 to discuss the concerns raised. The meeting did not go well. The claimant became upset and wanted her husband to join the meeting to support her. She called him and he tried to join the meeting. Mr Brown was very angry.

105. Following this confrontation Mr Niedzwiedzki told us he decided that this had been a repetition of the claimant's behaviour towards Mr Ratcliff and that he had to look at the instances of the claimant's behaviour which had happened over that term cumulatively as serious misconduct.

106. The claimant was then off work for a couple of days but returned on 4 December 2020. On the day she came back Mr Niedzwiedzki received letters of complaint from the keyworkers making allegations that the claimant had left her iPad in the FS1 kitchen area unattended while the keyworkers were using it and that they had noticed that iPad had been left in record mode. They felt the claimant was spying on them. In turn the claimant raised concerns about her relationship with the key workers. Mr Niedzwiedzkis decided to move the keyworkers involved. In the

meantime he had been seeking advice from the HR team and decided that formal disciplinary action was now appropriate.

107. This resulted in a letter initiating disciplinary action being sent to the claimant on 9 December 2020 by Gary Margerison, DCYP School Improvement Advisor, as the decision maker designated under the respondent's disciplinary procedure. The letter confirms disciplinary proceedings relating to three matters – the claimant's behaviour during the August 2020 Meeting; her behaviour during the December 2020 Meeting and the iPad recording incident. The incidents were to be investigated by Tricia Woods, Early Years Advisor, and a potential outcome of the disciplinary procedure would be a first or final written warning. The letter was handed to the claimant by Mr Rowland on 10 December 2020.

108. The claimant contacted her doctor and a psychologist and then her trade union. The trade union insisted on an immediate occupational health referral and the claimant prepared the first of a number of equality impact statements. The disciplinary proceedings were paused on or around 22 January 2021 to allow the claimant to raise a grievance.

109. In the new year the claimant describes her health as collapsing. She was signed off sick from 13 January 2021.

110. On 10th February 2021 the claimant she was assessed by Optima Health OH. The OH advisor reported that the claimant was unfit for work in any capacity and was unfit to engage with the misconduct investigation due to her mental health symptoms and making reference to the claimant taking medication for anxiety, depression and her menopausal symptoms. The report identified that that further medical evidence would be required from the claimant's GP / Psychologist. Mr Niedzwiedzki says this is the first time he became aware of these medical conditions.

111. On 22 February 2021, the claimant emailed Mr Ratcliff to say that she was unwell and that she would submit a further sick note. HR then asked Mr Niedzwiedzki if a formal absence review meeting had been scheduled as the claimant had been absent for 28 days in accordance with the Supporting Attendance Procedure (Absence Procedure) which states that a formal review meeting should take place, the purpose of which is to discuss the Occupational Health report, her absences, and anything that could be implemented to support the return to work.

112. On 25 February 2021, Mr Niedzwiedzki wrote to the claimant to invite her to a so called "Continuous Absence Review Meeting" on 9 March 2021. We accept that it was a standard form invitation which informs the employee that a potential outcome of them not returning to work within a reasonable timeframe, may be that their employment may be affected. The claimant however perceived it to be a threat.

113. The letter said this

"Dear Esther

I received an interim Occupational Health report on 16.02.21 to notify me that you remain unfit for work at present.

Because you have now been absent for longer than 28 consecutive days, we should meet to discuss what further assistance or support you require to enable you to return to work, and formal action is appropriate.

I would like to meet with you (either in person, through MS Teams or through a telephone conference call) on Tuesday 9th March at 13:30. A note taker will be present to record what we discuss. (I will send you an invitation through email where you can choose your preference for the meeting.)

I will give you the opportunity at the meeting to discuss any problems which may be prolonging your absence, and I will also explain what help and support is available, which may involve making temporary workplace adaptations or reasonable adjustments to help you return to work if possible.

One of the purposes of the meeting is to enable me to consider whether to progress formal action. I will consider whether this is appropriate. I must remind you that if I do this and you are not able to return to work within a reasonable timeframe, your employment with the Department could be affected."

114. On 1 March 2021, Mr Niedzwiedzki received a response from the claimant's trade union representative to question a formal process had been initiated and suggesting that the claimant was being threatened. Mr Niedzwiedzki sought internal advice and then write to the claimant to inform her that the Continuous Absence Review Meeting would be postponed.

115. Mr Niedzwiedzki's employment at the school ended on 19 March 2021 and that ended his involvement in the management of her case but on 12 March 2021 Mr Oley submitted a grievance against Mr Niedzwiedzki and Mr Ratcliff on the claimant's behalf.

116. The grievance was very long, running to some 66 pages and is somewhat wideranging. The claimant had not used the respondent's standard grievance form, referred to as Form JSP 763. The grievance was referred to Mr Yeoman, Chief Education Officer for Defence, Children Services. Mr Yeoman encouraged the claimant to use the official form and also asked her to particularise her grievance to clearly identify the allegations. Eventually Mr Oley sent a 17 page summary of the grievance to Mr Yeoman on 25 July 2021. It was clear to the tribunal that moving forwards it was this second document which was the focus of the consideration of the claimant's complaints. That was understandable in the circumstances given the nature of the first document.

117. It was agreed that the grievance meeting would be delayed to accommodate the claimant's return to work.

118. The management of the claimant's sickness absence was overseen by the Mr Bucknill. It was Mr Bucknill who had managed the occupational health referral and had sought the claimant's consent, although the referral had been signed off by Mr Niedzwiedzki as the claimant's line manager at the time.

119. On 10 March 2021, Mr Niedzwiedzki contacted the trade union to explain that he was leaving his post as headteacher and that Mr Bucknill would conduct the

return to work going forward and would make contact with the claimant every fortnight via email, as she requested. Mr Bucknill also contacted the claimant.

120. Mr Bucknill was interviewed as part of the grievance process but was not formally involved in that process as a decision maker.

121. On 30 March 2021, the claimant underwent a further Occupational Health assessment. The report from that assessment stated that the claimant was not yet ready to return to work but that plans could be made for a return date on 23 April 2021 providing that her symptoms improved. Recommendations were made for future meetings and a stress risk assessment. A Fit for Work Plan was then prepared.

122. Occupational Health made various recommendations for her return to work. Most of these were adjustments already put in place by Mr Niedzwiedzki including a reduced pupil contact timetable, a timetable adaptation to ensure that lunch and breaks are taken which had out in place via Mr Ratcliff and non-contact time introduced specifically for assessment/observation and regular short 1-1 meetings to discuss and assess her progress going.

123. On 21 April 2021, the claimant wrote to the Occupational Health provider to complaint that the Occupational Health report did not fully address the issues that she faced in relation to her pre-menopausal symptoms and identified a number of additional adjustments required.

124. Before any arrangements for her return to work were progressed, on 22 April 2021, the claimant was signed off work until 7 May 2021 on the grounds of anxiety and depression.

125. The meeting between Mr Bucknill and the claimant was put on hold but Mr Bucknill met with Mr Oley on 27 April 2021 to discuss how she could be supported.

126. The claimant was invited to a further continuous absence review meeting on 5 May 2021 in accordance with the Attendance Procedure However in light of her reaction to the previous letter, Mr Bucknill also wrote separately to explain the reason for the letter.

127. The claimant asked for adjustments to the process to allow her to be accompanied both her husband and her trade union and this was agreed. The meeting went ahead as scheduled. It was agreed that the stress risk assessment form would be completed and there was a discussion about what adjustments were already in place. In accordance with the respondent's procedures a "workplace adjustment passport". This is a way to ensure agreed adjustments are maintained through changes in line management was discussed, as a way to record reasonable adjustments in case of changes to line management or personnel.

128. On 7 May 2021, the claimant's GP, Dr Ure, wrote to Mr Bucknill with further details as to her menopausal symptoms, proposed reasonable adjustments which would "be very helpful".

129. On 12 May 2021, the claimant returned a completed stress risk assessment document and the meeting on 13 May 2021 went ahead.

130. On 20 May 2021, there was a further meeting between the claimant, Mr Oley and Mr Bucknill. The claimant told Mr Bucknill that the occupational health referral made by the headmaster earlier in the year contained a number of inaccuracies and that the referral had been hostile. She disputed that the adjustments referred to had been made. This was confirmed in writing and Mr Bucknilll informed the claimant that this could be considered as part of the grievance.

131. Discussions about a possible return to work continued in the following weeks including discussions about ensuring she had planned preparation time and other arrangements to help her return. On 28 June 2021, the claimant returned to work and the following day she and Mr Oley met with Mr Bucknill to discuss next steps like a risk assessment for her asthma. This was quickly followed by the summer break.

132. Just before the start of the new term, on 24 August 2021, Mr Oley contacted Mr Bucknill with concerns about her return to work. A meeting followed on meeting on 2 September 2021 to discuss the claimant's return to work and it was agreed a further occupational health referral would be made.

133. The claimant's return to work enabled Mr Yeoman to engage with her about her outstanding grievance. On 6 September 2021 Mr Yeoman met with Mr Oley and the claimant to discuss the grievance. Mr Yeoman told us that what he wanted to do was to identify what the key concerns were so that he could put this to Mr Niedzwiedzki and Mr Ratcliff. Mr Yeoman provided a copy of the meeting notes which further summarised the allegations, as slightly amended by Mr Oley.

134. Mr Yeoman told us that he understood the key allegations were

a. The Occupational Health referral had not been appropriately progressed despite repeated assurances by Mr Niedzwiedzki;

b. No reasonable adjustments were put in place;

c. The claimant's health and safety concerns were ignored or not taken seriously and the Covid-19 risk assessment was ignored and the claimant had been forced to do work outside this scope of the assessment

d. The claimant's mental health had not been taken seriously by Mr Niedzwiedzki and Mr Ratcliff and she had not been spoken appropriately

e. Mr Ratcliff had behaved aggressively towards the claimant's husband.

135. Mr Yeoman wrote Mr Niedzwiedzki and Mr Ratcliff on 17 September to explain the complaints made against and each was invited to a meeting to discuss the issues raised. Mr Niedzwiedzki provided a written statement in response. Both denied the allegations against them and Mr Yeoman decided that an investigation would be required. All of the protagonists were informed and Mr Yeoman prepared a summary of the key issues as terms of reference for the investigator.

136. Mr Conaghan was appointed to investigate the grievance in October 2021. He is not employed directly by the respondent but worked at the time for a company providing investigation services, CMP, and his investigation was carried out over the next 3 months.

137. The Occupational Health assessment took place on 10 November 2021. The report which followed advised that the claimant was fit to continue to work with the adjustments in place and various recommendations were suggested including that the claimant should have regular meetings with the new headteacher.

138. There was a further meeting to discuss workplace adjustments put in place for the claimant with Mr Bucknill on 10 December 2021. It was agreed moving forward the new headteacher would take over overseeing the adjustments put on place for the claimant.

139. Mr Conaghan's investigation report was submitted to Mr Yeomans on 27 January 2022. This included the further comments on the report from all the main protagonists. Ms Conaghan included a summary of the 40 or so pages of comments provided by the claimant and Mr Oley. The claimant is highly critical of Mr Conaghan's report. She says he reached the wrong conclusions on the facts and had not identified issues with the quality and integrity of the evidence, for example from the support workers and that he had uncritically accepted the evidence of the head and deputy head.

140. Mr Conaghan told us that he made his findings based on the evidence he gather from everyone involved. The panel concluded that he found the fact that the concerns raised by the claimant's keyworkers to be significant – criticism were made by those both junior and senior to her, and that the disciplinary process should consider most of the issues raised.

141. Mr Yeoman met with Mr Conaghan to discuss the report and for Mr Conaghan to answer any of Mr Yeoman's questions about the findings made. Mr Yeoman then made his decision about the grievance.

142. One of the complaints was partially upheld. It was concluded that Mr Niedzwiedzki had failed to properly progress the initial Occupational Health referral. It was found he could have done more to progress the referral but Mr Yeoman also accepted that Mr Niedzwiedzki did not have experience of making referrals and had not understood the process and what he needed to do and in particular that he needed to follow matters up. The fact that the claimant had not queried process or chased up the referral had contributed to that. Mr Yeoman concluded that there had been failings but this had not been deliberate and this had not been bullying or harassment.

143. Mr Yeoman accepted that Mr Niedzwiedzki, Mr Ratcliff and the MOD had no knowledge of the claimant's peri-menopause until the grievance process began. He also concluded that although the OH referral had not been made, numerous adjustments had been put in place by Mr Niedzwiedzki and Mr Ratcliff to support the claimant – she had been provided with fixed lunch times to help her manage her time, she had additional support from her husband, she had a reduced teaching

requirement and so on. Mr Yeoman also concluded that inappropriate language had not been used about the claimant's mental health.

144. Significantly when pressed in cross examination about why he had considered if the claimant's behaviour had been caused or mitigated the disciplinary charges Mr Yeoman told us that he believed these were matters to be examined when the disciplinary charges were considered.

145. The claimant and Mr Oley had requested that the disciplinary proceedings should be dropped. The disciplinary action had been stayed while the grievance was considered. Mr Yeoman took HR advice and decided that the disciplinary process should continue in light of the conclusions reached about the grievance.

146. The claimant appealed against the grievance decision and the progression of the disciplinary proceedings was again put on hold but not dropped.

