EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Dr S Driver	**v**	Sherrardswood School

Heard at: Watford
On: 22,23,24 and 25 April 2024
3 and 4 July 2024 (in chambers)

Before: Employment Judge S Matthews
Members: Mrs J Hancock
Mr R Jewell

Appearances
For the Claimant: In person
For the Respondent: Mr Hussain, (litigation consultant)

RESERVED JUDGMENT

The judgment of the tribunal is that:

The claimant's complaints of discrimination arising from disability and failure to make reasonable adjustments are dismissed. The complaints are not well founded.

REASONS

Introduction

1. The claimant was employed by the respondent, a school, as a newly qualified Computer Science Teacher from 1 September 2020 to 18 April 2021. She brings complaints of discrimination arising from disability, failure to make reasonable adjustments and says that she was forced to resign because of the discrimination (constructive dismissal). Acas conciliation started on 10 May 2021 and ended on 25 May 2021. The claimant's claim form was received at the tribunal on 24 June 2021. The respondent denies liability for each of the claims.

2. The claimant's disabilities are autism and Irlen's Syndrome (a processing disorder which affects the brain's ability to process visual information). The

respondent admits that the claimant was (and it knew she was) a disabled person at the relevant time.

Procedural background

3. The hearing was listed for four days. It was agreed that the tribunal would hear evidence on liability first and if the claimant was successful on liability a separate hearing would be listed to decide remedy. Evidence on liability was not completed until the end of day 4. The parties were invited to make written submissions. Written submissions were received from the claimant but not from the respondent. The tribunal met in chambers on 3 and 4 July 2024. An earlier date could not be arranged owing to the availability of the panel. Following the meeting annual leave has further delayed this Judgment, for which the tribunal apologises.

4. Adjustments to enable the claimant to attend the tribunal were discussed at the case management hearing before Employment Judge McNeill KC on 1 February 2023. The claimant intended to visit the tribunal centre before the hearing to see the hearing room. That could not be arranged because the claimant was not well enough to travel in the 2 weeks before the hearing. The claimant was instead allowed to see the room on the morning of the hearing.

5. The light from the window in the allocated room was too bright for the claimant and there was background noise from the air conditioning. She was offered a choice of 2 other rooms. She selected a room which she confirmed would be suitable. There was background noise from the air conditioning which could not be turned off. The claimant confirmed she was content to proceed and would use her noise cancelling headphones. The claimant set up her Roger radio mikes for use during the hearing.

6. The claimant was informed that she could ask for breaks at any time and the length and frequency of breaks was adjusted as required. The claimant was accompanied by her assistance dog. The claimant was not represented at the hearing, but she was accompanied by her friend and former trade union representative, Emma Thomas.

7. We discussed how questions would be put in cross examination prior to the claimant giving evidence, referring to the relevant guidance in the Advocate's Gateway and the Equal Treatment Bench book. The claimant explained how her condition affected her communication. We continued to monitor communication during the hearing and we were satisfied that the claimant was able to give her best evidence and represent herself.

8. The claimant was granted permission to use type to speak technology when required during the hearing.

9. We heard evidence from the claimant and from Emma Thomas on the claimant's behalf. On behalf of the respondent we heard evidence from Anna Wright, Head Teacher at the respondent and Matt Capuano, Head of Prep. Each witness had prepared sworn statements which the tribunal took

the time to read. Each confirmed the truth of the statement before being questioned.

10. The tribunal was provided with a bundle of 457 pages which was prepared by the respondent and a further supplementary bundle of 335 pages prepared by the claimant. There was some duplication. At the case management hearing the claimant had asked for documents to be provided in pdf form (saved as text and not scanned), with no highlighting in red. Some of the documents in the main bundle did not comply with this request. The tribunal offered the support of the tribunal's digital support officer if necessary to convert any documents. In the event the claimant was able to conduct the hearing with the bundles without further assistance.

11. References to pages in the bundle below are set out in brackets(x) and in the case of the supplementary bundle (x sup). References to paragraphs in the witness statements consist of the witness's initials and number of the paragraph (AB-YZ).

Issues

12. The issues the tribunal was required to decide were agreed at the case management hearing on 1 February 2023 and are set out below.

> "1. **Time limits**
>
> 1.1 Did the matters complained of by the Claimant amount to a continuing discriminatory state of affairs, beginning on 1 September 2020 and ending on 19 April 2021?
>
> 1.2 If not, are any of the Claimant's claims out of time?
>
> 1.3 If they are, should time be extended on a "just and equitable" basis?
>
> 2. **Disability**
>
> 2.1 Disability and knowledge are accepted. The relevant disabilities are autism and Irlen's syndrome.
>
> 3. **Key factual allegations**
>
> 3.1 Did the Respondent do or fail to do the following things:
>
> a. Failing to refer the Claimant for an Occupational Health consultation prior to commencing her employment;
> b. Failing to consult their Human Resources department about the support available for making reasonable adjustments for a member of staff;
> c. Failing to provide the Claimant with a "disability champion/mentor" to help her with ensuring access to adjustments as needs arose;
> d. Failing to provide the Claimant with a room that was suitable to use as a recovery space for sensory overload when the Claimant was not teaching;

e. Removing the reasonable adjustment of a single teaching room during the period when bubbles were implemented in accordance with government guidelines during the coronavirus pandemic;
f. Requiring that routine medical appointments should be made outside of working hours or during holidays so that the Claimant did not attend a medical appointment as soon as she should have;
g. Failing to ensure that measures that were agreed, such as providing coloured backgrounds for documents such as reports;
h. Failing to carry out a risk assessment in relation to the Claimant until November 2020;
i. Providing a single teaching room for the Claimant in November 2020 that was not set up for the Claimant's known sensory needs regarding lighting and visual equipment;
j. Failing to provide a suitable alternative space when the Claimant was from time to time removed from that room;
k. Failing to carry out repairs to the allocated room, such as replacing light bulbs, to ensure that it was a suitable working space for the Claimant;
l. Failing to respond to the Claimant's reports of the direct physical impacts of sensory overloads, such as becoming "stuck" on the stairs mid-flight;
m. Extending the Claimant's probation citing performance issues when such issues were directly related to a failure to implement adjustments that were within the Respondent's control;
n. Formally notifying the Claimant of the extension of her probation in a format that the Claimant was unable to access;
o. Requiring the Claimant to attend absence management meetings;
p. In February 2021, both within and outside the Respondent's formal absence procedures, repeatedly communicating the impact on the Claimant's colleagues of the Claimant's absence from work because of sickness so that the Claimant felt so pressurised that she felt that she had no option but to resign from her employment.

4. **Dismissal**

4.1 If the Claimant proves that the Respondent acted or failed to act in the way alleged, did such matters, taken individually or together, amount to a repudiatory (fundamental) breach of the Claimant's contract of employment?

4.2 Did the Respondent breach the implied term of trust and confidence in the Claimant's contract of employment, in that the Respondent, without reasonable or proper cause, behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent?

