EMPLOYMENT TRIBUNALS

Claimant: **A**

Respondent: **B**

Heard at: **Hull** **On:** **25, 26, 27 and 28 February 2025**

Before: Employment Judge Miller
Ms Y Fisher
Mr M Brewer

Representation
Claimant: Mr T Langley – Counsel
Respondent: Ms T Ahari – Counsel

RESERVED JUDGMENT

1. The complaint of unfair dismissal is not well founded and is dismissed.

2. The complaint of unfavourable treatment because of something arising in consequence of disability is not well founded and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a facilities manager. The respondent is an Academy chain which operates a number of academies including the one in which the claimant worked which was a secondary school.

2. The claimant's employment ended on 11 September 2023. She undertook early conciliation from 3 December 2023 to 19 December 2023 and presented her claim on 14 January 2024.

3. The claimant makes the following claims:

    a. That she was unfairly dismissed (s 98 Employment Rights Act 1996)

    b. That her dismissal and the failure to uphold her appeal were each unfavourable treatment because of something arising in consequence of her disability (s 15 Equality Act 2010).

4. The claimant relies on the disability of Epilepsy and the respondent agrees that the claimant was disabled by reason of epilepsy at all material times.

    a. The Claimant claims that

        i. Her impaired judgment; and

        ii. Her reaction (exhibiting frustration) to stressful situations i.e. stabbing a knife into the whiteboard

    each arose in consequence of her disability and medication

5. Although not explicit, the respondent has not sought to say that they did not have knowledge of the claimant's disability.

6. The hearing was held in person in Hull. We had witness statements from the claimant and for the respondent:

    a. TN – Principal at a different academy operated by the respondent and investigating officer

    b. HS - Regional Director for the Secondary Northeast Academies and chair of disciplinary panel

    c. JN - National Director of Safeguarding & Mental Health and chair of the appeal panel.

7. All witnesses attended and gave evidence. We had an agreed file of documents running to 880 pages and various other documents that were either agreed or admitted.

8. Both parties were ably represented by solicitors and counsel and we are grateful to them for their assistance in this case.

Findings of fact

Background

9. The claimant started working at the school on 1 December 2014 and transferred under TUPE to the respondent on 1 September 2016. By the time of the events that concern this claim the claimant had worked in her role for around eight years. We had limited details about the nature of the claimant’s role but it seems that she was responsible for on-site

maintenance and monitoring and reporting of such issues at school. There was a team of cleaners and two site assistants called RT and AB. RT and AB reported directly to the claimant and she described them as effectively caretakers.

10. The claimant reported to GS who was not based full time at the school.

11. The claimant has epilepsy and this was diagnosed in around October 2021. The claimant informed the school and her line manager at the time on 18 October 2021 and the respondent accepts that the claimant is, and was at the relevant time, disabled by reason of epilepsy, and that they knew about that.

12. In July 2022 the claimant's epilepsy started to get worse and the frequency of her seizures increased. An occupational health report dated 22 July 2022 records that the claimant was having an episode at least once a week and that on some occasions she has experienced shaking.

13. The claimant described the epileptic events as her being effectively frozen for up to a couple of minutes each time.

14. The claimant describes the seizures as short in duration – if they ever last for 5 minutes, then that would be very serious and an ambulance would need to be called. During a seizure, the claimant cannot move – her muscles become very tense which causes discomfort after. She might fall to the floor, depending on what she is doing at the time, and can experience urinary incontinence.

15. In the period after a seizure – the post ictal period – the claimant experiences confusion and memory problems. The claimant also described it as needing to wait for her true self to return. During this period the claimant uses routine activities to help her try to reset. The claimant said that these periods can last for a few minutes to a few days. The claimant says that she is not herself in this period. As we understand it, although there was no medical or expert evidence on this, the claimant's ability to think clearly is impaired – she referred predominantly to confusion and some memory problems. On occasions there is a reference to "fogginess".

16. Up to June or July 2022 the claimant had experienced a warning aura so that she was able to take herself to a place of safety before the seizure started. From this period the claimant started to experience seizures sometimes with an aura and sometimes without.

17. The claimant was absent from work because of ill health from 30 June 22 to 15 July 2022

18. The claimant was referred to occupational health and the report dated 22 July 2022 noted that the episodes are changing in frequency and severity/character; that the claimant was now having seizures without warning; that there was likely to be a good outcome once correct level of medication was identified, that there should be a seizure action plan with

discussions about lone working and who at the school was able to provide basic life support.