FURTHER DISCUSSION OF EVIDENCE AND OUR CONCLUSIONS ON SUBMISSIONS AND THE LAW

147. Our discussion below follows the numbering of the agreed and updated list of issues which is attached in the annex below. Unfortunately the numbering in the list of issues is not always easy to follow but the employment judge was concerned that seeking to renumber the parties' agreed list of issues in these written reasons may have caused confusion.

148. We received both written and oral submissions from counsel. The panel found those helpful in reaching our conclusions. Given the length of the submissions we have not tried to summarise them here but have dealt the arguments in our conclusions below.

149. The first 3 points in the list of issues relate to jurisdiction which in the event we did not have to consider.

Issue 4: disability

150. The respondent accepts that the claimant was disabled at all relevant times by anxiety and depression.

151. In relation to the additional disabilities which the claimant says affected her, perimenopause, including menorrhagia, and asthma, we reached the following conclusions.

152. We took into account the Secretary of State's *"Guidance on matters to be taken into account in determining questions relating to the definition of disability".* That guidance says this *"A person may have more than one impairment, any one of which alone would not have a substantial effect. In such a case, account should be taken of whether the impairments together have a substantial effect overall on the person's ability to carry out normal day-to-day activities. For example, a minor impairment which affects physical co-ordination and an irreversible but minor injury to a leg which affects mobility, when taken together, might have a substantial effect on the person's ability to carry out certain normal day-to-day activities. The*

cumulative effect of more than one impairment should also be taken into account when determining whether the effect is long-term".

153. Mr Small drew our attention to this guidance in support of his contention that we should look at the effect of the claimant's conditions cumulatively, We accept that the correct approach. Mr Small says this *"As aforesaid C in her disability impact statement (p148) has set out how the impairment has affected her. Thus, she has suffered flooding at work; she has suffered incontinence at work; hot flushes; night sweats, mood swings; anxiety and depression; low self-worth; reduced concentration etc".*

154. However we faced a significant difficulty with the claimant's case. When we look at the issue of disability one of our keys concerns, as reflected in the statutory guidance, is the extent of any impact of a medical condition on the ability to carry out day to day activities. We do not assess disability by looking at a list of medical symptoms. Regretfully despite being professionally represented and guidance having been provided by the employment judge at the case management stage, we faced a paucity of evidence on the impact of asthma and perimenopause on the claimant's ability to carry out day-to-day activities at the material time, that is when she says she says discriminated against, in either of her disability statements in 2022 (24 May and 17 November). There is also little evidence in her statement on the issue of liability.

155. Although we accepted that we must look at the effect of all the impairments in assessing disability, but we also concluded that where the claimant was relying in particular on an effect of her asthma and perimenopause which was independent from the impact of her anxiety and depression, we had to look at the whether those conditions had a singular or cumulative effect which created a further physical impairment within the meaning of section 6 of the Equality Act 2010.

Perimenopause

156. In relation to the perimenopause Mr Small highlighted to us that the claimant has referred to incontinence at work and needing to change clothes because of flooding incidents but in terms of specific evidence, the claimant told us about one incident of incontinence in the classroom which resulted in her needing to change her clothes in September 2020 and in terms of heavy bleeding about one incident in 2017 and one in June 2022. Only the incident in September 2020 falls within the relevant period for the claims before us. We have no doubt that those incidents which will have been uncomfortable and difficult, but we concluded they were occasional and isolated incidents which had not had a significant impact in day-to-day activities.

157. The claimant says that she was disabled because of list of symptoms. In addition to the incontinence and heavy bleeding we consider what were told about each of these as follows.

158. In terms of hot flushes, the claimant refers to a period of time in the autumn of 2020 when hot flushes made teaching "uncomfortable" and which she says drew criticism of colleagues, but we had no evidence about what that criticism was or how

it affected the claimant, we had no evidence that the hot flushes stopped or impeded the claimant from doing anything in her day to day life. The claimant only referred to any short term impact during the autumn which was not consistent any impairment having a long term impact.

159. The claimant says that from 2017 she had difficulties with fatigue but the impact on day-to-day activities is described as being a difficulty being able to arrive in school "refreshed". She referred to sometimes finding work very tiring and finding it "increasingly challenging" to complete administrative tasks such as report reporting. We found that evidence to be extremely vague. The claimant also described having nightmares but does not say how those nightmares impacted on day-to-day activities.

160. The claimant says she suffers from aches and pains and has found it "more painful" to move furniture and set up classrooms.

161. We looked at the cumulative impact of all these things but we found no impact on day activities which was more than trivial. Standing back from the claimant's evidence but we concluded that in fact the claimant described no more than what the day-to-day experience of most people. Sometimes work is tiring. Many employees will sometimes feel fatigued at the end of the day or experience some discomfort when moving furniture. We were not convinced that the claimant was doing more than describing the day to day challenges of working life as a teacher.

162. In relation perimenopause and menorrhagia, the claimant's medical records record that she had been suffering from heavy periods for around six months in April 2017 which is consistent with the email from business manager Nina Harris that in June 2017 she was aware of a flooding incident when the claimant have been undertaking a home visit. However we had evidence of only one specific incidents of heavy bleeding during the relevant time and despite a number of visits to her GP, the claimant's medical records do not record the possibility of menopause/perimenopause until February 2020 when it seems to be referred to as a possibility, but perimenopause and menopause are only referred to in any significant extent until the prescription of HRT medication in March 2021.

163. This is significant because although the claimant has brought complaints about the grievance process, the incidents she complains about in terms of discriminatory conduct occurred between 2020 and the OHR report in March 2021. That is the material relevant time in terms of discrimination.

164. The claimant said in her statement that "without medication these symptoms would be very much worse" but she does not seem to have prescribed HRT medication during the relevant time. We found the claimant's evidence in her impact statements to be problematic because of her lack of focus on the relevant time that we were considering.

165. To be clear this tribunal panel does not doubt that menopause and perimenopause are conditions which may cause or contribute to significant impairments on day-to-day activities, and which can amount to a disability. We reject the comments made by Dr Ure that the menopause is not a disability. However

the menopause is also a stage a life which women pass through as they age. The menopause is not inevitably a disability. It is also a transitory stage of life. As women move through the menopause their symptoms and the impact of those, if there are any, on day-to-day life will also change. Symptoms may have a significant impact on day-to-day activities for a short period of time, but that impact may quickly recede. We drew the conclusion that the nature of the menopause and perimenopause make it particularly important that if we are to find disability we have evidence that enables us to make clear findings about the relevant time. The claimant did not provide us with that evidence. In her disability statements the claimant describes symptoms which have come and gone, seeming to a transitory short term significant impact on her.

166. The claimant repeatedly used the words “eg” in her disability statement. We thought that was unfortunate in that it appeared to us that the claimant was suggesting that she could give us more evidence if she wanted to, but the fact remains she had chosen not to do so. We had to decide this case on the basis of the evidence the claimant has chosen to offer us and we concluded the claimant had not met the burden of proof in this regard.

Asthma

167. In terms of asthma, the claimant’s disability statement refers to a severe asthma attack in February 2019 when she was working in the outside garden. However the contemporaneous evidence at the time refers to bronchitis as being the reason for the claimant’s hospitalisation – including in the claimant’s own email sent to the respondent at the time. Anyone with serious chest infection is likely to see an impact on their breathing and no doubt if they also have asthma, even if only mild, such an infection may have a significant impact in the short term but a one-off asthma attack in those circumstances does not mean that that the asthma has a long-term impact on day-to-day activities.

168. Significantly the claimant’s GP records from October 2020 refer to her asthma being under control, and that it is not stopping the claimant doing any activities, including exercise, it is not disturbing sleep and is causing daytime symptoms (whatever those were) only one or two times per month.

169. In terms of the claimant’s disability witness statement, the claimant has referred to us one incident when she suffered breathless when cleaning in what the claimant told us was a very dusty and poorly ventilated classroom. Cleaning a very dusty classroom which has been closed up for many months during a very significant heatwave is not a day-to-day activity and it likely to be something that could be expected to cause most people some degree of breathing difficulty. The claimant does not suggest that asthma stopped her cleaning or gardening generally.

170. We recognise that we must disregard the effect of medication, but the claimant failed to provide us with any meaningful evidence about her medication. We know she kept inhalers at work but not how often she had to use that medication. The claimant simply says in her disability statement that without medication she would be a risk of a severe asthma attack and would be unable to preform her role in the outside learning area and in a poorly ventilated classroom. We considered

whether this could be enough to for us to conclude that without medication the claimant had shown us that her asthma has a more than trivial impact on day-to-day activities, but we concluded that it was not and that the claimant had not met the of burden of proof on her in that regard.

Conclusion On Disability

171. Our conclusion is that the claimant was only disabled by anxiety and depression at the relevant time.

Issue five: the respondent's knowledge of disability

172. In case the tribunal is wrong in its conclusion about the claimant's perimenopause or asthma amounting to a disability, we considered the question of when the employer knew or ought to have known about each of those conditions at the material time. We also determined when we concluded that the respondent knew or ought to have known about the claimant's anxiety and depression.

Perimenopause

173. In terms of the claimant having provided information to the school's business manager rather than Mr Niedzwiedzki, we accepted the evidence that the school business manager Nina Harris had a role in recording medical absence and dealing with similar matters.

174. In light of her role we find it reasonable for employees to perceive that she had something of an HR role or responsibility and that if information was disclosed to that manager about a medical condition it had in effect been disclosed to the employer. However even taking the claimant's evidence at its highest, we did not accept that it can be said that in disclosing to Ms Harris that the claimant had two specific incidents of heavy bleeding and that she had shown signs of anxiety during that term, that Ms Harris knew or ought to have known that the claimant was perimenopausal and her day to day activities were substantially impaired on a long term basis as a result. The nature of information provided to Nina Harris was not in itself sufficient to fix knowledge.

175. It appeared to be suggested to us that because the respondent knew the claimant was suffering from anxiety and depression in the period before the provision of occupational health report in March 2021 and that, via Nina Harris, the respondent knew that the claimant had had specific flooding incidents in 2017, it ought to have known that the claimant was perimenopausal. We found that submission troubling.

176. We do not see how a very small number of incidents of heavy bleeding is something which means an employer should have knowledge of disability or even lead them to make further investigations about whether an employee is perimenopausal and disabled as a result. Occasional heavy menstrual bleeding is something which happens to many women. It is in no way unique to the perimenopause. In relation to the claimant being emotional or irritable, most people will experience events which cause them to feel anxious on occasion. We have reached conclusions separately about the impact of the claimant's anxiety below, but we do not accept that employers who are aware that a woman in her forties or fifties

has had heavy periods and expressed to a colleague that she is feeling anxious, ought to then be investigating with that woman whether she is perimenopausal. We agree with Ms Cummings that this is requiring employers to apply gender-based stereotypes to their workforce which would be intrusive and inappropriate.

177. In this case in terms of knowledge we considered that the medical evidence was very significant. Menopause is not mentioned in the claimant's medical notes at all until briefly in February 2020 and does not seem to be an issue which concerned the claimant and her GP until the spring of 2021. We accept the respondent's analysis of the claimant's medical records in this regard. Of course many women do not recognise that they are in this stage of life for some time and their GPs may also not identify it. However when the medical evidence points to this matter not being something which the claimant's own GP was having any substantial regard to until 2021, we find no basis for finding that the respondent was or ought to be fixed with knowledge of perimenopause before it had been recognised by the claimant and her GP.

178. The respondent did become aware that the claimant was experiencing perimenopause or menopause symptoms in March 2021. If we are wrong about the claimant being disabled by perimenopausal symptons, we find that the respondent was only fixed with knowledge of that impairment at that point in time.

Anxiety and depression

179. The respondent accepts it had knowledge of anxiety and depression from 30 March 2021, but the claimant says that the respondent knew, or ought to have known she was disabled at an earlier time.

180. We have taken into account the guidance in the cases about occupational health referrals as a reasonable adjustment referred to above that consultation with an employee, or indeed a referral to occupational health (OH) is not a reasonable adjustment in itself, but if such a consultation should have taken place or an OH referral should have been made, an employer will be unlikely to be able to show it is not fixed with the knowledge it would have had if that enquiry had been made. This was potentially significant in this case.

181. The first time there was a discussion about a possible need to refer the claimant to occupational health because of concerns about her mental health was in November 2018. We had evidence of a meeting when Mr Niedzwiedzki had been concerned about the claimant's reaction to some feedback and reports of tension within the team and the claimant causing her keyworkers to be upset. The meeting notes record the claimant has being "angry and upset". The claimant told Mr Niedzwiedzki she was feeling overwhelmed and stressed and that she was seeking medical help.

182. Knowledge that someone is experiencing short term stress is not knowledge that they are disabled by mental illness. If there was evidence of other incidents following this or of the claimant herself raising concerns, we may have found that the respondent should have been aware of the claimant' anxiety and depression at this

time but we accept that this appeared to be something of a one-off short-term period of stress.

183. By the following May (2019) Mr Niedzwiedzki was sufficiently concerned to seek to refer the claimant to OH. The referral form he filled in May 2019 refers to "significant levels of stress" and "deep distress and upset". Of course that OH referral was not progressed.