4.3 Did the Claimant resign in response to the Respondent's breach of contract?

5. **Discrimination arising from disability (Equality Act 2010 section 15)**

5.1 Did the Respondent treat the Claimant unfavourably in all or any of the ways set out in paragraphs 3 and 4 above.

5.2 Did the following things arise in consequence of the Claimant's disability:

5.2.1 The Claimant's vulnerability to sensory overload;
5.2.2 A need for specific aids to assist with the processing of visual information;
5.2.3 Performance issues:
5.2.4 Sickness absence.

5.3 Was the unfavourable treatment because of any of those things?

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

6. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21**

6.1 Did the Respondent have the following provisions, criteria or practices (PCPs):
6.1.1 That medical appointments could not be arranged during work time except in an emergency;
6.1.2 That a support mentor was not permitted and that communication on disability-related issues had to be with the headteacher.

6.2 Did the Respondent's PCPs put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that:

6.2.1 She needed to see a medical practitioner reasonably promptly to advise and assist her;
6.2.2 Without a support mentor, her need for adjustments was not effectively progressed?

6.3 Did a physical feature, namely the lack of rooms for her with suitable privacy and lighting arrangements, put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant's ability to deal with sensory overload was impaired?

6.4 Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

6.5 What steps could have been taken to avoid the disadvantage?

6.6 Was it reasonable for the Respondent to have to take those steps?

6.7 Did the Respondent fail to take those steps?"

Factual findings

13. This section of our reasons sets out the broad chronology of events to the extent that it is relevant to the factual findings we need to make. There were points where we had to resolve disputed issues of primary fact in order to decide the case and we give our reasons for the findings we made. The parties will note that not all the matters they told the tribunal about are

recorded in the findings of fact; that is because we have limited them to points that are relevant to the legal issues.

14. The claimant was employed by the respondent as a Newly Qualified Teacher (NQT). The respondent is a co-educational independent non-selective school with approximately 500 pupils on the role. At the relevant time the respondent employed about 95 staff. Approximately 48% of the students at the senior school have observed or diagnosed special educational needs.

Recruitment

15. The claimant first contacted the respondent on 10 March 2020 when the respondent was advertising for a Computer Science teacher. The claimant expressed an interest in applying for the vacancy as an NQT. She was due to complete her PGCE in the summer (56). The claimant subsequently applied for the position in May 2020. Her application form refers to her experience teaching undergraduates and other adults and being a Brownie Guider (1-10 sup).

16. The application referred to the claimant being diagnosed with autism in 2017. This was in the context of gaps in her employment which occurred following a previous misdiagnosis. She wrote:

> "There is no likelihood of similar GAPs in the future, now that the misdiagnosis has been resolved and I have spent my PGCE year working out what adjustments I need as an autistic member of staff in order to manage the classroom environment" (6)

17. In reply to a question about whether special arrangements would be needed to attend an interview the claimant stated that she was autistic and had Irlen's Syndrome (8)

18. The Head Teacher, Mrs Anna Wright (AW), was very impressed with the claimant's application. She also felt that it would be good for the students to see a successful autistic teacher operating within the staff body as a role model (AW/14). The school has a number of autistic pupils and has successfully worked with a child with Irlen's Syndrome (AW/14).

19. The interview took place by Zoom during the covid lockdown period. The claimant was offered the job on 28 May 2020 (64). The employment contract (57-63) states:

> "The first three months of your employment will be served as a probationary period. During this period your work performance in general suitability will be assessed… If your work performance is not up to the required standard, or you are considered to be generally unsuitable we may either extend your probationary period or terminate your employment at any time.
>
> We reserve the right not to apply our full capability and disciplinary procedures during your probation period." (58)

Initial discussions about adjustments

20. Prior to starting work on 1 September 2020, the claimant submitted further information about her disabilities. In June 2020 on a form headed "Staff Data Verifications" (11 to 18 sup) (AW/23) the claimant explained that both Irlen's Syndrome and autism were likely to require reasonable adjustments:

> "but these are bespoke to the environment, and may need to be developed over time as issues arise. Regular reviews/changes to adjustments would be useful when beginning the role, a named person to manage this process for consistency would be very useful" (13 sup).

21. In respect of hearing she explained that she is hyper-sensitive to noise and uses Roger Radio Aid microphones "to help me filter people speaking".

22. In oral evidence the claimant explained that she spent her PGCE year working out what adjustments would be helpful and she had a good idea of what had and had not worked. Adjustments for sensory overloads enabled her to complete her PGCE course (14).

23. AW reviewed the Staff data Verification Form on 10 July 2020 and made annotations (70-74). These included: "All medical issues can be managed with reasonable adjustments." Next to the statement from the claimant that she would need a named person to manage the process for reasonable adjustments she wrote: "That will be me".

24. On 12 August 2020 the claimant met with AW and talked about arrangements for the start of term including her room, mentor, equipment and duties. She had a tour around the school with the office manager. This was followed up by an email dated 18 August 2020 (190-191) confirming the adjustments which were discussed. These included AW being the "main port of call" for practicalities. The email also recorded that there was discussion about identifying a room as a permanent base when not teaching and use of an iPad to view the students' work (we refer to these adjustments in more detail below).

25. The claimant informed AW about the organisation Access to Work (AtW) at the interview. The claimant submitted an application to AtW on 22 July 2020 hoping that they would be able to put assistance in place before she started work in September 2020.On 21 August 2020 AtW indicated that they would ask an independent assessor to visit the claimant's workplace (192). Unfortunately, this visit did not take place, presumably due to the covid pandemic, and further contact with AtW was by way of virtual meeting or email.

26. It became clear that AtW would not be able to put assistance in place before the beginning of term, the lead time being several weeks (194).

27. Having considered the recruitment process and the arrangements discussed when the claimant first joined the school, we made findings on the key factual matters raised by the claimant in the list of issues as follows:

Issues 3.1(a) and (b)

28. The claimant complains that the respondent failed to refer her for an Occupational Health consultation prior to commencing employment and failed to consult their Human Resources Department about the support available for making reasonable adjustments. She said in evidence that she expected to be referred to a "Medical person" because of all the medical information she had supplied at the time of recruitment.

29. The tribunal find that she did not have that expectation at the time. She did not raise it at the time, and it was not raised until her exit meeting following termination of her employment on 29 April 2021 when it was queried by her union representative, Emma Thomas (ET).

30. In the light of all the information that the claimant supplied to the respondent and the assessment carried out by AtW, the tribunal do not consider that referral to Occupational Health would have added to the respondent's knowledge of the claimant's condition or adjustments that could be made. Referral to an Occupational Health consultant prior to commencing her employment may have been appropriate if the respondent was considering whether the claimant would be able to carry out the role but matters had gone beyond that stage. AW was keen to employ the claimant. Moreover, the claimant was very proactive in contacting AtW to obtain the help she needed and said she had learnt about what adjustments would work for her in her PGCE year.