19. There was a return-to-work meeting on 2 August 2022 with GS, the claimant's line manager. We find there was a discussion about creating a seizure action plan, providing medication storage and it was identified that there should be no lone working, no working at height and start and finish communication arrangements.

20. On 5 August 2022 the claimant used a PC at the school to Google whether she would get into trouble if she took an overdose of work. This was caught by "smooth wall" which seems to be a firewall or similar application used at the school. This came to GS's attention and he contacted and spoke to the claimant about it. He followed it up with an email attaching details of the respondents counselling service. It is clear from the content of that email that GS did have a detailed conversation with the claimant about the incident.

21. The claimant had a further 2 absences from work on 25 and 28 August 2022.

22. An epilepsy management plan was created in around September 2022 which set out a number of matters: the claimant should avoid lone working and that radio support may be needed. It also said that if the claimant suddenly breaks her usual working routine (for example non-attending work with no explanation) her line manager must be alerted and a home welfare check organised.

23. On 17 October 22 the claimant was issued with formal management advice from GS relating to how she had spoken to a senior member of staff over the radio. The terms of the advice are not clear, but it related to relationship issues between the school and the property and estates department (where the claimant worked), complaints about services provided to the school and complaints about communication between staff.

24. The relevant part of the letter setting out the formal advice said:

> Despite your assurances you have failed to progress the matters that we agreed therefore I have no alternative but to issue you with a Formal Management Advice Note. Whilst this is not a formal disciplinary sanction a continued breach of our agreement may lead to formal action under the disciplinary policy.

25. We do not know what the agreement is, but we do find that the claimant was under the threat of disciplinary action if she did not improve or maintain her improvement in these matters.

26. In the meeting about the formal management advice on 17 October 2022, the claimant did say that she needed the support plan and suggested she could be signed off work for a month. It appears that nothing further came of that.

27. On 28 November 2022 it appears that the claimant had two seizures in one day. It is not clear whether the first one happened while the claimant was at work but she says, and we accept, that while at work she was struggling with the aftermath of the seizure. The claimant spoke to HB (operations manager) and told her about the seizure. Initially the claimant said that she felt sick and had a headache but did not wish to go home. She said that she did not want AB or RT to know about the seizures and the claimant explained on a number of occasions in her evidence to the tribunal that she felt that RT and AB did not want to know about the claimant's epilepsy. Although they had had a good relationship with the claimant before this time, the claimant thought they found it difficult to deal with her disability and her seizures.

28. In a conversation with HB, the claimant also said that over the weekend she had had thoughts of self-harming. She said that she had called the crisis team and was no longer having those issues. The claimant was shaking in her conversation with HB.

29. HB sent an email to PN, who is a senior manager in the property and estates team, setting out these issues and he replied:

> "I spoke with the FM [the claimant] this morning and she did say that if we preferred she could sign herself off until we had been to site and discussed the issues with her. I've told her that is not necessary and there is no need for her to be signed off if she is fit for work which she has confirmed that she is".

30. PN agrees in the email that the claimant needs to be monitored in the event of future seizures and says:

> "she has asked in the past for support to make sure academy staff and site staff can assist if she has an episode".

31. PN asked GS sought to try to persuade the claimant to work in the office.

32. Later that day the claimant had another seizure and decided that in retrospect it would be better for her to go home and she was taken home by SM, Principal of the school, and she remained off sick until Monday, 5 December 2022.

33. We find on the balance of probabilities that GS did contact the claimant on 30 November while she was at home because there is an email to that effect and it appears that he did have a response from the claimant.

The December incidents

34. On 5 December 2022 the claimant returned to work.

35. On 6 December 2022 the claimant deliberately hit and broke her finger with a hammer while at home. The claimant was experiencing severe

headaches, possibly migraines, which may have been a side-effect of her medication. It is not entirely clear why the claimant did this.

36. On many occasions including in the tribunal, the claimant said that the reason she hit and broke her finger with a hammer was to distract herself from the pain of the headaches. It is alleged by GS (although not in this hearing because he did not give evidence) that in fact the claimant told him on 15 December 2022 that she had had to hurt herself to avoid hurting someone else. We do not need to decide why the claimant harmed herself.