184. After school restarted in the late summer there was a particular incident at a senior leadership meeting in September 2019. The Head Teacher described the claimant as having derailed that meeting – the claimant told the head that *"there is no need to have any undue concern regarding my emotional/mental well-being. I did suffer from stress last year which [was] dealt with openly. I do not believe every time I exhibit stress it is a reflection of any deeper issue*". At this time Mr Niedzwiedzki appeared to be concerned there might be an underlying issue which was more than just serious stress. That is consistent with the referral which he had sough to make in May. Mr Niedzwiedzki had done what he should in this regard and sought to investigate the matter further with the claimant herself. However the claimant denied that there was an underlying cause and that there was anything more than stress affecting her. We accept that Mr Niedzwiedzki was entitled to accept that assurance that this had been a matter of short-term stress, perhaps a reaction to day-to-day life, and it cannot be said that he ought to have know there was something more going on in the face of the claimant's own denials.

185. The GP notes at the time record that the claimant's mood was low but stable with no sign of anxiety and the low mood was linked to her daughter going to university. The medical evidence at that stage strongly suggests that if it had been available to the respondent and its occupational health advisers they would have been concluded that the claimant was being impacted by stress, in other words an adverse reaction to life events, but not anything more.

186. For these reasons we do not find that Mr Niedzwiedzki ought to have known that the claimant was disabled at that stage.

187. In November 2019 there was a further confrontation between the claimant and Mr Ratcliff following the coaching session. The claimant's behaviour was such that a meeting was held between her and Mr Niedzwiedzki. There was conflicting evidence about precisely what was said at the meeting, but what is not in dispute that after the meeting Mr Niedzwiedzki wrote to the claimant noting that although occupational health had not been discussed, she should let him know if she thought this would be useful. The claimant says she thought OH was discussed at the meeting but we accept that following receipt of that letter she must have known that for a referral to be made at that point in time she would need to contact Mr Niedzwiedzki to take that forward. She did not do so. Although we are satisfied that at that stage Mr Niedzwiedzki was aware that claimant is suffering from workplace stress, we do not find that by then he was or should have been aware that the claimant was disabled by anxiety and depression because of the claimant's lack of engagement.

188. During the months that followed the claimant took a short amount of time off work for stress but there is no evidence of any continuing issues at that time. Of

course from February and March 2020 across the UK and Europe life was increasingly affected by the Covid-19 pandemic. From March 2020 the claimant was working from home.

189. The SHAPE school reopened in August 2020, initially just for teaching staff in the usual way. There was a severe heatwave at the time the school reopened, and we are required to determine a number of complaints arising from what happened.

190. We will come to our conclusions about the incidents in due course, but relation to the issue of knowledge of disability, the claimant's response to the email about the rumours of a colleague travelling to the a red zone led to Mr Niedzwiedzki asking the claimant if there were issues for which she required support. After the learning observation on 11 September 2020 Mr Niedzwiedzki expressed significant concern about claimant's mental and emotional health and on 21st September Mr Niedzwiedzki wrote to the claimant to say *"we need to explore how we can support you".* It was clear to the Tribunal that by this stage the claimant's behaviour in the workplace suggested that she was affected by more than simply a short-term reaction to stress. By that stage the respondent was aware that there had now been reports of stress adversely impacting the claimant's behaviour from time to time for more than 12 months.

191. Mr Niedzwiedzki again identified at that time an occupational health assessment was required but this too was not properly actioned. If an occupational health assessment had been obtained at that time, we consider it more likely that not that advice would have been given that the claimant was disabled by anxiety and depression at that time. We find that the respondent ought to have recognised that the claimant was disabled by reason of anxiety and depression from September 2020 onwards.

Knowledge of asthma

192. If we are wrong about asthma being a disability, we found that that knowledge fixed at time of Covid risk assessment in the summer of 2020. In January 2019 the claimant says she had a severe asthma attack and the respondent ought to have known then that she was disabled, but in correspondence she had told the respondent it was bronchitis being treated by antibiotics. We do not accept knowledge of that would have meant the employer ought to have known there was underlying condition.

193. The claimant did identify her asthma in her covid risk assessment and if the asthma did (contrary to our findings) amount to a disability, the respondent knew or ought to have know from then that the claimant was disabled.

Issues 6 to 10 in the agreed list of issues: s15 - unfavourable treatment because of something arising in consequence of disability

194. A number of matters are identified as unfavourable treatment (taken from the list of issues):

a. Allegation 6(a) that on 9th December 2020 the Respondent initiated formal disciplinary proceedings against the Claimant due to her removing her face mask

and raising her voice/shouting when speaking to Ian Ratcliffe, DHT, on 21st August 2020? ("disciplinary ground 1")

b. Allegation 6(b) On 9th December 2020, initiate formal disciplinary proceedings against the Claimant due to the Claimant raising her voice / shouting at Mr Niedzwiedzki Niedwiedzki during a meeting on 1st December 2020? ("disciplinary ground 2")

c. Allegation 6(c) On 9th December 2020, initiate formal disciplinary proceedings against the Claimant due to her recording on her iPad in the kitchen on 4th December 2020? ("disciplinary ground 3")

d. Allegation 6(d) is that on 25th February 2021, the claimant was treated unfavourably when she was sent a letter to the Claimant inviting her to a sickness review meeting and threatening disciplinary sanction.

e. Allegation 6(e) On 11 February 2022, not uphold the Claimant's grievance

f. Allegation 6(f) Resume disciplinary proceedings against the Claimant following the dismissal of her grievance

g. Allegation 6(g) Ignore the Claimant's menopausal symptoms prior to instigating disciplinary action against her

195. Knowledge is required for a s15 complaint. For the reasons already set out, the tribunal found that by 9 December 2020 the respondent ought to have known that the claimant was disabled by reason of her anxiety and depression.

Allegation 6 (a) Disciplinary Ground 1

196. In terms of what had happened on 21 August 2020, Mr Ratcliffe and the claimant agree that there was a confrontation between them in his office. It is common ground that the claimant removed her face mask and raised her voice to him and that she was upset. Mr Ratcliffe says that that claimant came closer to him than allowed by social distancing guidance at the time and shouted in his face. That is disputed by the claimant who says she stayed at the door, but she does not seem to dispute that there was a significant altercation.

197. In our factual findings we have accepted the evidence of Mr Ratcliffe about what happened. We accepted that he had perceived that the claimant had come closer to him than social distancing guidelines and shouted at him without her face mask on and this had particularly concerned him because of the covid risk.

198. The claimant was given an informal disciplinary warning about what had happened by Mr Niedzwiedzki, but she was subsequently told that it was matter which would be the considered as part of the formal disciplinary action. The tribunal accepts that it was reasonable for the claimant to perceive that as a detriment.

199. The claimant says that this was something arising in consequence of disability because her behaviour at the meeting was as a result of mood swings caused by her anxiety. The evidence before the tribunal appears to show that the claimant was

experiencing difficulties controlling her temper and emotions. We accept could be described as being mood swings and that this behaviour could be connected to her accepted disability. For the reasons explained above we found that in August 2020 the respondent did not know and could not reasonably be expected to know that the claimant was disabled by anxiety and depression but by the time the decision was taken to initiate disciplinary action it did, or ought to have had, that knowledge. In other words this was unfavourable treatment because of something arising in consequence of disability.

200. Our findings about s15(1)(b) – the second limb of the definition, about the extent to which the treatment is a proportionate means of achieving a legitimate aim, are explained further below.

Allegation 6 (b) Disciplinary Ground 2

201. In terms of the initiation of disciplinary proceedings on 9 December 2020 due to the claimant raising her voice and shouting at Mr Niedzwiedzki during the meeting on 1 December 2020, we made the following findings.

202. This was a meeting at which Mr Niedzwiedzki raised concerns about the claimant's behaviour towards keyworkers which had been raised with him. The claimant became upset and angry and shouted at Mr Niedzwiedzki. The tribunal accepted that Mr Niedzwiedzki was genuinely concerned about the appropriateness of claimant's behaviour towards him and he clearly thought this might be linked to her mental health difficulties, even if he was not aware of a formal diagnosis of depression and anxiety at that time.

203. The tribunal accepts that when the claimant was told that disciplinary action had been initiated against her for her conduct at that meeting, she reasonably perceived that as a detriment.

204. The respondent argued that there is no evidence of any link between what happened and the claimant's disability because the cause of the incident was that the claimant was unwilling or unable to accept criticism. However we accept that the claimant's conduct was linked to mood swings and problems controlling her temper. Although we had some sympathy with the respondent's submission that the claimant had failed to provide evidence of that connection, on balance, we accept there was a material, in the sense of more than trivial, connection.

205. Our findings about s15(1)(b) – the second limb of the definition, about the extent to which the treatment is a proportionate means of achieving a legitimate aim, are explained further below.

Allegation 6(c): Disciplinary ground 3

206. The third disciplinary issue to be covered by disciplinary proceedings on 9 December 2020 was in connection with an allegation that the claimant had left her iPad on the kitchen area on 4 December 2020. leading key workers to complain to Head Teacher in belief she was trying to covertly record them.

207. From the evidence available to the panel we are unable to reach any conclusion about whether the iPad was actually recording, but we accept that an allegation to that effect was been made by the keyworkers which it was appropriate to investigate. The claimant appears to accept that she had left the iPad in the kitchen and we accept there was material allegation of wrongdoing about the claimant's conduct which justified further investigation.

208. We accept that the claimant reasonably perceived a threat of disciplinary proceedings is a detriment.

209. The claimant says that this was something arising in consequence of disability because if she had left her iPad in the kitchen to record it would be caused by fatigue and mood swings. However, we were not persuaded by that. The disciplinary allegation to be investigated is that the claimant had deliberately recorded her key workers. It is relevant that at the time she was in dispute with her colleagues. The claimant has not shown us how her depression and anxiety could influence a deliberate decision to record, which was the allegation being raised. We do not accept that this ground for disciplinary action could be described as being because of something arising in consequence of disability.

210. In summary we had found that the first and second grounds for disciplinary action were unfavourable treatment because of something arising in consequence of disability and as explained we found that the respondent ought to have been aware that the claimant was disabled at that time.

Was the unfavourable treatment a proportionate means of achieving a legitimate aim?

211. We then considered whether the unfavourable treatment was a proportionate means of achieving a legitimate aim.

212. Mr Small relied on a concession made by Mr Niedzwiedzki in cross examination to argue that we cannot find that the above unfavourable treatment was proportionate but we do not accept that the tribunal is so bound. The concession was not made by a party to the proceedings. Mr Niedzwiedzki's concession was rather like a disciplinary manager making a concession about fairness in the course of an unfair dismissal claim. It is clearly something which we must give careful consideration to, but ultimately this was an issue for the tribunal to determine on the basis of the facts as we have found them.

213. We took into account the following matters. First and significantly no disciplinary penalty has been applied to the claimant, rather the claimant seeks to argue that because of her disability the respondent is not entitled to even consider if the conduct in question warrants disciplinary penalty or action under the disciplinary procedure.

214. The claimant is a senior teacher with responsibility for managing a team of more junior staff. She teaches very young children. We accept that in that context the respondent had a legitimate aim in managing the standards of workplace behaviour. We accept Mr Niedzwiedzki had genuine concerns about the nature of

her behaviour towards colleagues, for example the claimant had not only shouted at Ian Ratcliffe, but it was also suggested that she breached the social distancing guidelines and breached the covid safety rules by removing her facemask – an allegation that the claimant had created a health and safety risk to a colleague. One of the allegations (the covert recording) is not disability related and is of also of serious inappropriate conduct. The tribunal accepts that it was proportionate for the respondent to at least look at these matters as potential disciplinary matters which required further investigation.

215. The tribunal panel accepts the respondent submissions that this case can be distinguished from the case law referred to by claimant's representative, for example the *Grosset v York City Council* case, because the respondent has not imposed any particular penalty on the claimant at this stage.

216. We accept the respondent's submissions that it is appropriate for employers to manage behaviour in workplace, including the behaviour of disabled employees which arises from disability, which impacts on colleagues, and which could, if found, have implications for their suitability in role. The means to achieve a legitimate aim must be proportionate and an employer must consider how to achieve their aims whilst minimising discrimination, but we accept that they have to be able to investigate what has happened and whether action is required. If conduct has been caused in whole or part by a disability, we would expect the disability to considered in terms of culpability and as potential mitigation in the course of the disciplinary action. It may not be proportionate to apply the same penalty to a disabled person whose conduct is linked to their disability as it would to a non-disabled employee. The disability may be reason not to apply any penalty at all, but that does not mean that disciplinary action cannot or should not be considered at all. Some conduct even if closely connected to disability may mean it is not appropriate for their employment to continue. An employee who has responsibility for young children but who for reasons related to their mental health cannot control their mood swings and temper is an obvious example of a situation where disciplinary action may still be proportionate because the employer owes not only duties to the disabled person but to their colleagues and the children in their care.

217. In short we found that although there had been unfavourable treatment because of something rising in consequence of disability in relation to 6 a and b, but it had been a propionate means of achieving a legitimate aim. There had been no unfavourable treatment because of something rising in consequence of disability in relation to 6 c. Accordingly we found that the complaints in paragraphs 6 a to c in the list of issues were not well founded for these reasons.

Allegation 6(d) - the letter to the Claimant inviting her to a sickness review meeting and threatening disciplinary sanction.

218. The fourth unfavourable treatment we had to consider was sending the claimant a letter on 25 February 2021 inviting her to a sickness review meeting and threatening disciplinary actions.

219. The letter in question said this:

"I will give you the opportunity at the meeting to discuss any problems which may be prolonging your absence, and I will also explain what help and support is available, which may involve making temporary workplace adaptations or reasonable adjustments to help you return to work as possible.