31. At the relevant time the respondent did not have an HR Department. The respondent had approximately 95 staff and the Headteacher, AW, was responsible for HR issues, in conjunction with the Chair of Governors.

Issues 3.1 (c), 6.1.2 and 6.2.2

32. The claimant complains that the respondent failed to provide her with a "Disability champion/mentor" to help her with ensuring access to adjustments as needs arose. She asserts that communication on disability-related issues had to be with the headteacher.

33. AW decided that she would be the main point of contact at the beginning of the claimant's employment (paragraph 23 above).

34. The arrangement had been discussed with the claimant prior to the claimant starting employment and was referred to in AW's email to her dated 18 August 2020 (190-191):

> "We discussed who should be your main port of call for practicalities of working [at the respondent]. This role would usually be [KT] (assistant head: academic), in her absence, I will take this role, but if either of us feel it is not working we have undertaken to be honest with each other before frustrations arise and another solution will be found".

35. Although the claimant said in evidence that AW refused her a mentor "point blank" we find this inconsistent with the wording of the email dated 18

August 2020 which said she was willing to be flexible if the claimant had indicated that that was not acceptable. The claimant confirmed in oral evidence that she did not challenge the decision at the time.

36. AW thought that she would be the best point of contact as she could authorise purchases without having to refer to another member of staff; this removed potential delays. She bought everything that the claimant asked for in October 2020, following the advice from AtW (AW/45). She arranged for an iPad to be purchased even though it was not in the budget (AW/19, AW/23) (paragraph 62 below).

37. The claimant also had an NQT mentor. This was originally Tracy Layton (TL). Subsequently it was Caroline Mahan (CM). From half term (November 2020) CM became her disability champion because AW felt that CM would be more accessible. AW arranged for the claimant to have extra meetings a week with her NQT mentor and heads of department to reflect the extra help the claimant required (AW/39).

Issues 3.1(d), (e),(i),(j),(k), 6.3

38. The claimant asserts that up to 3 separate rooms should have been allocated solely to her as a reasonable adjustment;

a single teaching room (issue 3.1(e) and (i))

"a suitable alternative space" which she could use when she could not be in her single teaching room (3.1(j)),

a room that was suitable to use as a recovery space for sensory overload when she was not teaching (issue (3.1(d)).

39. We set out below the attempts that the respondent made to allocate rooms to the claimant. Before doing so however we consider the feasibility of allocating 3 rooms to the claimant.

40. We find that a school the size of the respondent did not have the capacity to offer dedicated rooms, especially during the covid period when bubbles were in place. The school has small class sizes (AW/9), occupies a site with a limited number of classrooms and runs at capacity (AW/10 and AW/40). During Covid the students had to be spread out so they could socially distance, with fewer students in each classroom (AW/40). None of the other teachers were given their own dedicated room (AW/22).

41. We also concluded that the claimant's vulnerability to sensory overload meant that even if she had been provided with rooms for her sole use the nature of the busy school environment, with staff and students moving around the school, meant that the claimant would still have struggled within the environment. Examples of the difficulties she faced are set out below: when people walked in to her room is set out at paragraph 55 and getting stuck on the stairs when moving around the school at paragraph 71.

Teaching room

42. AW attempted to allocate a room to the claimant for her sole use, which she could use when teaching and during free periods. Unfortunately, the covid pandemic made this very challenging.

43. It was originally envisaged that the claimant's permanent base would be room ICT17 and she could use that both when teaching and during free periods. In her email to the claimant before she commenced employment on 18 August 2020, AW wrote:

> "We discussed a permanent base for you when not teaching. Room 17 is the best choice for this room as it is not being used very much at all by other teaching staff. Dave is keen to swap you to Room 4 when things go back to normal, hopefully in the spring term, but for now Room 17 should be your base."

44. However, when the claimant started work in September 2020, covid regulations required the students to be "zoned", meaning that the teachers had to go to the students rather than students moving around the school to teachers' classrooms. Measures had to be put in place to avoid cross contamination of year groups; for example, Year 11 having to walk past Year 7 to get to a specific classroom would breach covid protocols (AW/41).

45. Despite this AW managed to make arrangements so that ICT 17 was maintained as a base for the claimant (AW/22), albeit that it was inevitable that other staff would sometimes need to use the room (it was a computer teaching room) or would sometimes enter the room thinking it was not in use. The claimant also had to teach in other rooms at specific times (216).

46. From early November 2020 when the regulations around class "bubbles" eased the claimant was given ICT 4 for her sole use as originally planned. AW was pleased to be able to offer this, describing it as "Your palace/playground, with all your meetings and no other lessons timetabled in there" (259). It was intended that the claimant would be in there both for lessons and for free periods.

47. There were issues with the lighting and the window blinds in ICT4. On 13 November 2020 the claimant sent an email to AW referring to two full blocks and two half blocks of lighting being "out", stating that her "hunch" was that the lighting was below the safe limits of illumination for using computers. She also referred to a broken blind saying that that was problematic when it was sunny, the room being too bright (279).

48. At the time the claimant did not refer to any difficulties she was experiencing. She raised these issues in the context of the room being unsuitable for the students. In oral evidence she explained that the low lighting was worse for her as she wore dark glasses.

49. AW said the delay in replacing the bulbs in the ceiling lights was because the site manager's resources were affected by covid. At that time, it was necessary for the site team to clean/wipe down three times a day. If AW had realised the matter was urgent, she would have asked for it to be prioritised, but she had no reason to consider it needed attention more

quickly than other matters in the site manager's book. She had bought a lamp for the claimant to use in the room (AW/47) and other adjustments were in place for the condition Irlen's syndrome (paragraphs 58 to 63 below). AW was not alerted to the particular problems the claimant now says she was experiencing.

50. At the probation meeting on 27 November 2020 (2 weeks' later) AW said that she would "fast track" the issues with the blind for the room and obtain a new bulb for the projector (326). There is no mention of the bulbs in the ceiling lights, and they may have been replaced by then. In any event the claimant did not return to work following that meeting.

51. We find that the respondent made a conscientious and genuine attempt, within the limitations brought about by the covid pandemic, to ensure that the claimant had her own room as a base for teaching. There was a period of approximately 2 weeks when the claimant said that the lighting was not appropriate in ICT4, but the respondent was not made aware that the claimant herself was affected by it and could reasonably have thought that the measures put in place for Irlen's syndrome would mitigate the problems.

Non-teaching room

52. The claimant was offered the room M3 as a "bolt hole" when ICT17 was being used during the first half term (AW/22). AW managed to establish that it was free every time another lesson was taught by a different teacher in ICT17. The claimant did not find this suitable because of the bright sunlight and broken blinds. Other staff, thinking it was not in use, would go in there. AW emailed the claimant on 25 September 2020 to say that she would arrange for blinds to be put up (217).

53. From early November onwards the claimant had sole use of ICT4 and could use it when not teaching. The claimant was also allowed off site when she was not teaching which would alleviate the problem if there was time for her to go home outside lesson time (AW/20, AW35).