37. There was a return to work meeting on 7 December 2022. In that meeting the claimant's finger was strapped up because it was broken. The claimant did not tell GS how it had happened, she was vague because she did not want him to know. There were also some discussions about potential adjustments in that return to work meeting. They were predominantly about whether the claimant could hot desk in the admin office so that she was not alone. The claimant was not keen on this idea because of the embarrassment of having a seizure in front of other people which could include urinary incontinence.

38. On 8 December the claimant told SM that her hand injury was self-inflicted by the use of a hammer at home. SM sent an email to GS and PN about this and said that the claimant had told her that she was getting the necessary support. In the subsequent email trail GS said:

> "She was vague with me yesterday when I asked her about her hand. In her RTW she was just very thankful of the support given by the academy when she had her seizure on site".

39. HB asked about the need to complete a risk assessment in relation to the claimant being in the building and GS said that he would see the claimant the following week to discuss this further and the concerns about it on site. 8 December 2022 was a Thursday.

40. It appears that that conversation between the claimant and GS did not happen. On 14 December 2022 the claimant attended work very early to start gritting. It seems to be agreed by the parties that GS had asked the claimant to come in and do the gritting. One of the site assistants started at 7.30 in the morning the other started at 10.30. The claimant came in somewhere between 6.30 and 7.00 to do the gritting before anyone attended at school.

41. On the way into school the claimant found a knife lying at or near the entrance to the school. The knife was in total about 30 cm long, something like a bread knife and with a 19 cm blade. That morning the claimant was unwell. She had had a seizure at some point before attending work and had vomited on the way to work.

42. At this time the claimant's left hand was still bandaged from her hitting it with a hammer and she was pulling a trolley as a bag. The claimant picked

up the knife and put it in her trolley together with tissues that she kept with her for cleaning vomit.

43. The claimant went into work and the cleaners were there. She had an interaction with them which the claimant agrees irritated her. The cleaners referred to the claimant as “she” and expressed irritation about the claimant dirtying the clean floor or being about to dirty the clean floor. The claimant responded in an abrupt and irritated manner to the cleaners.

44. It is unclear exactly what happened next. What is clear is that the claimant did not report the knife that she had picked up to anybody. We pause at this point to note that the issue of knives in or near schools is a serious one. Although HS gave evidence about the high risk of and from knife crime generally and the deprived and challenging circumstances in which the school is situated, we are perfectly aware of the current issues of knife crime. The respondent accepts that the claimant was, by picking up the knife, initially intending to do the responsible thing removing it from the possibility of being used as a weapon near the school.

45. The claimant’s evidence is that she has patchy memory of that day because she was in a post-ictal state. She says though that she went into the school into her office and at some point shortly after arriving in her office put her hand in her bag to retrieve some tissues. She had forgotten that the knife was in there. On the basis of the claimant's statement to the disciplinary panel – that she then went into “work mode” – we find that she forgot about the knife because she was just simply busy getting on with other tasks. In any event when the claimant put her hand into the trolley, she accidentally stabbed one of her fingers on the knife.

46. The claimant then took the knife from the trolley and stabbed it twice into the whiteboard in her office. It was put to her that she did this out of frustration in cross examination and the claimant replied ‘apparently yes’. When she was subsequently investigated in the disciplinary investigation the claimant told TN that she did it out of frustration.

47. In her written submissions to the subsequent disciplinary hearing the claimant said:

> “I was feeling very low at the time. I had been having multiple seizures and I had just recovered from vomiting that morning (again). I felt like I was never going to get better, I had just been “told off” for unavoidably walking on a floor, I had a painful broken finger and now had stabbed myself on my good hand. I felt very sorry for myself.
>
> I was facing the whiteboard. I grabbed the knife and stabbed the board with it (I found out later I had done this twice) thinking out loud “can my life get any worse.””

48. AB said to the disciplinary investigator (and the claimant did not dispute what he said) that in fact the knife was not in the wall in the morning he only saw it in the afternoon after lunch. He said that he told the claimant to

remove the knife, but he did not take any further action himself (such as reporting it or removing it).

49. The claimant says that she went back out and did the gritting after stabbing the knife in the whiteboard in the morning.

50. AB and RT say that at lunchtime the claimant saw them when they were having lunch in the staff room. They are recorded as saying that the claimant was giggling or laughing and said that she had stabbed the whiteboard twice.