One of the purposes of the meeting is to enable me to consider whether to progress formal action. I will consider whether this is appropriate. I must remind you that if I do this and you are not able to return to work within a reasonable timeframe, your employment the department could be affected."

220. The respondent accepts that the letter was sent but disputes there was a threat of disciplinary action.

221. The tribunal panel considered if the claimant could reasonably perceive this letter as a detriment such that it amounts to unfavourable treatment.

222. On balance the tribunal does not accept claimant could reasonably perceive the letter as a detriment or unfavourable treatment. It is a standard letter highlighting the potential implications of absence. Employers are expected to be transparent with employees so staff understand what the implications of absence maybe. The letter did not say any action under the absence policy was or would be taken, only that it may be in the future. The claimant is a senior teacher in a management role, represented by an experienced trade union colleague. We do not accept that she could reasonably perceive the letter as a threat. There is no suggestion of any immediate threat of dismissal, and we do not accept that categorisation of the letter by claimant. We found that that the claimant must have been aware that this was no more than an employer highlighting to an employer the implications of absence.

223. If we are wrong about that and the letter was unfavourable treatment, we accept that it was something arising from disability because the claimant's absence to which the letter related was caused by her depression and anxiety.

224. However, in those circumstances we accept the respondent's submission that letter is a proportionate means of achieving a legitimate aim. The MOD has a legitimate aim in managing absence of staff at the SHAPE school to ensure it can meet the teaching needs of the children at the school. In meeting that aim they must act proportionally and part of that is ensuring that they have procedures for managing absence which are understood by staff. Employees who are absent from work should be made aware that absence will be monitored and may eventually result in action being taken. The fact that an employee has a disability does not mean that their employment cannot be terminated if they are incapable of performing their role either because of absence or the impact of the disability. It is right that employees understand that.

225. We found that although there had been unfavourable treatment because of something rising in consequence of disability in relation to 6 a and but it had been a propionate means of achieving a legitimate aim.

Allegation 6(e) - not upholding the claimant's grievance

226. Ms Cummings submitted that the basis of this allegation is flawed in that claimant's grievance was upheld in part, because the grievance found that the occupational health referral had not been made appropriately.

227. Mr Small submitted that unfavourable treatment we were being asked to consider was that Mr Conaghan had not addressed the claimant's grievance that disciplinary action was being taken because of disability and that this had been ignored. Given that the claimant has been represented by her trade union throughout these proceedings and by counsel at this hearing it is clearly unfortunate that the unfavourable treatment had only been identified in that clear way at such a late stage but we considered the complaint on that basis.

228. Mr Conaghan and Mr Yeoman gave evidence to this tribunal that when they looked at the grievance they considered that they should look at the grievance about the failure to make occupational health referral and to look at issues in relation to reasonable adjustments, but that to look at the underlying causes of disciplinary action being taken would be to determine matters which should be considered as part of the disciplinary investigation or perhaps as grounds of mitigation.

229. The tribunal accepted that. We found that the reason that those matters in the grievance were not considered within the grievance was not because of something arising in consequence of disability, but because of a genuinely held belief on the part of Mr Conaghan and Mr Yeoman that the grievance investigation should not pre-empt the disciplinary process. The claimant does not seem to dispute the facts underlying the incidents to any great extent but rather she says she should not be disciplined because Mr Niedzwiedzki had failed to make reasonable adjustments for her. Mr Conaghan and Mr Yeoman thought that was potential mitigation to the application of any disciplinary sanction. We accept that it would be reasonable for the managers to take the view that this issue should be considered as part of the disciplinary action, rather than considering mitigation before a disciplinary hearing.

230. In conclusion we found that this was not unfavourable treatment because of something arising in consequence of disability and the complaint was not well founded.

Allegation 6 (f) Resumption of disciplinary proceedings against the claimant following the dismissal of her grievance

231. We accept that the resumption of the disciplinary proceedings at the conclusion of the grievance process was unfavourable treatment. There is no factual dispute between the parties that this had happened, but the claimant argues that disciplinary action should ceased.

232. We accept that the initiation of disciplinary action where two of the allegations relate to conduct linked or contributed to by mood swings caused by depression and anxiety was unfavourable treatment for something arising in consequence of disability. It follows that restarting that action is also unfavourable treatment for something arising in consequence of disability.

233. However we also accept that Mr Conaghan and Mr Yeoman concluded that the possible impact of disability should be considered as part of the disciplinary process. By the time the decision to restart the disciplinary action was taken occupational health advice had been received. There is nothing in that advice that suggested that the disciplinary action should be dropped because of the claimant's health.

234. We accept that in the circumstances it was proportionate to restart the disciplinary action. That is consistent with the legitimate aim of considering the grounds of action in the first place as already set out. No doubt the delays in the process and the claimant's conduct in the meantime will be relevant matters for the disciplinary officer to consider in due course, but we accept that it would be proportionate for an employer to conclude that it should not allow an employee to derail or avoid disciplinary action which was justified in the first place by pursuing grievances processes. To do so could be seen as incentivising employees to bring grievances challenging disciplinary action simply so that they could argue the passage of the grievance action means it would be disproportionate to restart it. We accept that if the grievance concludes that disciplinary action should be considered it would be irrational to terminate that action..

Allegation 6 (g) - ignoring the claimant's menopausal symptoms prior to instigating disciplinary action

235. The something arising is said to be fatigue and mood swings as a result of the claimant's peri-menopause and depression.

236. We found this complaint somewhat difficult to follow. The claimant is alleging that the reason, conscious or subconscious in the mind of the putative discriminator, that her menopausal symptoms were ignored prior to instigating disciplinary action because of symptoms of her menopause. It seemed to the Tribunal that in essence this was a complaint about the disciplinary action being instigated in the first place when the claimant which we had already considered.

237. In any event insofar as this is a complaint specifically about menopausal symptoms we found that was not disability and Mr Niedzwiedzki did not have knowledge of the perimenopause symptoms in December 2020. He knew, or rather ought to have known, about the anxiety and depression, but not the perimenopause in December 2020. Mr Niedzwiedzki was concerned with how the claimant's mental health impairments were affecting her conduct and he took action for that to be investigated but we do not find that Mr Niedzwiedzki had closed his eyes to other symptoms the claimant was trying to draw to his attention.

Issue 11 to 15 in the list of issues

238. In relation to the complaints about making reasonable adjustments Mr Snall drew our attention to para 6.10 f of the Statutory Code Of Practice which says this 6.10 *"The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and*

actions", and 6.15 which reminds us that *"The Act says that a substantial disadvantage is one which is more than minor or trivial".*

239. We are also reminded that we must consider the shifting burden of proof. We are assisted in how we apply this in reasonable adjustment complaints by the guidance in **Project Management Institute v Latif** UKEAT/0028/07. The burden of proof does not shift to a respondent until

a. the claimant has established on the balance of probabilities that he or she was substantially disadvantaged within the meaning of the reasonable adjustment provisions

b. the claimant or Tribunal has suggested an adjustment that it is suggested the employer should have made, in sufficient detail to enable the employer to deal with it; and

c. there is evidence that is at least capable of leading a Tribunal to conclude that the proposed adjustment would be reasonable and would eliminate or reduce the disadvantage.

240. Turning to the list of issues, the tribunal found many of the pleaded PCPs as set out in the list of issues difficult to understand. It is unfortunate that at the outset of the hearing both counsel had reassured the tribunal that the claims were understood by the parties and clarification was not required. The fact that Mr Small has somewhat reframed the PCPs in his submissions and Ms Cummings has suggested that some of the relied upon PCPS cannot be understood, is an indication that this was not the case.

241. Mr Small reordered the PCPs in his submissions, grouping them by reference to the alleged disability and impact. That is a perfectly sensible way to order the PCPs but regrettably it was not how the parties had set out the issues. To avoid confusion we have dealt with the PCPs in the order set out in the list of issues.

242. It is significant to note is that in his submissions Mr Small referred to the PCP of not having any air conditioning in August 2020 following the re-opening of the School after the covid lockdown as having a substantial impact on the claimant because of her asthma. That did not reflect the agreed list of issues which we had been assured the legal issues in the pleaded case. The practice of having no air conditioning operating during the period 18th August 2020 to 24th August 2020 inclusive, is said in the list of issues to place the claimant at a substantial disadvantage because working in very high temperatures exacerbated her symptoms of hot flushes and fatigue. We will come to our conclusions about that in due course.

243. A number of the PCPs relate to making occupational health referrals in some way. As noted above there is case law about this. In assessing the claimant's case about these matters we have taken into account caselaw on this common source of dispute. In **Smith v Salford NHS Primary Care Trust** UKEAT/0507/10 the Employment Appeal Tribunal held that:

"Adjustments that do not have the effect of alleviating the disabled person's substantial disadvantage…… within the meaning of the Act. Matters such as consultations and trials, exploratory investigations and the like do not qualify"

244. The reason for this was explained by HHJ Serota QC in **Environment Agency v Rowan** [2008] ICR 218 applying principles previously set by Elias J in **Tarbuck v Sainsbury's Supermarkets** [2006] IRLR 664 in the context of a trial period as follows *"a trial period is akin to a consultation, or the obtaining of medical and other specialist reports; these do not themselves mitigate or prevent or shield the employee from anything. They serve to better inform the employer as to what steps, if any, will have that effect, but of themselves they achieve nothing."*

245. The law requires employers to reduce the substantial impact of a disability in the workplace from the employers' policies and practices. An occupational health report is a stepping stone in that process, but it does not itself change the workplace. This significant principle does not seem to have been appreciated by the claimant and those who had advised her when her claim was submitted and despite Mr Small's best efforts, we are not persuaded that Mrs Brown's complaints about the lack of the OH referrals, in their various guises, do not fail for precisely the reasons set out above.

246. The PCPs we considered were these:

Para 11 (a): The practice of having no air conditioning operating during the period 18th August 2020 to 24th August 2020 inclusive.

247. The substantial disadvantage relied upon by the claimant in the pleaded case relates specifically to the perimenopause and in Mr Small's reframing, her asthma – there appears to be no suggestion that the disadvantage related in any way to the claimant's depression and anxiety. Our primary conclusion was that this complaint fails in light of our findings on disability.

248. Even if we were wrong in those conclusions, we would not have upheld this complaint. In August 2020 there was no air conditioning in the SHAPE School because there was a genuine and material concern that to run the air conditioning would have been to breach Belgian law at the time. There was a heatwave coinciding with preparation to reopen the school. The description given by the claimant suggests a state of affairs which would have been difficult for all employees, and we are not satisfied that the claimant has shown that she faced substantial disadvantaged compared to non-disabled employees working in the early years area of the school given the weather at the time.

249. We also accepted that this was a one-off transitory state of affairs which was outside Mr Niedzwiedzki's control. When he became aware of the apparent conflict issue had had sought urgent clarification which was provided within days. On the basis of our findings of fact, it was an unusual and one off situation, We concluded that the respondent's short-term belief that the air-conditioning could not be run because of a conflict Belgian law did not mean there was a practice of operating was not a practice to which the respondent was required to make adjustments.

Para 11(b) – "The requirement for employees to undertake cleaning including wiping down of table tops, door handles and sink as part of the end of lesson 'clear up' and undertaking cleaning tasks which were assigned to SIS but not completed".

250. The substantial disadvantage relied upon by the claimant relates specifically to the asthma – as we found the claimant has not shown that she was disabled by asthma at the relevant time this complaint cannot succeed for that reason.

251. If we were wrong in our primary finding about that, we accept the respondent's case that there had been a misunderstanding about when the Early Years area of the school was being reopened on the part of the respondent's on-site cleaning contractors. When he found out about that, Mr Niedzwiedzki took steps to ensure the deep cleaning was undertaken. There was never any expectation that the claimant was to do cleaning not done by the contractors and there was no practice of requiring the claimant to undertake deep cleaning.

252. In terms of the more routine cleaning, the claimant did not persuade us that the wiping down tables and so on and other day to day cleaning caused her any disadvantage. In any event the claimant was a senior manager, and she could delegate cleaning tasks to key workers if she needed to so she was able to control how much cleaning, if any, that she did. Even if we had found the claimant was disabled by asthma, we would not have upheld this complaint for those reasons.

Paragraph 11(c) "<u>Disability in employment: </u>The practice of not referring employees to OH who are suffering from mental health symptoms."

253. We accept that the failure to refer an employee to occupational health may mean that an employer does not find out that an employee is disabled, but of itself it will not alleviate any disadvantage in the workplace. This is not a practice which would trigger a duty to make a reasonable adjustment for the reasons explained above.

Para 11(d) "<u>Menopause awareness practice and/or policy - </u>left blank in the list of issues.

Para 11(e) "Menopause awareness practice and/or policy - The practice of not referring employees with peri-menopause symptoms to occupational health.

254. As already noted, failing to refer an employee to occupational health may mean that an employer does not find out that an employee is disabled but of itself it will not alleviate any disadvantage in the workplace. This is not a practice which would trigger a duty to make a reasonable adjustment.

Para 11 (f) "O<u>ccupational Health referral procedure or practice</u> - The practice of expecting employees to self-refer to Occupational Health.

255. The Tribunal notes that the practice of failing to refer an employee to occupational health may mean that an employer does not find out that an employee is disabled, but of itself it will not alleviate any disadvantage in the workplace. This

would also be true if there was a practice of self-referral and it seemed to the Tribunal that this complaint was flawed for the same reasons already explained.