Emergency room

54. The claimant asked for a third room to which she could retreat if she experienced a sensory overload. The respondent suggested two rooms at the beginning of her employment, the First Aid Room and the Deputy Head's Office, the deputy head being on maternity leave at the time.

55. The claimant did not consider either room suitable. The claimant said she needed exclusive use of a room that no one else would enter when she was experiencing sensory overload. The First Aid Room was used by others when they needed first aid, and she was troubled by the ticking clock noise caused by the boiler. She tried to use the Deputy Head's office, but someone came in unexpectedly and she was troubled by the smell of coffee.

56. After half term the claimant had ICT 4 for her sole use, (see paragraph 46 above). She did not have another suitable room she could retreat to the respondent having already offered the only 2 rooms available.

57. The tribunal concluded even if a suitable room had been available, it was not practical or desirable for the school to prevent other staff entering rooms; this would be contrary to good safeguarding practice and unsafe should be claimant herself need assistance.

Issue 3.1(g)

58. The claimant required adjustments in respect of the condition, Irlen's Syndrome. On the "Staff Data Verifications" form (11 to 18 sup) she stated that:

> "Coloured glasses and paper work well, except for about a fortnight around each solstice when the colour of the natural light is very different." (12)

59. She further advised that the condition was mitigated by tinted glasses partly but not entirely. She used display adjustments on her computer screen to reduce the amount of red light.

60. Initially AW and the claimant expected AtW to provide a large screen iPad which the claimant could adjust to take screen shots of students' work (so that she could see the work on a different coloured screen) (190-191). AW allowed the claimant to use her own mini iPad mini on a temporary basis while they waited for AtW to provide one (AW/17).

61. On 8 September 2020 AtW confirmed the equipment it recommended for the claimant's disability, including her visual disability (225). All items apart from overlays and the iPad were to be provided by AtW (225).

62. AW queried the decision not to provide an iPad (224). She did not receive a response and decided to proceed with purchasing it rather than allow further delay (224). The respondent purchased the iPad for the claimant on 8 October 2020, together with a touch sensor lamp, an architect desk lamp, colour changing light bulbs, and overlays (227-229).

63. The claimant was able to read documents if they were on green paper or if she could use overlays but experienced difficulty when completing reports. These were on the school computer as they were shared documents. She felt concerned she was getting behind with reports on 22 November 2020 although she did not explain why it was difficult for her, other than saying she had been feeling unwell (284/287). There is no suggestion that she was criticised for the delay or that it was a factor in her probation being extended.

Issues 3.1(f), 6.1.1, 6.2.1

64. The claimant contends that the respondent had a PCP that required routine medical appointments to be made outside working hours or during holidays.

She asserts that her condition means that she needed to see a medical practitioner reasonably promptly to advise and assist her.

65. The alleged PCP is set out in a handbook dated 2019 to 2020 (61 sup) and a later handbook in the main bundle dated 2020 (135). The wording in the 2019 to 2020 handbook which was supplied to the claimant states:

"Our expectations are that:

....

Wherever possible, you make routine medical and dental appointments outside of your working hours or during holidays. The only exceptions to this requirement will be in the event of an emergency or particular difficulty, in relation to hospital appointments (which are rarely negotiable) or to attend for ante-natal care if you are pregnant."

The wording in the 2020 handbook which the claimant said she did not receive stated:

"Employees should schedule appointments for the doctor, dentist etc. outside of School hours wherever possible. Where this is not possible, they should be arranged at the start or the end of the working day to minimise disruption. Advance permission to attend appointments during working hours should be obtained from the employee's line manager."

66. The policy was implemented to minimise disruption to the students' learning. It gives a discretion to the line manager to give permission to attend appointments in working hours. The claimant conceded in evidence that she did not ask for permission to attend a non-urgent appointment, saying 'it never occurred to me that I could'. She admitted that she did not know whether AW would have agreed if she had asked her. Moreover, the claimant accepted that she was able to attend appointments while off sick and during the holidays and she did not feel the need to ask for time off to attend a routine appointment.

67. AW said that she would have been 'flexible' if the claimant had asked to attend a routine appointment in working hours (AW/42). We accept AW's evidence that she would have allowed the claimant to attend routine appointments if she had asked. The reference to 'particular difficulty' and advance permission being required from the employee's line manager would have provided this flexibility if the claimant had asked.

Issue 3.1(h)

68. The respondent carried out a whole school risk assessment in relation to covid around September 2020 when the claimant started employment. The claimant complains that the respondent did not carry out a covid risk assessment which was specific to her until November 2020. She did not explain why she considered it to be necessary before then. She did not have 'clinically extremely vulnerable' status.

69. The claimant felt vulnerable from November 2020 when regulations were put in place stipulating that she would need to wear a mask at work. She was unable to wear a mask because of her condition (255). We find that as soon as those circumstances arose the respondent carried out a risk assessment. Prior to that the whole school risk assessment applied to the claimant.

Issue 3.1(l)

70. The claimant's disability causes her to be vulnerable to sensory overload.

71. On 4 November 2020 she sent an email to AW (272) referring to "a couple of sensory overloads yesterday including one where I got stuck on the spiral staircase". AW did not reply to this email; she was very busy at the time in the light of the covid pandemic (AW/48).

72. We find that it was reasonable for AW to view the email as information only, the claimant saying in the email that "Dave suggested I let you know too...I predict my background levels of overwhelm will settle down once I move to ICT4 next week but the rest of this week is going to be a bit wobbly". AW was aware that the following week the claimant was due to move to ICT 4 on the floor below.

Issues 3.1(m), 4

73. The claimant's probation period was extended by 3 months to 28 February 2021 on 27 November 2020. Performance issues were cited which the claimant says were directly related to the respondent's failure to implement adjustments that were within their control.

74. AW and Matt Capuano (MC), Head of Prep, had a conversation in which they agreed to extend the claimant's probation a day or so before they informed the claimant. In evidence AW referred to a "flurry" of matters that arose just after half term. The tribunal were taken to emails with details of complaints (265,276 and 324). In her statement AW said that they were not confident that the claimant's teaching style suited their students (AW/36), she was not making the students happy (AW/30), she gave a child a detention unfairly and they had to abandon a project because it was felt the claimant could not cope with the group work (AW/49).

75. There was a summary of concerns in the probation letter (325-326). It included concerns about 'brusque responses and interactions' with the students, students dropping out of the GCSE course, younger students not enjoying the course and ongoing frustrations with regards to lack of support from AtW.

76. The concerns were performance related and arose mainly from the claimant's disability. To an extent some of the performance issues may have been due to other factors, such as inexperience and aptitude for the role but it is clear, and was not disputed by the respondent, that the

claimant's disability was a significant cause of the need to extend the claimant's probation.