256. In any event we found that there was no practice of self referral. The claimant did not self refer herself at any stage nor was she expected to. We understand this to be complaint from the claimant about the fact that comment was made on the fact she had not chased the headteacher when the OH referrals were not progressed. She was asked why she had not chased the occupational health referral herself with the head of human resources if she was concerned about a lack of progress. We do not accept that meant the respondent had a practice of requiring employees to self refer in any sense, rather we accept it was essentially an evidential issue which arose in the grievance – the fact the claimant has never queried matters, especially given her seniority, rather suggests she was not unduly unconcerned by the lack of progress in relation to the occupational health referral. It was no more than that. There was no PCP as alleged.

Para 11 (g) "<u>Sickness management procedure or practice:</u> The practice of inviting employees to attend absence review meetings whilst signed off sick and where no reasonable adjustments can be carried out."

257. The claimant says that this placed her at a substantial disadvantage in that her symptoms were substantially exacerbated as a result of being forced to attend a meeting where her future employment was being discussed and she was placed at risk of being dismissed.

258. Ms Cummings accepted that the respondent had the practice of requiring employees to attend absence review meetings whilst on sickness absence but says that the respondent fails to understand the second part of this PCP "where no reasonable adjustments can be carried out". We agree that this is rather curiously worded and appears to be non-sensical and we were not assisted by the claimant's evidence in trying to work out her case.

259. We understand that what the claimant's complaint was that a capability process was initiated before the issue of whether reasonable adjustments for her disability had been explored. In factual terms the claimant was invited to a meeting which she says caused her health "to collapse" without any evidence being presented that the respondent knew or ought to have known the letter would have that effect. We accept that the impact the letter had on the claimant was not anticipated and had come as a surprise to the respondent. The claimant's own case seems to acknowledge that the employer cannot have had knowledge of the disadvantage the policy caused her because she alleges the letter caused the disadvantages she relies upon.

260. When the claimant said she was too ill attend adjustments were made to the absence management procedure in that the requirement for the claimant to attend the meeting was put on hold and when it was restarted in due course as Mr Bucknill sought to secure her return to work he took care to bear in mind the impact this letter had had when he contacted her.

261. Whilst the tribunal remained concerned the complaint had been adequately explained to us we concluded that it was not well-founded because the respondent did not have the requisite knowledge of disadvantage and could not be excepted to have had that knowledge.

262. **Issue 11 (h) "<u>Equality policy and procedure or practice (JSP 887 Diversity, Inclusion and Social Conduct)</u>: The practice of not applying the equality policy by not considering the effect of their decisions and policies in respect of discriminating those with protected characteristics in accordance with Section 3 of the policy."**

263. We also found this aspect of the claimant's case very difficult to follow. The claimant did not say anything in her witness statement to help us understand it further.

264. The claimant alleged that the substantial disadvantage she was subject to was that *"her health collapsed, leading to many months sickness and the continuation of less favourable treatment to her as a result of not considering the effect of their decisions and policies in respect of discriminating those with protected characteristics in accordance with Section 3 of the policy. Thus no consideration was given to the Claimant's condition in either subjecting her to disciplinary action and in the dismissal of her grievances."*

265. Ms Cummings submitted that it is not clear how this policy caused the substantial disadvantage compared with those without the disability of depression and anxiety. We agreed with that submission.

266. Generally in terms of these complaints about policies we found that the claimant had asserted in rather vague terms that the substantial disadvantage caused to her by various policies was that policies or a failure to follow them caused her health to collapse. She has failed to explain what is about the policies, or a practice of not following them caused that collapse nor did we have specific medical evidence from the claimant supporting that assertion. The panel concluded that was in essence an expression of a generalised complaint about failing to make reasonable adjustments rather than a complaint about a failure to put in place adjustments to a particular provision criteria or practice which caused the claimant a specific workplace disadvantage.

267. This complaint was not well founded.

Para 11 (i) <u>Disciplinary policy and procedure or practice (Misconduct and Discipline, 2019)</u>: The application of the disciplinary policy without considering whether the conduct in question was disability related conduct.

268. The claimant says that the substantial disadvantage was that she was more likely given her conditions to be subject to disciplinary action.

269. The Tribunal found this complaint difficult to follow. It appears to be a suggestion that as someone with anxiety or depression she was more likely to be subject to disciplinary action, a reasonable adjustment would be not to take disciplinary action.

270. It was not disputed that the respondent did not have a practice of considering if conduct which an employee was accused of was related to a disability.

271. The claimant did not present us with evidence that employees disabled by anxiety or depression are more likely to be subject to disciplinary action and therefore disadvantaged by such a policy. Mr Small suggested that if someone has mood swings and has problems controlling their temper they will be more likely to be disciplined but the Tribunal were troubled by that suggestion but in any event we accepted Ms Cummings' submission that the reasonable way for an adjustment to be made for such a substantial disadvantage is for the impact of disability to be considered as a mitigating factor in the course of the disciplinary process.

272. We accept that it would not be reasonable for an adjustment to be made that no disciplinary action will be taken against employees with disabilities or certain disabilities if the conduct is disability related. The claimant worked with young children and was a manager. This meant her conduct including in keeping or controlling her temper was relevant to the appropriateness of her staying in her role.

273. In essence this appears to be a recasting on the s15 complaints about the disciplinary action taken in December 2020. We found that it fails for similar reasons to why we accept that the respondent had a legitimate aim in considering disciplinary action. In the circumstances of the claimant's employment it would not be a reasonable adjustment to say that no disciplinary action should be considered if it was related to disability.

Para 11 (j) <u>Grievance Policy and Procedure or practice /Bullying and Harassment Procedure:</u> The application of a practice not considering an employee's disability and the symptoms therein when applying its procedures, which placed the Claimant at a substantial disadvantage in that someone with the Claimant's condition was more likely to have their grievances dismissed.

274. We did not accept that we had evidence that the respondent did not consider disability as a practice.

275. The question arises whether this is actually a complaint about a "practice" – an alleged practice must usually have an element of repetition about it and be applicable to both the disabled person and his or her non-disabled comparators. It is common for complaints to be raised about decisions where it might not be clear whether this part of "practice" and it seems to us that this is one of those cases.

276. **Ishola v Transport for London** 2020 EWCA Civ 112, CA, is a case about a claimant who argued that requiring him to return to work without a proper and fair investigation into his grievances was a PCP which put him at a substantial disadvantage in comparison with persons who are not disabled.

277. An employment tribunal in that case found that this was a one-off act in the course of dealings with one individual and not a PCP. After that was upheld by the EAT, the Court of Appeal looked at the extent to which all "one-offs" could be said to be practices. Lady Justice Simler accepted that the words 'provision, criterion or practice' were not to be narrowly construed or unjustifiably limited in their application,

but she identified that it was significant that Parliament had chosen these words instead of 'act' or 'decision'. Her explanation is helpful. *"As a matter of ordinary language, it was difficult to see what the word 'practice' added if all one-off decisions and acts necessarily qualified as PCPs. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The act of discrimination that must be justified is not the disadvantage, but the PCP. To test whether the PCP is discriminatory or not it must be capable of being applied to others. However widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. The words 'provision, criterion or practice' all carry the connotation of a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. Although a one-off decision or act can be a practice, it is not necessarily one".*

278. Returning to the claimant's case, we conclude that this complaint is about just such a one-off situation – the handling of the claimant's particular grievance, not about a practice which is capable of being applied to others. That is confirmed by the way the disadvantage is expressed. The claimant says that she was placed at a substantial disadvantage in relation to this alleged PCP in a number of respects set out in paragraphs 11 (l) i-vii in the list of issues. These are various allegations of particular specific allegations of unfairness made against the grievance investigator relating to the reasons why the claimant's particular grievance was not upheld.

279. We find no suggestion in the claimant's case that a grievance from another employee with anxiety and depression would be handled in the same way. Rather the claimant complains about the particular disadvantages she says she was subject to in the one-off handling of her grievance. We also had no evidence to suggest that that employees with anxiety and depression are more likely to have their grievances rejected or even that the claimant would have another grievance in different circumstances upheld.

280. The complaint is not upheld for that reason.

Para 11 (k) <u>Health and Safety Procedure or practice including risk assessments and stress in the workplace procedure</u>*:* The application of not considering completed risk assessments in (a) the School's working environment.

281. We understand this to be a policy or practice which is said to put to the claimant to a substantial disadvantage for a reason related to her asthma. The list of issues appears to refer to other disabilities as well as asthma, but we understand from Mr Small's submissions that he was arguing this related only to her asthma. In that regard in light of our primary finding on asthma, this complaint could not succeed.

282. In any event the evidence before us was that the SHAPE School did have a risk assessments in place. There was a risk assessment in place for the return to work after the first Covid lockdown. In terms of following the risks assessments in the Early Years area, the claimant was the senior teacher in the early learning area and

the application of the risk assessment in terms of matters like mask or face shield wearing was within her control. One of the reasons for the disciplinary action taken against in December 2020 was that the claimant was not following the risks assessment by removing her face mask and following social distancing when she had the altercation with Mr Ratcliffe.

283. We concluded that even if we had reached a different conclusion on asthma the claimant had not shown the respondent had applied the alleged PCP.

284. The complaint was not well founded

Issue 16 to 19 – harassment related to disability

Allegation 16a "That the respondent caused the claimant distress at a meeting in September 2020 as pleaded in section 31 of the ET1."

285. As noted by Ms Cummings, the pleaded case relates to the conduct in the meeting, but in his submissions Mr Small appeared to put the case on the basis that the unwanted conduct was the contents of the letter sent after that meeting. That is a slightly different issue but we considered both the meeting and the letter.

286. The meeting between Mr Niedzwiedzki and claimant was for him to give feedback to the claimant after a "learning walk" when claimant had been observed with children in the outside garden area.

287. We accept that Mr Niedzwiedzki gave the claimant feedback which she did not agree with, about ways Mr Niedzwiedzki felt her teaching interactions with the pupils could have been improved. We accept that what was discussed was what is set out in the letter.

288. The claimant says that she became very upset from around halfway through the meeting and became visibly distressed, that she asked for positive feedback but was not given any, and that Mr Niedzwiedzki carried on despite her distress.

289. Mr Niedzwiedzki told us that he only became aware that the claimant was upset towards the end of the meeting and when he did, he stopped the meeting. He had believed it was a standard feedback meeting and nothing out of the ordinary. He was surprised and worried by the claimant's reaction and that is why he wrote to her about the feedback given and her reaction. In the letter he said this *"you shouldn't be affected [by the feedback] in this* way". In cross examination he conceded that this had been a poor choice of words. It seems that what he had intended to mean was he would not have expected the claimant, as a senior teacher with many years of experience, to be upset by the feedback he had given on ways the lessons could perhaps have been improved.

290. We accept the respondent's case that the meeting related to an unplanned observation which is something teachers will or should expect to be undertaken. Professional feedback on ways performance could be improved is something which can be expected in most professional settings. It is inevitable perhaps, that it is sometimes challenging but that is part of a professional feedback process. No

senior teacher could reasonably participate in a feedback process on the basis they have a right not to be criticised.

291. In any event we do not accept that what Mr Niedzwiedzki said fell outside the bounds of the sort of feedback which might reasonably be expected to be given and this could not reasonably be regarded as unwanted conduct. We also do not accept that the feedback appeared in any sense to relate to the claimant's mental health issues. They related to her teaching interactions – for example a missed opportunity to talk about nature.

292. The tribunal panel concluded the claimant's pride had been somewhat hurt by it being suggested there were ways her teaching practice could be improved which she found upsetting and that the claimant had felt upset at a much earlier stage than would be apparent to a third party. We accept that when the claimant's distress became apparent to Mr Niedzwiedzki he tried to show concern and the meeting was brought to an end.

293. We think it is likely that this was handled a little clumsily by Mr Niedzwiedzki who had not anticipated such an emotional response to the feedback given, but we see nothing in the feedback itself nor what was said to bring the meeting to an end which seemed to justify the claimant's response.

294. We did not consider that the feedback could be reasonably considered to be unwanted conduct, but even if we are wrong about that we find that it was not done with the intention of creating, nor could it reasonably regarded as having the effect of creating a hostile environment. It is simply part of a professional process intended to ensure standards of teaching to very young children are maintained and if possible improved. The claimant has many years of teaching experience but that does not mean she could not do things in a different and perhaps better way that is part of professional development and the panel found it surprising that she did not recognise that.

295. The claimant said in evidence that the letter she received after the meeting was "even worse" than the meeting itself. This is the "you should not have been affected.." comment. The tribunal accepted the letter had been sent in an attempt to be supportive and Mr Niedzwiedzki's intention had not been to criticise the claimant for her mental health but to express surprise and concern that her reaction to something which he expected to be a routine and expected professional interaction. The letter could, perhaps, have been worded more sensitively as he accepted, but it could not reasonably be perceived as being intended to create and having the effect of creating a hostile or degrading environment. It was not harassment.

296. The complaint is not well founded.

Allegation 16b - the letter dated 9 December 2020 advising the claimant there was to be a disciplinary investigation and citing three allegations

297. The respondent accepted that the letter was sent and that it amounted to unwanted conduct.

298. The Tribunal found that the letter was not related to the claimant's disability as such, but rather to a decision which have been taken that her conduct towards others may have breached the respondent's code of conduct and the decision to initiate an investigation into which the respondent was required by its procedures to notify to the claimant.

299. However, the Tribunal panel accepted that the claimant's conduct in relation to two of the allegations was to some extent caused by or linked to her anxiety and depression. For the reasons already explained, the tribunal does not accept that the allegations in relation to the ipad, on the evidence available to us, is related to the claimant's disability.

300. The claimant does not accept that the disciplinary action was appropriate, but she did accept that there had been altercations between her and the deputy and headteacher. Staff reporting to the claimant had raised concerns about her conduct towards them. We accept the respondent could not simply ignore those concerns. The claimant is a senior teacher with many years of teachers experience. We do not consider that she could reasonably expect the respondent to ignore those concerns.

301. Although the disciplinary action, which has never progressed significantly beyond notification of disciplinary charges because of the intervening grievance, was unwanted we accept that it was reasonable for the concerns about the claimant's conduct should be considered within the context of a disciplinary procedure. That procedure is a measure in place to ensure a safe working environment for teaching and other staff and children. It was not done with the intention of creating a hostile working environment nor could it reasonably be perceived as having that effect.

302. This complaint was not well founded.

Allegation 16c send the claimant a letter dated 20 February inviting her to a sickness review meeting and threatening sanction.

303. The respondent accepted that the letter was sent but denied that it threatened any sanction and it did not accepts that the letter related to the claimant's disabilities. The tribunal accepted Ms Cummings submission about that.

304. We accepted that the letter sent was a standard letter supplied by the MOD's HR department to the SHAPE School which warned the claimant about the long-term possible consequences of sickness absence.

305. Employees who are not able to attend work due to sickness and do not meet an employer's attendance requirements may be dismissed. Such a dismissal may be alleged to be unfair. If an employee is disabled and the sickness is connected to the disability, such dismissal may be alleged to be unfavourable treatment because of something arising in consequence of disability under s15 of the Equality Act but may not be unlawful if the employer had a legitimate aim, for example in managing and maintaining its workforce to meet the need of the business provided the employer has acted in propionate way. When tribunals look at the fairness of such dismissals and whether employers have acted proportionately, a common question is whether the employer has clear policies which have been communicated to its

employees, that they have been told what the attendance requirements are and what the consequences of extended absence might be. That is to ensure fairness to employees.

306. The Tribunal could not accept in those circumstances that the letter had been sent with the purpose of violating the dignity of the claimant or creating an intimidating, hostile, degrading, humiliating, or offensive environment a hostile environment. The letter had been sent to make the claimant aware of the possible consequences of absence in accordance with the principles of fairness referred to above. We also could not expect that the claimant could reasonably perceive the letter as having the prohibited prescribed effect to amount to harassment. The claimant was a senior manager and the Tribunal found it surprising she did not recognise the purpose of the letter. She may never have expected to receive such a letter and may have been upset to be reminded that absence can impact on employment, but that did not mean it amounted to harassment.

307. This complaint is not well-founded.

Allegation 16d - issuing the grievance investigation report dated 7 January 2022.

308. The Tribunal accepted Ms Cummings' submission that the claimant had raised a grievance and therefore she must have had a reasonable expectation that her grievance would be considered. If the grievance had not been investigated or if the claimant had not been shown the outcome we accept that it is likely she would have complained about that.

309. We also we accepted Ms Cummings' submission that issuing the grievance report cannot be unwanted conduct related to her disability simply because that disability was one of the issues raised in the grievance – there has to be something in the decision to issue the report which is related to the claimant's disability.

310. Turning to our findings of fact, the purpose of the grievance report was to set out what conclusions the grievance investigation had found. We accepted that that investigation had been conducted in good faith. Mr Small was critical of the conclusion that the question of the relevance of the claimant's medical conditions should be considered in the course of the disciplinary process and they should not reach conclusions about at the grievance stage, but we accepted that was a decision taken in good faith and it was decision taken on that basis that it was the correct approach to take procedurally, not for a reason related to the claimant's disability. It was not done with the purpose of violating the claimant's dignity or creating an intimidating or hostile environment nor do we consider that the claimant could reasonably perceive it as having that effect.

311. In terms of the contents of the report itself which does seem to form part of the complaint, we accept that it may not have been what the claimant hoped for, but it did uphold some of her concerns about the occupational health advice and was critical of Mr Niedzwiedzki failure to progress that. We accept that it was intended to be fair. It was not prepared with the intention of It was not done with the purpose of

violating the claimant's dignity or creating an intimidating or hostile environment nor do we consider that the claimant could reasonably perceive it has had that effect.

312. This complaint was not well founded.

Allegation 16e - issue a grievance outcome letter dated 11 February 2022

313. Our conclusions about this were very similar to those in connection with the report above. We agree with Ms Cummings that a grievance outcome in itself cannot be unwanted conduct related to the claimant's disability simply because that was the subject of her grievance. The employer issuing an outcome is the consequence of the claimant lodging her grievance. Providing the outcome was not done with the purpose of violating dignity or creating an intimidating or hostile environment. The outcome may not have been the one the claimant hoped for, but she could not reasonably perceive it as creating a hostile environment.

314. The complaint was not well founded.

Allegation 16 f - recommencing disciplinary action against the claimant following dismissal of her grievance and then staying the disciplinary action following her appeal instead of withdrawing it

315. We accept the respondent's case that the re-commencement of the disciplinary action and the stay to allow an appeal against the grievance outcome was a consequence of the application of the procedures.

316. The claimant did not want the disciplinary action to be recommenced and in that sense this was unwanted. However it was consequence of the respondent following its policies and procedures. We accept Ms Cummings submissions' about that. In circumstances where the grievance had not been wholly upheld, we accept that it was entirely proper for the employer to decide to restart that disciplinary action. Nor do we find surprising or improper that the disciplinary action was not dismissed because the claimant appealed against the grievance outcome. We would expect a senior manager being advised by a trade union to anticipate that possibility.

317. We have taken into account that the claimant has been represented by her trade union throughout and she cannot reasonably have had any expectation that initiating a grievance could result in the disciplinary action been dropped if the grievance was not fully upheld nor could she reasonably have an expectation that appealing against a decision she does not agree with could be a way of avoiding the disciplinary proceedings she was already subject to. In those circumstances the claimant could not reasonably perceive this as creating a hostile environment.

318. This complaint is not well founded.

Paragraphs 20 to 23 List of Issues - harassment related to sex

319. The Tribunal understood that these complaints are advanced on the basis that the menopause is related to sex and therefore the acts which are said to be disability harassment are also allegations of harassment related to her sex.

320. The tribunal concluded that Mr Niedzwiedzki and Mr Ratcliffe did not have actual or constructive knowledge of the claimant's menopause until March 2021. This meant their conduct during this period was not influenced consciously or subconsciously by the fact the claimant was menopausal.

321. In any event much of our conclusions above is relevant here. Our primary findings in relation to the allegations made were that although the conduct may have been unwanted (see above), the claimant could not reasonably perceive that any of the alleged conduct was intended to or had the effect of creating a hostile working environment for the reasons previously explained.

322. We concluded that all of the complaints of harassment related sex were not well founded for that reason. There was no harassment.

Direct Sex Discrimination - Para 24 to 27 of the list of issues

323. The alleged less favourable treatment is:

a. That on 9th December 2020 the Respondent initiated formal disciplinary proceedings against the Claimant due to her removing her face mask and raising her voice/shouting when speaking to Ian Ratcliffe, DHT, on 21st August 2020? ("disciplinary ground 1")

b. On 9th December 2020, initiate formal disciplinary proceedings against the Claimant due to the Claimant raising her voice / shouting at Mr Niedzwiedzki during a meeting on 1st December 2020? ("disciplinary ground 2")

c. On 9th December 2020, initiate formal disciplinary proceedings against the Claimant due to her recording on her iPad in the kitchen on 4th December 2020 ("disciplinary ground 3")

d. Refuse to accept knowledge of the claimant's perimenopause arising from the deficient investigation report, dismissed the claims and moved to disciplinary procedure

e. Treat Mr Niedzwiedzki more preferentially than the claimant in the investigation report dated 7 January 2022

324. The first three allegations of less favourable treatment on grounds of sex are the same complaints made as allegations of unfavourable treatment because of something arising from disability and our analysis of those complaints is also relevant here.

325. The claimant has suggested that the appropriate comparators for her direct sex discrimination complaints are either a hypothetical male comparator or Mr Niedzwiedzki.

326. We accept Ms Cumming's submission that Mr Niedzwiedzki cannot be the correct comparator for most of these complaints because he was not an employee in a comparable situation to the claimant except for the protected characteristic. In

relation to the complaints about the disciplinary action, Mr Niedzwiedzki was the alleged discriminator. He was the subject of the grievance but he was not accused of any misconduct and he had not asserted that he had a medical condition which explained his actions.

327. In the circumstances we found that the appropriate comparator was a hypothetical one. We concluded that the appropriate comparator was a senior male employee about whom concerns have been raised in relation to his conduct towards colleagues in circumstances where some or all of the conduct may be related to an underlying medical condition.

328. In relation to these allegations the claimant bore a burden of proof to show not only that she had been subject to detrimental treatment, but that there are facts which could suggest that the that treatment was because of her sex. That requires something more than simply unfair or unreasonable treatment. Something more is required. The claimant does not have to prove it was because of her sex but we have to have evidence which suggests the reason *could* be her sex.

329. We found the claimant had not discharged that burden of proof. The case presented to us suggested the disciplinary charges resulted from misogyny on the part of Mr Niedzwiedzki and the deputy headteacher, and "in particular that It is contended that Mr Mr Niedzwiedzki had simply ignored C's condition because he did not take it seriously and he would not have treated a male comparator in the same cavalier fashion and so he would not have commenced disciplinary action on 9 December 2020". In terms of sex discrimination we found it was significant that concerns about the claimant's conduct had raised about the claimant came not only from senior male employees, but also from female key workers. We had no evidence of any other conduct by these senior male teachers, teaching as Ms Cummings pointed out in an overwhelming female dominated environment, that suggested hostility towards women. Rather this seemed to be case where tensions had arisen between different members of a senior team, but we saw no evidence that was related to the claimant's sex.

330. We did not find that Mr Niedzwiedzki had ignored the claimant's medical condition, he did not know it was the menopause but neither did the claimant or her GP at that time – he did to know it was the menopause. He had had concerns about mental health, but he also concerns which we accept he was entitled to take seriously. We did not accept Mr Small's submissions about Mr Conaghan's approach.

331. The claimant herself accepted that she had shouted at Mr Radcliff, albeit she says her conduct could be explained. Although she framed what happened with Mr Niedzwiedzki more that she had become upset she did not dispute there had been a confrontation. She did not dispute that the key workers had raised concerns about being recorded although she said if she had been recording it had been a mistake. The particular reasons why the conduct of teacher in the claimant's role are identified elsewhere but are relevant there too. The claimant was manager who also taught very young children. We accepted that the issues raised did warrant a disciplinary investigation. In the context we could nothing from the circumstances of disciplinary action being initiated which warranted us drawing an adverse inference of sex

discrimination. We accept that Mr Niedzwiedzki had genuine concerns about the claimant's conduct which could have implications for the claimant's role given her seniority and responsibilities. We are satisfied that a hypothetical male comparator who was accused to this sort of misconduct would have been subjected to the same treatment.

332. In terms of allegations a to c, we were troubled by Mr Small's apparent suggestion that the respondent should have been assumed that the cause of the claimant's behaviour was her perimenopause and menopause and therefore it was sex discrimination for the employer to proceed with the disciplinary process. The claimant did not suggest to Mr Niedzwiedzki that her behaviour had been caused by peri/menopause and indeed the medical records suggest that although there was some recognition of perimenopausal symptoms in 2020, it was not until March 2021 that it was suggested she needed any medical intervention. It is not clear to the Tribunal that the claimant herself thought her behaviour at the time was connected to her menopause. An employer who assumes that an older female employee who was behaving inappropriately towards colleagues was menopausal is likely to be applying inappropriate and stereotypical assumptions to that employee. We cannot accept that is what the respondent should have done. In any event we did not accept that because the cause of at least some of the behaviour may be caused by the menopause, and is therefore specific to women, that means it is necessarily sex discrimination to apply the possibility of disciplinary action to that conduct.

333. This seems to be an argument based on the principles which apply to pregnancy, but pregnancy and childbirth are afforded their own unique protection which means the usual comparator exercise is not applied. We did not accept that principle applies to the menopause. If there is to be comparison that must be a man whose behaviour is said to have been caused by a medical condition which is unique to men.

334. In terms of allegation 24d, we do not accept that the respondent refused to accept knowledge of the perimenopause. The claimant did not identify her menopause and perimenopause in December 2020. There is no evidence that the respondent has denied or disputed the claimant's perimenopausal symptoms once they have been identified by occupational health and by her GP. Mr Bucknill who handed the sickness abscess processes too time to engage with the claimant and the information provided about her menopause.

335. Mr Congahan and Mr Yeoman did not refuse to accept knowledge of perimenopause but they did conclude that the extent to which this should be taken into account in terms of the disciplinary action was as possible mitigation at the disciplinary hearing, not in the course of the grievance. We were satisfied that this approach would also have been adopted with a hypothetical male comparator.