77. AW did not view the extension of probation as punitive. She did not expect it to come as such a shock to the claimant. She wanted to allow time for further training and put in place mutual 'observations' (other teachers observing the claimant's teaching and the claimant observing other teachers) (AW/2, AW/36, AW/49). AW still hoped that the claimant would succeed in the role. MC also maintained that there was no question of wanting to dismiss the claimant, they wanted to give her the support she required (MC/8).

78. We found AW's and MC's accounts of their thought processes at the time credible. The reason for the extension of the probation was to try and help the claimant succeed in the role. It was important to tackle the performance difficulties because of effect on children's education but AW and MC were still hoping that the claimant would be successful; putting plans in place for lesson observations was evidence for this, as were the attempts that they were continuing to address problems that the claimant faced in her working environment (paragraph 50 above).

79. The criticisms came as a complete surprise to the claimant. She had not been informed of any issues by her NQT mentor or Head of Department and she felt wrong footed and ambushed (SD/346). Following the meeting she went off sick and did not return to work.

Issue 3.1(n)

80. The claimant cannot read standard print (SD/272-273). The letter informing her of the extension of her probation (325-326) was sent to her by post. The claimant admitted in evidence that she had the technology to scan the letter, but she was too upset to do so. Accordingly, we find that it was in a format that she could access. Moreover, a copy of the letter was emailed as soon as requested (AW/50). The claimant maintained she was unable to bring herself to read the letter until the final tribunal hearing.

Issue 3.1 (o),(p)

81. The claimant complains that in February 2021, both within and outside the respondent's formal absence procedures, the respondent 'repeatedly' communicated the impact on the claimant's colleagues of the claimant's absence from work. The claimant says she felt so pressurised that she had no option but to resign.

82. The claimant went on sick leave following the extension of her probation on 27 November 2020. On 14 December 2020 the respondent commenced a sickness absence procedure. The respondent sent a letter to the claimant headed "Case Review" (331). It invited the claimant to a meeting (by Zoom) on 4 January 2021 to discuss how she was and what progress she was

making towards recovery. She was told that she could be accompanied by a trade union representative/work colleague/family member/spouse or partner.

83. The meeting did not take place as the claimant was too unwell. The respondent followed up with a further letter inviting her to a case review meeting. That letter was sent as a PDF attachment to an email dated 8 February 2021 (356). There was no letter dated 8 February 2021 in the bundle before the tribunal and the respondent has been unable to locate a letter of that date.

84. The claimant maintains that it was an email sent in February 2021 that prompted her resignation (SD/287-288). The claimant was unable to access a copy for the bundle as it was sent to her work email address.

85. During the course of her evidence AW concluded that a letter in the bundle dated 14 December 2020 (333-334) was the letter attached to the email dated 8 February 2021. It was incorrectly dated, having been based on the earlier letter dated 14 December 2020 (331). AW apologised to the tribunal for the confusion and explained that she must have been very busy at the time she sent out the letter.

86. The claimant was recalled to give her evidence on AW's assertion that the letter sent to her in February 2021 was the one erroneously dated 14 December 2020 (333-334). The claimant's evidence was that that letter was not the email or letter that prompted her resignation. She could recall being sent an email (not an email with a PDF attached) which was differently worded, although she could not record the wording. Her explanation was that she can remember having a 'visceral reaction' to the email at the time which she did not have when she read the letter that AW says was attached to the email dated 8 February 2021; therefore she says it cannot have been that letter.

87. The tribunal find that the claimant was mistaken. We found AW's explanation more credible, based on our own reading of the letter. The letter refers to a potential return to school on 8 March. It is therefore unlikely to have been sent in December 2020 as it would have referred to a return in January. We noted that it refers to a case review taking place on Monday 15 January 2021 which is not consistent with being sent in February 2021. We find it likely that the date should be 15 February 2021, that being a Monday as the letter refers to the case review taking place on a Monday.

88. The letter states: "Whilst Mr Holmes and Mr Woodcock have done sterling work in covering your lessons in an online situation, I will need to plan for our face to face return".

89. The claimant replied on 11 February 2012, stating she was sorry to read that her colleagues had been 'inconvenienced' and 'given the esteem in which I hold those colleagues, I feel my only option is to resign my post'. She also wrote "I need a less inaccessible working environment in order to thrive" (361).

90. The tribunal was not taken to any other evidence of the respondent communicating the impact of the claimant's absence on her colleagues. The claimant did not refer in oral evidence or her statement to any further conversations taking place in February 2021. The tribunal find that the only reference was in the letter attached to the email.

91. AW's reason for sending the letter and following an absence management procedure was an attempt to establish a timescale for the claimant's return. She was anticipating a move from online teaching to face to face teaching. The length of the claimant's absence would affect decisions about who would teach the students. The point of the comment was not to make the claimant feel awkward about colleagues covering her work, but to explain why it would be helpful to have an idea of time scale. If the claimant was going to be absent for a longer period more long term arrangements would need to be made; the school preferring not to rely on agency teachers (AW/52). The tribunal find that this was a credible explanation and accept that this was AW's thought process at the time.

Reason for resignation

92. We considered the evidence relating to the reason for the claimant's resignation. Although the claimant case is that it was the respondent 'repeatedly communicating' the impact of her absence from work on colleagues (issue 3.1 p) we have found, as set out above, that the respondent did not do that, and it was only mentioned on one occasion.

93. The claimant suffered from health issues from the beginning of her employment and the tribunal finds that this was a factor in her decision to resign. Shortly after the start of her employment on 15 September 2020 she emailed AW to say, "I am burning out fast" (203-204).

94. On 18 November 2020 (288-289) she emailed to say, "I have never been in this situation before" and referred to the "cumulative affect [sic] of environment" and AtW not supplying the technical support required. The claimant's fit note dated 16 December 2020 referred to stress due to lack of reasonable adjustments (SD/240-244).

95. The claimant was struggling to carry out the role owing to the nature of a school environment which caused sensory overload. She referred in her resignation letter to needing a less inaccessible working environment (361).

96. Although the claimant blames the respondent for the inaccessible environment and argues in submissions that the respondent implemented the adjustments she needed in a haphazard way, leading to her 'becoming more and more impaired' and to her constructive dismissal, we do not find this to be supported by our factual findings. We set out in our conclusions below our reason for finding that the respondent made all the adjustments that were possible within the school environment.

97. The claimant was upset by the extension of her probation period, and we find this influenced her decision to resign. The claimant said in evidence that

she 'trusted' AW until late November (the time of the probation meeting) but from the time of the meeting onwards she felt convinced that AW wanted her gone. 'I was convinced at the probation review that the headmistress wanted me gone' (SD/296).

98. In submissions the claimant argued the 'final straw' was the respondent sending the case management letter regarding the second case conference in February 2021 direct to her and not to her appointed representative, ET.

99. ET was first assigned to the claimant's case in October 2020. She spoke to AW on 13 January 2021. She maintains that she asked for all correspondence for the claimant to be sent to her. That was not confirmed in writing.

100. ET says that she could have dissuaded the claimant from resigning if it had been sent straight to her. The tribunal consider this to be speculation. In circumstances where the request to send correspondence direct was not confirmed in writing it was reasonable for the respondent to send the absence management letter to the claimant.