336. . It is impossible to know to what extent the claimant's menopause will be accepted as mitigation for the claimant's actions in 2020 because her grievance appeal and these tribunal proceedings have stalled the disciplinary process. That process has never meaningfully progressed. It will only be at the conclusion of those procedures that to will be possible to see if an appropriate and proportionate account has been taken of the claimant's disability and menopause. We accept however that

the respondent is entitled to view these matters which can only be weighed at the disciplinary hearing stage, if indeed that stage is reached on conclusion of the disciplinary process.

337. Finally in terms of 24e, the allegation that the investigator simply accepted what Mr Niedzwiedzki and others said and rejected what the claimant said, we do not find that the evidence supports that complaint.

338. A range of people were spoken to about the allegations and evidence was gathered in the course of the grievance investigation It is the role of an investigator to decide who they believe and who they do not. The fact that they chose to prefer the evidence of one employee over another is an inevitable in any process where conflicting accounts have to be decided. That is not itself evidence of any bias. Criticisms were made of Mr Niedzwiedzki and his actions. The claimant's case is that what she said was not simply rejected out of hand but that was not the case.

339. We do not accept that the claimant has shown facts that suggest a hypothetical made comparator would have been treated any differently.

Indirect sex discrimination – issue 27 to 31 in the list of issues

340. The list of issues contains a number of allegations of indirect sex discrimination. The claimant alleges that a number of provisions, criterion or practices were applied to her which had an indirectly discriminated against on grounds of her sex.

341. These complaints were withdrawn by counsel in the course of submissions. That was the correct thing to do. The claim appears to be misconceived. A practice can only amount to be indirect discrimination if the provision would also be applied those who do not share the protected characteristic. A practice of not referring perimenopausal symptoms to occupational health or otherwise not taking into account the perimenopause and menopause into account in other procedures would not of course be applied to men.

Indirect disability discrimination

342. Paragraph 32 to 35 of the list of issues identify that the claimant also argues that the PCPs said to amount to indirect discrimination also amount to indirect disability discrimination.

343. We heard very little in the way of submissions about these complaints and they are not addressed specifically in the claimant's evidence.

344. The claimant alleges that she was placed at a disadvantage in comparison to a non-disabled comparator, or in the alternative, a non-disabled male comparator. The claimant relies upon the same alleged detrimental treatment as contained in her indirect sex discrimination complaint.

345. The complained or practices are pleaded by reference to the indirect sex discrimination claims and the claimant's menopause/perimenopause, so we understand this to be complaint of indirect discrimination only in terms of the claimant's menopause and perimenopause and not her anxiety and depression. As We concluded that the claimant had not been disabled by her menopausal and perimenopausal symptoms for the reasons explained and these complaints could not succeed on that basis. Further the claimant has produced no evidence of group disadvantage to enable us to reach any conclusions about that. It may be that the claimant had rather lost sight of this claim is so wide-ranging proceedings.

346. The complaint is not well founded.

Employment Judge Cookson
Date: 17 June 2024

Sent to the parties on:
18 June 2024

For the Tribunal Office

IN THE MANCHESTER EMPLOYMENT TRIBUNAL

Case Numbers: 2405493/2021 and 2404717/2022

BETWEEN:

MRS E BROWN

Claimant

-and-

MINISTRY OF DEFENCE

Respondent

DRAFT LIST OF ISSUES

Jurisdiction

1. Have the Claimant's claims been brought within three months starting with the acts and omissions to which the claim relates, subject to any extension resulting from ACAS Early Conciliation?

2. If not, do the alleged acts and omissions which the Claimant refers to in her claim forms constitute a continuing act of discrimination, the end of which fell within the time limit?

3. If not, are there any grounds on which it would be just and equitable to extend time?

Disability

4. At the time of the alleged acts of disability discrimination on (a) 9 December 2020 (b) 25 February 2021 (c) 7 January 2022 (d) 11 February 2022, and following did the following disabilities have a substantial and long-term adverse effect on the Claimant's ability to carry out normal day-to-day activities so as to constitute a disability within the meaning of the Equality Act 2010, section 6 & Schedule 1?

    a. Peri-Menopause including menorrhagia;

    b. Asthma.

5. Did the Respondent know or could the Respondent be reasonably expected to know that the Claimant was disabled under the Equality Act 2010 at the relevant times/ dates?

   The Respondent accepts that the Claimant was disabled at the material time by reason of her anxiety and depression and that the Respondent had knowledge of such disabilities from 30th March 2021 (receipt of OH Report).

Discrimination arising from disability – s15 EqA10

6. Did the Respondent:

   a. On 9th December 2020, initiate formal disciplinary proceedings against the Claimant due to her removing her face mask and raising her voice/shouting when speaking to Ian Ratcliffe, DHT, on 21st August 2020?

   b. On 9th December 2020, initiate formal disciplinary proceedings against the Claimant due to the Claimant raising her voice / shouting at Mr Niedzwiedzki Niedwiedzki during a meeting on 1st December 2020?

   c. On 9th December 2020, initiate formal disciplinary proceedings against the Claimant due to her recording on her iPad in the kitchen on 4th December 2020?

   d. On 25th February 2021, send a letter to the Claimant inviting her to a sickness review meeting and threatening disciplinary sanction?

   e. On 11 February 2022, not uphold the Claimant's grievance?

   f. Resume disciplinary proceedings against the Claimant following the dismissal of her grievance?

   g. Ignore the Claimant's menopausal symptoms prior to instigating disciplinary action against her?

7. Did any of the alleged treatment referred to at Paragraph 6 above constitute unfavourable treatment of the Claimant?

8. The Claimant alleges that the something arising for the purposes of EqA10, s15(1)(a) is:

a. In respect of Paragraph 6.a above the something arising was the Claimant's breathlessness and the need for the Claimant to remove her face mask as a result of her peri-menopause and Asthma and fatigue and mood swings as a result of peri-menopause, depression and anxiety;

b. In respect of Paragraph 6.b above the something arising was fatigue and mood swings as a result of peri-menopause and depression and anxiety;

c. In respect of Paragraph 6.c above the something arising was fatigue and mood swings as a result of peri-menopause and depression and anxiety;

d. In respect of Paragraph 6.d above the something arising was fatigue and mood swings as a result of peri-menopause and depression and anxiety;

e. In respect of Paragraph 6.e above the something arising was fatigue, mood swings and breathlessness as a result of peri-menopause and depression and anxiety and asthma

f. In respect of Paragraph 6.f above the something arising was fatigue, mood swings and breathlessness as a result of peri-menopause and depression and anxiety and asthma;

g. In respect of Paragraph 6.g above the something arising was fatigue and mood swings as a result of her peri-menopause and depression.

9. If so, was the unfavourable treatment because of the something arising set out in Paragraph 8 above and in consequence of her disabilities for the purposes of EqA10, s15(1)(a)?

10. If so, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim for the purposes of EqA10, s15(1)(b)? The Respondent relies on the following: -

a. In relation to paragraphs 6a – c and 6f - g ensuring that all potential breaches of its Code of Conduct and/or standards of behaviour are properly investigated and that all employees maintain the correct standard of behaviour.

b. In relation to paragraph 6d, ensuring the effective running of the Respondent's work obligations and operations by managing employees' absence.

c. In relation to paragraphs 6e to ensure that employee's concerns and complaints are sufficiently investigated and addressed and to ensure that the Respondent's working environment is free from all forms of bullying and harassment, and that the dignity of others is respected.

Failure to make reasonable adjustments – ss20 & 21 EqA10

11. Did the Respondent have the following PCPs?:

Covid19 procedure and practice (Defence People Health and Well Being Guide)

a. The practice of having no air conditioning operating during the period 18th August 2020 to 24th August 2020 inclusive.

b. ~~The requirement for employees to wear a mask, as follows:~~

~~i. In shared areas when 1.5 metres social distance could not be followed;~~

~~ii. If a distance of 2 m could not be maintained whilst teaching;~~

~~iii. Throughout the outside area between buildings;~~

~~iv. If a facemask prevented effective communication, it could be removed briefly to deliver messages.~~

c. The requirement for employees to undertake cleaning including wiping down of table tops, door handles and sink as part of the end of lesson 'clear up' and undertaking cleaning tasks which were assigned to SIS but not completed.

Disability in employment policy

d. The practice of not referring employees to OH who are suffering from mental health symptoms.

Menopause awareness practice and/or policy

e. Intentionally Blank

f. The practice of not referring employees with peri-menopause symptoms to occupational health.

Occupational Health referral procedure or practice

g. The practice of expecting employees to self-refer to Occupational Health.

Sickness management procedure or practice

h. The practice of inviting employees to attend absence review meetings whilst signed off sick and where no reasonable adjustments can be carried out.

Equality policy and procedure or practice (JSP 887 Diversity, Inclusion and Social Conduct)

i. The practice of not applying the equality policy by not considering the effect of their decisions and policies in respect of discriminating those with protected characteristics in accordance with Section 3 of the policy.

Disciplinary policy and procedure or practice (Misconduct and Discipline, 2019)

j. The application of the disciplinary policy without considering whether the conduct in question was disability related conduct.

Grievance Policy and Procedure or practice /Bullying and Harassment Procedure

k. The application of not considering an employee's disability and the symptoms therein when applying its procedures, which placed the Claimant at a substantial disadvantage in that someone with the Claimant's condition was more likely to have their grievances dismissed;

Health and Safety Procedure or practice including risk assessments

l. The application of not considering completed risk assessments in (a) the School's working environment.

12. Did any such PCP put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:

Covid19 procedure and practice (Defence People Health and Well Being Guide)

The claimant was placed at a substantial disadvantage by:

a. working in very high temperatures exacerbated the Claimant's peri-menopausal symptoms of hot flushes and fatigue;

b. wearing a mask exacerbated the Claimant's breathlessness. Undertaking manual and cleaning work resulted in breathlessness affected by her Asthma;

c. significant impact on claimant arising from her peri-menopause, resulting in the need for her to remove her mask to ease the physical and psychological pressure on her and to enable her to breathe more easily and reduce her temperature.

Disability in employment policy

The claimant was placed at a substantial disadvantage in that:

d. The failure to refer to occupational health meant that her conditions were not recognised by the respondent which led to the instigation and the continuation of disciplinary action, which resulted in the collapse in her health, leading to many months sickness and the continuation of less favourable treatment to her.

Menopause policy and practice.

The claimant was placed at a substantial disadvantage in that:

e. The Respondent initiated / continued with disciplinary action against her and ultimately found against her in that action.

f. That the respondent failed to refer the claimant to occupational health at least twice (but most recently in September 2020), when it was clear that she was presenting significant symptoms associated with her peri-menopause and depression/anxiety, where such actions would have provided the respondent with relevant information, but by not doing so the respondent treated the claimant less favourably arising from her disabilities.

g. Following which the Respondent subjected the Claimant to disciplinary action which it should not have done if it had referred the Claimant to Occupational Health.

Occupational Health referral procedure or practice

The claimant was placed at a substantial disadvantage in that

h. The respondent's grievance decision-maker in February 2022 found that the Claimant was responsible for the failure to refer herself on at least two occasions to occupational health. In doing so, he treated the Claimant less favourably than the head teacher by not upholding her grievance.

Sickness management procedure or practice

i. The claimant was placed at a substantial disadvantage in that her symptoms were substantially exacerbated as a result of being forced to attend a meeting where her future employment was being discussed and she was placed at risk of being dismissed.

Equality Policy and Diversity and Inclusion Plan

The claimant was placed at a substantial disadvantage in that

j. The Claimant's health collapsed, leading to many months sickness and the continuation of less favourable treatment to her as a result of not considering the effect of their decisions and policies in respect of discriminating those with protected characteristics in accordance with Section 3 of the policy. Thus no consideration was given to the Claimant's condition in either subjecting her to disciplinary action and in the dismissal of her grievances.

Disciplinary procedure

k. The imposition of the disciplinary procedure and policy placed the claimant at a substantial disadvantage that she was more likely given her conditions to be made subject to disciplinary action.

Grievance Policy and Procedure or practice and Bullying and Harassment Policy (JSP763)

The claimant was placed at a substantial disadvantage in that

l. The investigator gave more weight to the former head teacher's evidence in that:

i. He did not consider the claimants evidence in a proportionate way, including the respondents knowledge of the claimants peri-menopause, from 2017-18.

ii. He failed to, in a proportionate manner, consider the medical evidence submitted by the claimant to the investigation.

iii. He failed to, in a proportionate manner, consider the failure of the head teacher (a non disabled male) to follow MOD schools procedure and refer the claimant to occupational health.

iv. He treated the head teacher (a non disabled man), more favourably in that the HT could provide no evidence to support why he had not referred the claimant to occupational health, despite stating that he would, on at least two occasions, and in so doing created a higher threshold for the claimant to meet in her grievance process.

v. He found that the Claimant should have, or could have, organised her own occupational health referral contrary to MOD schools procedure.

vi. He failed to consider the Claimant's grievance in light of her disabilities;

vii. He dismissed her grievance.

Health and Safety Procedure or practice including risk assessments and Stress in the Workplace Procedure:

The Claimant was placed at a substantial disadvantage in that:

m. the respondents knowledge of the claimants disabilities including Asthma from the risk assessment in August and September 2020, from which it initiated a disciplinary allegation for removal of the face mask and shouting/raising her voice on

9 December (for an issue that was resolved in August and was nearly four months after the claimant removed her mask), this placed her at a substantial disadvantage to a non disabled person;

n. Placing the claimant at a substantial disadvantage by putting her in an unsafe working environment thereby exacerbating her symptoms.

13. If so, did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at any such disadvantage?

14. If so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? The Claimant alleges that the following steps should have been taken:

a. The respondent should have considered the risk assessments that were undertaken in the summer of 2020 (Covid19) and that the failure to undertake this led to the substantial disadvantage;

b. Ensuring the Claimant did not have to undertake cleaning duties under extreme temperatures and/or whilst wearing a face mask;

c. Addressing the Claimant's concerns about the cleaning contracts

d. Referring the Claimant to occupational health and in particular in or around:;

(i) 22 November (or around) 2018; and 3 December 2018

(ii) 21 September 2020;

(iii) May, June and November 2019.

e. Providing the Claimant with additional support; Mitigate impact of menopausal symptoms, Depression/Anxiety and Asthma through

~~i. time to attend medical appointments;~~

ii. ability to access a private/quiet place to rest;

iii. easy access to toilets and wash areas (avoidance of embarrassment if has had incident / accident e.g. incontinence and/or 'flooding' (menorrhagia));;

iv. access to fresh air e.g. windows and fans (hot flushes);

v. a reasonable working temperature;

vi. assistance with any manual work, lifting heavy items can exacerbate the urinary continence issue;

vii. flexibility with working patterns to allow for variation in emotional wellbeing, taking time out if needed;

viii. Mitigate impact of asthma through conducting an annual (more regular if required) risk assessment of working conditions and put in place relevant mitigation measures, identified in the risk assessment;

ix. Timetable keyworkers to ensure that there is support for setting up and clearing away activities at the start and end of days to assist with manual lifting;

x. ongoing dialogue with line manager to authorise absence if required;

xi. PPA time be taken at home;

xii. Open dialogue with the line manager regarding health to assist with emotional fluctuations, who can authorise absence or alternative working arrangements if required;

xiii. Mitigate impact of anxiety and depression through having weekly meetings with line manager to address emerging work matters wellbeing and ensure clarity on expectations. (Where areas of development are identified, claimant can become anxious and may need to take a short break before continuing the meeting);

xiv. OH referrals if required to support working practices and claimants health and medical conditions;

xv. To have assumed that the Claimant was disabled before making an OH referral;

xvi. For the purposes of her grievance R should have assumed that the Claimant was disabled;

xvii. By not commencing disciplinary action against the Claimant in December 2020;

xviii. By not recommencing and then staying the disciplinary action against the Claimant following the dismissal of her grievance;

f. Allowing the Claimant to be accompanied (by a TU representative / colleague) to the meeting at which she was issued with the letter of 9th December 2020.

15. If so, would it have been reasonable for the Respondent to have taken those steps at any relevant time?

Harassment – Disability s26 EqA10

16. Did the Respondent subject the Claimant to the following conduct:

a. Cause the claimant distress at the meeting in September 2020 as pleaded at §31 of the Claimant's first ET1?

b. Send to the Claimant a letter dated 9th December 2020 advising that there was to be a disciplinary investigation into the Claimant and citing three allegations?

c. Send to the Claimant a letter dated 25th February 2021 inviting her to a sickness review meeting and threatening sanction?

d. issue a grievance investigation report dated 7 January 2022?

e. issue a grievance outcome letter dated 11 February 2022?

f. Recommencing disciplinary action against the Claimant following the dismissal of her grievance in or around February 2022 and then staying the disciplinary action following the Claimant's appeal instead of withdrawing it.

17. If so, did the act(s) set out at Paragraph 16 a – f above constitute unwanted conduct?

18. If so, was this unwanted conduct related to the Claimant's disability?

19. If so, did the unwanted conduct have the purpose or (taking into account the Claimant's perception) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Harassment – Sex s26 EqA10

20. Did the Respondent subject the Claimant to the conduct in Paragraph 16a – f above.

21. If so, did the act(s) set out at Paragraph 16 a – f above constitute unwanted conduct?

22. If so, was this unwanted conduct related to the Claimant's sex?

23. If so, did the conduct have the purpose or (taking into account the Claimant's perception), the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Direct Sex Discrimination s13 EqA10

24. Did the Respondent:

    a. On 9th December 2020, initiate formal disciplinary proceedings against the Claimant due to her removing her face mask and raising her voice/shouting when speaking to Ian Ratcliffe, DHT, on 21st August 2020?

    b. On 9th December 2020, initiate formal disciplinary proceedings against the Claimant due to the Claimant raising her voice at Mr Niedzwiedzki Niedwiedzki during a meeting on 1st December 2020?

    c. On 9th December 2020, initiate formal disciplinary proceedings against the Claimant due to her leaving her iPad in the kitchen on 4th December 2020?

    d. Refuse to accept the knowledge of the Claimant's peri-menopause arising from the deficient investigation report, dismiss her claims and move to disciplinary procedures?

    e. Treat Mr Niedzwiedszski more preferentially than the Claimant in the investigation report dated 7 January 2022?

25. If so, did the above conduct amount to less favourable treatment of the Claimant than a hypothetical male comparator and/or Mr Niedzwiedszki?

26. If so, was the Claimant subjected to the less favourable treatment because of her sex?

Indirect sex discrimination s 19 EqA10

27. What is the provision, criterion or practice (PCP) relied upon which the Claimant asserts was applied or would apply to persons with or without her protected characteristic?

    a. Menopause – the practice of not assuming that employees with peri-menopause symptoms were disabled; and further the practice of not referring employees with peri-menopause symptoms to occupational health;

    b. Disciplinary Procedure – the application of the disciplinary procedure without considering whether the conduct in question was related to a sex specific protected characteristic of peri menopause;

    c. Grievance Procedure and Bullying and Harassment Procedure – the practice of not considering whether an employee's peri-menopause condition and symptoms when assessing their grounds of complaint;

    d. Application of Equality Policy – the practice of not applying the equality policy by not considering the effect of their decisions and policies in respect of discriminating those with sex specific protected characteristics in accordance with Section 3 of the policy

    e. Application of sickness procedure - The practice of inviting employees to attend absence review meetings whilst signed off sick and where no reasonable adjustments can be carried out.

28. Did each PCP put persons with whom the Claimant shared the protected characteristic at a particular disadvantage when compared with persons with whom the Claimant does not share the protected characteristic. The Claimant says the particular disadvantages are:

a. Menopause - by not assuming the Claimant was suffering with menopausal symptoms, and by not referring her to OH and disciplinary procedure imposition in December 2020, arising from claimants peri-menopause (and depression/anxiety) and disproportionate impact on women with peri-menopause (and depression) compared to a man in that it puts women at a particular disadvantage in that their conditions are not recognised and women are blamed for their own symptoms ;

b. Disciplinary procedure: imposition of disciplinary procedure arising from peri-menopause and less favourable treatment on the grounds of sex. The particular disadvantage is that women are more likely to face disciplinary action on account of their symptoms.

c. Grievance Procedure/Bullying and Harassment Procedure: respondent created higher burden for claimant placing her at a substantial disadvantage on the grounds of her sex. The particular disadvantage is that the grievance/harassment procedure fails to take into account of any peri-menopausal symptoms meaning that the investigation officer does not consider as part of his or hers report whether the complainant's conduct was affected by her symptoms, meaning that women are more likely to have their grievances dismissed.

d. Application of Equality Policy: Respondent treated claimant less favourably by treating male comparator more favourably through the disciplinary and grievance/bullying and harassment procedure placing her at a substantial disadvantage on the grounds of her sex. The particular disadvantage to women is that the Respondent failed to take into account the peri-menopausal condition at all in all of its policies meaning that women are more likely to face disciplinary action, have their grievances dismissed and be subjected to formal sickness procedures.

e. Sickness procedure: The respondent treated the claimant less favourably by subjecting her to its formal sickness review procedure and invited her to a sickness review meeting where she was warned that her employment could be affected, when the Respondent was in receipt of an interim occupational health report, which made clear that further medical evidence was needed and there was

no adjustments that could be made at the time. The particular disadvantage to women is that they face a risk of being dismissed for their menopause condition.

29. Was the Claimant put to the particular disadvantage? The claimant was placed at a disadvantage by the application of the:

a. **Peri-menopause policy and guidance**: Despite the respondent having knowledge of the claimants peri-menopause (and anxiety and depression) and their presenting features from 2017-18, when it imposed the disciplinary procedure on 9 December 2020 placing her at a particular disadvantage to a comparator, whether real or hypothetical by not following the specific guidance and policy for women with the peri-menopause/menopause;

b. On 7 January 2022, the investigator disregarded the material evidence of the former school business manager in relation to the claimants peri-menopause and depression, placing her at a particular disadvantage to a comparator, whether real or hypothetical in that he treated the claimant less favourably by his actions and treated the comparator more favourably by accepting his response without any evidence being provided. This placed the claimant at a material disadvantage;

c. The investigator failed, despite the claimant referring the investigator to the EAT decision in *Rooney* (in terms of the approach that should be considered when investigating cases which involve the menopause or peri-menopause symptoms), and by referring to the MOD/DBS Menopause guidance of October 2019, to properly consider the significant day to day impact of the peri-menopause on the claimant. This resulted in the claimants claims being disregarded thereby placing her at a substantial disadvantage in comparison to a comparator, whether real or hypothetical;

d. On 11 February 2022 the commissioning manager acting on the investigators outcome and despite the response of the claimant to the investigators report, on which she was asked to comment and to which she did, failed to consider on a proportionate basis, the claimants peri-menopause, dismissed her claim and set out the continuation of the disciplinary procedure. This act, based on the investigators less favourable treatment of the claimant and the disproportionality

of the investigators response, placed her at a substantial disadvantage in comparison to a comparator, whether real or hypothetical.

e. **Disciplinary Procedure**: The respondent, in imposing the disciplinary procedure for reasons arising from the claimants peri-menopause placed her at a particular disadvantage to a comparator, whether real or hypothetical;

f. On 11 February 2022, the commissioning manager, by dismissing the claimants grievance claims, and re-commencing the disciplinary procedure for reasons arising from the claimants peri-menopause (and depression), placed her at a particular disadvantage to a comparator, whether real or hypothetical;

g. **Grievance Procedure/Bullying and Harassment Procedure**: On 7 January 2022, and subsequently following the claimants response to his draft investigation report, the investigator disregarded the material evidence of the former school business manager in relation to the claimants peri-menopause and depression, placing her at a particular disadvantage to a comparator, whether real or hypothetical in that he treated the claimant less favourably by his actions and treated the comparator more favourably by accepting his response without any evidence being provided. This placed the claimant at a material disadvantage;

h. **Application of Equality Policy**: Despite the respondent having knowledge of the claimants peri-menopause (and anxiety and depression) and their presenting features from 2017-18, it failed to follow the respondents equality policy, undermining and treating the claimant less favourably, placing her at a particular disadvantage to a comparator, whether real or hypothetical e.g. not considering the gender specific nature of her peri-menopausal presenting features and their impact;

i. **Sickness procedure**: The respondent treated the claimant less favourably by not applying the correct procedure to her, up to and including February 2021, with the issuing of the 25 February letter, placing her at a substantial disadvantage on the grounds of her sex e.g. failing to refer the claimant to occupational health in September 2020 and then bringing disciplinary allegations against the claimant despite the respondents knowledge of the claimants peri-menopause and

depression/anxiety, not keeping documentary evidence required by procedure and treating the head teacher more favourably.

30. Is the PCP a proportionate means of achieving a legitimate aim?

31. The Respondent relies on the following legitimate aims: -

a. Ensuring that all potential breaches of its Code of Conduct and/or standards of behaviour are properly investigated and that all employees maintain the correct standard of behaviour.

b. Ensuring the effective running of the Respondent's work obligations and operations by managing employees' absence.

c. Ensuring that employee's concerns and complaints are sufficiently investigated and addressed and to ensure that the Respondent's working environment is free from all forms of bullying and harassment, and that the dignity of others is respected.

d. Ensuring decisions regarding employee's bullying and harassment complaints are informed and based on relevant and appropriate evidence.

Indirect disability discrimination s 19 EqA10

32. The Claimant relies upon the same PCPs for her indirect sex discrimination claims.

33. Was the Claimant put to the particular disadvantage?

a. The claimant was placed at a disadvantage in comparison to a non-disabled comparator, or in the alternative, a non-disabled male comparator. The Claimant relies upon the same alleged detrimental treatment as contained in her indirect sex discrimination claim.

34. Is the PCP a proportionate means of achieving a legitimate aim?

35. The Respondent relies on the following legitimate aims:

a. Ensuring that all potential breaches of its Code of Conduct and/or standards of behaviour are properly investigated and that all employees maintain the correct standard of behaviour.

b. Ensuring the effective running of the Respondent's work obligations and operations by managing employees' absence.

c. Ensuring that employee's concerns and complaints are sufficiently investigated and addressed and to ensure that the Respondent's working environment is free from all forms of bullying and harassment, and that the dignity of others is respected.

d. Ensuring decisions regarding employee's bullying and harassment complaints are informed and based on relevant and appropriate evidence.

Remedy

36. Did the Claimant suffer injury to feelings as a result of the alleged discriminatory treatment? If so, what compensation is the Claimant entitled to receive? The Claimant claims:

    a. Compensation for financial loss and injury to feelings. The claimant submits Injury to Feelings, Mid Vento Band, £15,000;

    b. A declaration that she has been subject to discrimination.