Exit meeting

101. An exit/handover meeting took place on 19 April 2021 (393). This was attended by the claimant and ET (she was her union representative at that time). There are no factual allegations arising out of this meeting which relate to the issues. ET did most of the talking and asked AW why she had not arranged an OH review and about her understanding of legal duties (SD/405-430).

The law

102. The claimant brings complaints of disability discrimination. The complaints fall to be considered under the Equality Act (EA) 2010. This section of our reasons sets out the relevant law under the EA 2010 together with respective provisions on the burden of proof.

Disability

103. Section 6 EA 2010 defines a disability for the purposes of the Act. The respondent accepts that the claimant had the disabilities of autism and Irlen's Syndrome at the relevant time and that the respondent was aware of the disabilities.

104. For a claim relating to the duty to make reasonable adjustments the employer needs to have knowledge of both the disability and the substantial disadvantage that the employee is subject to. That is an additional requirement to that required for discrimination arising from disability where the employer only needs to have knowledge of the disability.

Section 15

105. Section 15(1) EA 2010 provides:

> "15 Discrimination arising from disability
>
> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

106. It is for the claimant to establish facts from which the tribunal can reasonably conclude that there has been a contravention of s.15. Those facts include whether the claimant was subject to unfavourable treatment, a link between the disability and the "something" that is said to cause the unfavourable treatment, evidence from which the tribunal can infer that the "something" was an effective reason or the cause of the unfavourable treatment. If the claimant establishes those facts the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

107. Langstaff P explained the two step test required for a s.15 claim in Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305. He said it did not matter in which order the tribunal approaches these two steps:

> "It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability."

108. In Pnaiser v NHS England and anor [2016] IRLR 170 EA**T**, Mrs Justice Simler summarised the proper approach to determining s.15 claims as follows in paragraph 31:

> **"(a)** A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> (b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial)

influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport [1999] IRLR 572*. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, ...

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

109. In considering an employer's defence pursuant to s.15(1)(b) the question as to whether an aim is "legitimate" is a question of fact for the tribunal. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business, but it has to make its own judgment based upon a fair and detailed analysis of the working practices and business considerations involved.

110. The Equality and Human Rights Commission's Code of Practice on Employment (2011) ('the EHRC Employment Code') sets out guidance on objective justification. The aim pursued should be legal, should not be discriminatory in itself, and should represent a real, objective consideration. Although business needs and economic efficiency may be legitimate aims, the Code states that an employer simply trying to reduce costs cannot expect to satisfy the test (para 4.29).

111. 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 (para 4.31).

112. The Code also states (para 5.21):

"If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified."(para 5.21)

Sections 20 and 21

113. Section 20 EA 2010, so far as is relevant to the facts of this case, states:

> "20 Duty to make adjustments
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature 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.
>
> ...."

114. Section 21 EA 2010 states:

> "21 Failure to comply with duty
>
> (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
>
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
>
> ...."

115. Section 212 EQA defines "substantial" as meaning "more than minor or trivial".

116. The EHRC Employment Code identifies the factors relevant to whether an adjustment is reasonable or not (para 6.28). These include the extent to which it is likely to be effective, the financial and other costs of making the adjustment, the extent of any disruption caused, the extent of the employer's financial resources, the availability of financial or other assistance (e.g. Access to Work), and the type and size of the employer.

117. An important consideration is the extent to which the step will prevent the disadvantage. The more effective the adjustment is likely to be the more likely it is to be a reasonable adjustment; the less effective it is likely to be, the less likely it is to be reasonable.

118. The claimant must prove facts relating to the application of a provision, criterion or practice (PCP), the substantial disadvantage, and the adjustment which might have avoided that disadvantage. PCP is broadly interpreted. The Code says (paragraph 6.10):

"[It] 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."

119. The burden will then shift to the respondent. It might discharge that burden by proving there was no knowledge of the substantial disadvantage or by showing that the proposed adjustment was not in fact reasonable.

120. Consulting an employee or arranging for an Occupational Health or other assessment of his or her needs is not in itself a reasonable adjustment because such steps do not remove any disadvantage: Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664, EAT.

121. Physical features are defined in section 20(10) as including the design or construction of a building, features of the approach to, exit from or access to a building, and any fixtures, fittings, furniture, materials, equipment in or on the premises.

Constructive dismissal

122. Section 39 (2) EA 2010 provides, so far as is relevant to the facts of this case:

> "(2) An employer (A) must not discriminate against an employee of A's (B)—
>
> ....
>
> (c)by dismissing B;
>
> ....
>
> (7)In subsections (2)(c) .... the reference to dismissing B includes a reference to the termination of B's employment—
>
> (a)....
>
> (b)by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice."

123. Accordingly, dismissal includes constructive dismissal, which occurs where, owing to the repudiatory conduct of the employer, the employee is entitled to resign and regard herself as dismissed. Section 39 EA 2010 requires the tribunal to decide whether the claimant's protected characteristic (in this case disability) was the reason for the acts or omissions which amounted to a breach of contract.

124. Although not all adjustments are contractual in nature, an employer's actions and omissions in failing to comply with the duty to make reasonable adjustments under s.20 EA 2010 may be regarded as a breach of the implied contractual term of mutual trust and confidence, Meikle v Nottinghamshire County Council 2005 ICR 1, CA.

125. In Williams v Governing Body of Alderman Davies Church in Wales Primary School [2020] IRLR 589, at paragraph 89, HHJ Auerbach said that a constructive dismissal should be held to be discriminatory "if it is found that discriminatory conduct materially influenced the conduct that amounted to a repudiatory breach." At paragraph 90, HHJ Auerbach said that the question was whether "the discrimination thus far found sufficiently influenced the overall repudiatory breach, such that the constructive dismissal should be found to be discriminatory."

126. In Lauren de Lacey v Wechseln Limited trading as the Andrew Hill Salon UKEAT/0038/20/VP Mr. Justice Cavanagh considered the significance of the last straw principle in discriminatory constructive dismissal claims, stating at paragraph 68 that "in principle, a "last straw" constructive dismissal may amount to unlawful discrimination if some of the matters relied upon, though not the last straw itself, are acts of discrimination."

Limitation

127. Section 123 EA 2010 provides, so far as is relevant to the facts of this case:

> "123 Time limits
>
> (1) proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a)the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b)such other period as the employment tribunal thinks just and equitable.
>
> (2)...
>
> (3)For the purposes of this section—
>
> (a)conduct extending over a period is to be treated as done at the end of the period;
>
> (b)failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4)In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

> (a)when P does an act inconsistent with doing it, or
>
> (b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

128. The position relating to time limits for reasonable adjustments was considered by the Court of Appeal in Matuszowicz v Kingston Upon Hull City Council [2009] ICR 1170. There was no clear moment in time where the employer consciously decided not to make the adjustment in question. This engaged section 123(4) which specifies when a person is deemed to have decided to fail to do something. There are two alternatives:

(a) when the person does an act inconsistent with making the adjustment; or

(b) at the end of the period in which the person might reasonably have been expected to have made the adjustment.

129. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194 (CA) the court emphasised the difference between the date when the duty to make reasonable adjustments arose and the date by which an employer might reasonably have been expected to have made those adjustments, setting time running.

Submissions

130. We received written submissions from the claimant. We did not receive written submissions from the respondent. We considered the claimant's submissions carefully. To a large extent they did not align with the issues we needed to decide. Some of the factual allegations set out did not relate the issues.

131. We have referred to some of the claimant's submissions when setting out our factual findings above.

Conclusions

132. The tribunal worked through the list of issues at paragraph 12 above. We have applied the legal principles to our findings of fact to reach our conclusions in respect of the issues we had to decide.

133. We have addressed the issues in a different order, starting by considering the complaints of failure to make reasonable adjustments, then discrimination arising from disability and unfair dismissal.

Disability and Knowledge (Issue 2)

134. The respondent accepts that the claimant had the disabilities of autism and Irlen's syndrome and that it was aware of the disabilities at the relevant time.

135. The effects of the disabilities are set out in the list of issues at 5.2; vulnerability to sensory overload, a need for specific aids to assist with the processing of visual information, performance issues and sickness absence. The respondent did not put forward any evidence during the hearing that they were unaware of the effects or that the effects did not relate to the disability. We were satisfied that the information provided by the claimant at the time of recruitment demonstrates the respondent was aware of the effects.

Limitation (Issue 1)

136. Anything that happened before 11 February 2021 is outside the primary time limit (being 3 months before the claimant commenced ACAS conciliation).

137. Did the matters complained of by the Claimant amount to a continuing discriminatory state of affairs, beginning on 1 September 2020 and ending on 19 April 2021?

138. We found that there was not a continuing discriminatory state of affairs continuing until 19 April 2021. The last factual allegation at paragraph 3.1 (p) in the list of issues relates to events in February 2021. The claimant's case is that the matters set out at 3.1 (a) to (p) were discriminatory and individually or together led to her resignation on 11 February 2021. There are no events referred to after that date. An exit meeting took place on 19 April 2021 when there was a discussion about what had happened up to the date of resignation. No new allegations of discrimination arose from the meeting.

139. The alleged discriminatory conduct ceased at the latest when the claimant resigned on 11 February 2021. Consequently all events are out of time except the alleged dismissal, unless the tribunal find that the events prior to 11 February 2021 formed a continuing discriminatory state of affairs with the dismissal.

140. As it is relevant to the limitation issue, we identified a date when the alleged reasonable adjustments may reasonably have been expected to be made. Time for bringing a claim for reasonable adjustments starts to run from that date. We decided that if we had found adjustments ought reasonably to have been made the date from which they should have been made would have been mid-November 2020, shortly after the beginning of the second half term. The first half term was a time when Covid bubbles were in place and when the claimant and respondent were seeking help from AtW and gaining an understanding of what adjustments the claimant needed in that environment. It was reasonable for the adjustments to be put in place shortly after the start of the second half term, that is by 16 November 2020.

141. As events prior to 11 February 2021 are out of time the complaint of failure to make all the reasonable adjustments is out of time. The claimant can only be allowed to proceed with the claim if there is a continuing course of discriminatory conduct or if the tribunal exercises its discretion to extend time on the grounds that it is just and equitable.

142. As we did not find discriminatory conduct in respect of any of the allegations there was not a continuing course of discriminatory conduct.

143. The merits of the claim would be one of the factors we would take into account in deciding whether it would be just and equitable to extend time and our findings in respect of the merits are set out below. As we decide not to uphold the complaints on their merits the tribunal does not extend time.

Reasonable adjustments

144. We first considered whether the respondent failed to make reasonable adjustments. If we had found that reasonable adjustments could have been made that would influence our findings in respect of the s.15 and constructive dismissal complaints.

145. The tribunal is required to decide whether the respondent had the following provisions criteria or practices (PCPs):

> That medical appointments could not be arranged during work time except in an emergency;
>
> That a support mentor was not permitted and that communication on disability-related issues had to be with the headteacher.

Medical appointments (issue 3.1 (f))

146. It is for the claimant to prove facts relating to the PCP and that it caused her a substantial disadvantage. The claimant relied on the wording in the staff handbook (2019 to 2020). She said her condition meant she needed to see a medical practitioner reasonably promptly to advise and assist her. We accept that was the case.

147. We found that the respondent had a PCP regarding medical appointments. The PCP was not an absolute prohibition on appointments during work time. Appointments in work time were permitted where there was a ‘particular difficulty’. We found AW would have allowed the claimant time off during work time if asked; the policy gave her a discretion to do so.

148. As we have found that the PCP that the claimant said put her at a disadvantage was not in place the claimant’s claim for failure to make reasonable adjustments in that respect does not succeed.

Support mentor (issue 3.1 (c))

149. We found that the respondent did not refuse the claimant a support mentor. The support mentor was AW (the headteacher) until November 2020, and

that helped progress matters (such as supplying the claimant with an iPad) more quickly. From November 2020 the mentor was CM.

150. As we have found the PCP that the claimant said put her at a disadvantage was not in place the claimant's claim for failure to make reasonable adjustments in that respect does not succeed.

Rooms (issues 3.1 (d,e,l,j)

151. We considered whether a physical feature, a lack of rooms with suitable privacy and lighting arrangements, put the claimant at a substantial disadvantage compared to someone without the claimant's disability in that the claimant's ability to deal with sensory overload was impaired.

152. We accept that the claimant's vulnerability to sensory overload put her at a disadvantage, particularly in a busy school environment. Our conclusions mean that the respondent was under a duty to take reasonable steps to avoid the substantial disadvantage which arose. The respondent was fully aware of the difficulties and did take steps to avoid the disadvantage, including providing a room in which all the claimant's lessons were held.

153. We found that the provision of up to 3 rooms for the claimant's exclusive use in a school environment, particularly in times of the Covid pandemic, was not reasonable because it was too challenging to arrange within the confines of the school site. The school environment was busy with people walking in and out of the rooms. Even if all 3 rooms were allocated to the claimant it was impossible to reduce all triggers for sensory overload as the claimant would need to walk around the site and deal with students in the classroom.

154. The claimant said in her resignation letter that she needed a less inaccessible environment. We do not consider that the provision of rooms for the claimant would have made an appreciable difference to alleviating the disadvantage. The incident where the claimant got stuck on the stairs was an example of what could happen as she moved around the school. Working from home, which the claimant was allowed to do when she did not have lessons, was a more effective way of addressing the disadvantage but working solely from home is not feasible in a school environment.

155. When balancing the degree of disruption in providing 3 rooms for the claimant's exclusive use against the effectiveness of the measure we concluded that it was not a reasonable adjustment.

156. With regard to the lighting issues in ICT4 (issue 3.1 (l,k) we established that this was a temporary short-term situation. It did not put the claimant at a substantial disadvantage. We consider it was reasonable for the respondent to prioritise Covid safety measures rather than lighting, particularly as the claimant did not complain that the lighting problems were affecting her personally at the time. The respondent could reasonably consider that the other adjustments made for Irlen's Syndrome would address the problem and was not aware of the alleged substantial disadvantage.

157. As the respondent was not aware of the disadvantage and it was not a substantial disadvantage the complaint fails.

158. With regard to the need for privacy we find that it was not reasonable for the respondent to provide the claimant with a room in which she had absolute privacy. Not only was no such room available on the school site but it would counteract safeguarding and concerns about the claimant's own safety. This complaint therefore fails.

159. We are satisfied that the respondent made extensive efforts to mitigate the effect of sensory overload on the claimant, including the efforts we set out in respect of room arrangements above. However, a school is by its nature a busy environment and it was not possible to change the environment to remove all possible triggers. When balancing the likely effectiveness of the measure against the disruption caused, we find that the balance lies in favour of the respondent. Sensory overload was unfortunately inevitable. Setting aside 3 or even 2 rooms for exclusive use would have caused major disruption, particularly during Covid. We therefore found it was not a reasonable adjustment to take steps to avoid the disadvantage by providing the claimant with all the rooms she required.

Further complaints

160. We will consider issues 3.1 (a), (b), (g), (h) (n) and (l) under this section as the claimant has raised them as factual allegations, notwithstanding that the claimant has not identified a PCP in respect of these further complaints. We bear in mind that conduct that was discriminatory, either in respect of section 21 or section 15 EA 2010 may be relevant to deciding if there has been a discriminatory dismissal.

161. The failure to consult Occupational Health and Human Resources (issues 3.1 (a) and (b)) are not in themselves steps that it is reasonable to take to avoid disadvantage. They are potential means by which the respondent could have assessed what reasonable adjustments were necessary. We found that neither measure would have made a difference to the adjustments discussed; that was already being dealt with by AtW.

162. With regard to 3.1 (g), (failing to ensure that measures that were agreed such as providing coloured backgrounds for documents such as reports) we found that the respondent did not fail to provide coloured backgrounds. The claimant was supplied with an iPad and other aids to assist with visual processing. The issue was that the claimant could not use her iPad or the coloured backgrounds when writing reports which was part of her role towards the end of her time at respondent. She did not make the respondent aware of this difficulty. It would have been easy to do as she was in communication with AW at the time about the lateness of the reports. She did not explain why she was struggling, attributing it to her time off sick rather than visual difficulties. The respondent was therefore not aware it put her at a disadvantage. The respondent did not cite the late reports as a performance issue when it extended her probation. That is inconsistent with the claimant's assertion that it put her at substantial disadvantage.

163. With regard to 3.1 (h) (failing to carry out a risk assessment in relation to the claimant until November 2020), the claimant did not explain why there was a requirement to carry out an assessment. In submissions she argued the respondent should have done so as she was a disabled person. As with referring to OH and HR this is not a reasonable adjustment in itself. It could be used to establish what reasonable adjustments were needed but AtW was already considering this.

164. With regard to 3.1 (n) (formally notifying the claimant of the extension of her probation in a format that the claimant was unable to access) the claimant admitted in evidence she could read the letter, by scanning it, but she did not do so because she was too upset to read it. In addition, the respondent swiftly followed up with an email once it was brought to their attention. Therefore this factual allegation is not made out.

165. With regard to 3.1 (l) (failing to respond to the claimant's reports of the direct physical impacts of sensory overloads such as becoming stuck on the stairs mid-flight) that is not an adjustment. In any event it was anticipated that an adjustment that had been made, moving to another classroom on the ground floor, would alleviate the problem.

166. The complaints therefore fail as they do not constitute reasonable adjustments or discrimination arising from disability.

Section 15

167. In reaching our conclusions on whether there has been a breach of s.15 we made findings on the factual allegations set out at 3.1(m) (o) and (p) of the list of issues. These are the allegations where the treatment complained of is alleged to be caused by the 'something arising' from the disability; that is the claimant's vulnerability to sensory overload, a need for specific aids to assist with the processing of visual information, performance issues and sickness absence.

168. In respect of 3.1 (p) we did not find that factual allegation was made out. The respondent did not repeatedly communicate the impact on the claimant's colleagues of the claimant's absence from work because of sickness. It was mentioned in the context of planning going forward and there was no suggestion that the claimant was to blame. The claimant cannot therefore succeed in that allegation.

169. We accept that extending probation (issue 3.1m) and requiring the claimant to attend sickness absence meetings (issue 3.1 (o)) was ostensibly unfavourable treatment. We accept that both actions were caused by the claimant's disability. Extending the probation period was in consequence of performance issues that arose at least in part out of her disability. The sickness absence arose out of her disability; she was finding it difficult to cope with sensory overload. The burden of proof shifts to the respondent at this stage. The respondent accepts that it knew the claimant was disabled and has not denied that the reason for the unfavourable treatment was the 'something arising' alleged by the claimant.

170. We considered the conscious and unconscious thought processes of AW and MC in extending the probation. We were satisfied that the reason for extending it constituted a legitimate aim. The students' education was paramount. We found that they wanted to support the claimant to succeed in the role, using observations and training. This was a proportionate step to take. They were not intending to terminate her employment at that stage, although it was open to them to do so under the terms of the contract. They wanted to see if they could address the issue without taking that step and they were prepared to put training and observations in place to assist the claimant.

171. In respect of the sickness absence the respondent invited the claimant to 2 absence meetings (on zoon) which she did not attend. We find that managing sickness absence so the respondent can plan lessons is a legitimate aim. The situation was about to change from online teaching to face to face and the respondent wished to avoid using short term agency staff if possible. Inviting the claimant to discuss her illness, especially by zoom, was a proportionate way of achieving that aim

172. As the treatment was a proportionate means of achieving a legitimate aim the complaint of discrimination in respect of extending the probation and managing sickness absence does not succeed.

Constructive dismissal

173. The claim for constructive dismissal is based on discriminatory conduct under s.39(2)(c) EA 2010, the claimant not having sufficient service to claim 'ordinary' unfair dismissal under the Employment Rights Act 1996.

174. The tribunal found that there was not a dismissal under s.39 (7)(b) because we did not find conduct by the respondent that entitled the claimant to terminate the employment contract without notice. Although we accept that the claimant's disability and the extension of the probation period were factors that led to her resignation, we did not find the respondent in breach of the EA 2010 in respect of these matters or in respect of any other factual allegations which the claimant raised. As the tribunal has decided that there was no discriminatory conduct entitling the claimant to resign the complaint does not succeed.

Summary

175. Accordingly the complaints are not well founded and are dismissed.

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Employment Judge S Matthews

Date: 30 August 2024

Sent to the parties on:
4 September 2024

For the Tribunal Office

Recording and Transcription
Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/