51. So it was not clear to the respondent in the course of its disciplinary investigations whether the claimant stabbed the knife in the whiteboard early in the morning when she first arrived before she did the gritting or sometime late morning around or just before lunch.

52. We find, on the balance of probabilities, that the claimant did do this early in the morning. Despite her memory problems, the claimant has been able to give a clear account of this in her representations to the disciplinary panel. Although that was some time after the incident, it was nonetheless a clear and positive account. Although the knife was in a prominent position, it is possible that AB simply did not see the knife or changed the time he saw it for his own reasons.

53. The claimant continued working that day and the knife remained stuck in the whiteboard in her office. Having heard what the claimant's job entails, we find that it is likely on the balance of probabilities that the claimant went in and out of the office a number of times that day. The knife was in the whiteboard at around eye level and it seems likely that the claimant would have noticed it.

54. We also find that the claimant is likely to have had a seizure later that day. She told the disciplinary investigator that although she had no recollection of it, a contractor had later asked her if she was ok and the claimant concluded this must have meant she had had a seizure. We weigh that, however, against the fact that the claimant worked throughout the rest of the day with no apparent reports of any problems and that AB and RT said she “seemed ok”. On balance, we find that there was a period during the day, between the claimant putting the knife in the white board and having a seizure when the claimant would have seen the knife in the whiteboard. In oral evidence, the claimant agreed that she had had time to report the knife before she had a seizure.

55. The claimant’s office was in an area which was not habitually used by students at the school but which was accessible to staff and students as it was next door to the safeguarding office. It was also potentially en route to a classroom. We find that the claimant’s office was visible from the corridor and from the courtyard outside. In the normal course of events people walking past the office either in the corridor or outside would probably have been able to see the knife in the whiteboard. The claimant says that the knife was likely to have been obscured by either her coat hanging on the

door and/or blinds being pulled down. This was not, however, raised at the disciplinary panel or appeal.

56. There was some debate about the extent to which staff and students would have been in proximity to the windows into the office whether in the corridor or the courtyard and whether in fact they would have been able to see through the window.

57. We find that, as this was a secondary school with people regularly moving around it and certainly with people being able to access the safeguarding office the knife in the whiteboard had the potential to be seen by someone walking past the office.

58. The claimant does not dispute that her actions that day were not appropriate.

59. Eventually that evening the knife was seen by SM and HB who were in the office looking for a torch. They took a photograph of the knife, removed it and informed senior academy staff.

60. The next day, GS came into the Academy to speak to the claimant about the knife incident from the previous day and the self-harming instant from 6 December 2022. There are no notes of this meeting, although there is a record made some time later in January 2023. The claimant says that the discussion took place in various locations around the site while the claimant was gritting/doing other jobs. In the January note, it is recorded that the claimant could not remember why she had not handed the knife in, or why she stabbed it in the whiteboard. GS records that

> "The gravity of the incident slowly started to sink in [with the claimant] and she got very flustered about her actions".

61. In his statement to the investigating officer (we have very limited evidence from GS as he did not attend to give evidence) GS said that in that conversation he explained what he'd been told the previous evening about the knife in the whiteboard and he said the claimant

> "seemed foggy when asked questions, couldn't give answers, seemed to close up a little bit".

62. He reported that the claimant could not recollect if she found the knife walking into work or on the grounds. He was unable to get any clear answers from her about that.

63. In respect of the self-harming incident, he told the investigating officer that he asked the claimant about this at the same time by which we assume he means same occasion as he asked claimant about the knife incident. He is recorded as telling TN that the claimant

> "disclosed conversation to counsellor she intended to hurt herself so she didn't hurt others".

64. The claimant said that she had no clear recollection of that conversation or what she said, but she denies saying that. The claimant's evidence to the tribunal was that she was confused that morning when she was speaking to GS and she would not have said that. On the whole, she had no reason to doubt GS, she thinks it likely that GS has misunderstood or taken the comment out of context. The claimant says the fact that GS referred to her as being foggy in their conversation supported her evidence that at the time she was in a state of post-ictal confusion having had a seizure.

65. The respondent has not called GS to give evidence and has been unable to explain why. However, the claimant has never cast any criticism on anything GS said except that he is likely to have misunderstood the context of the conversation on 15 December 2022. We find that the claimant did say words to the effect that she hurt herself to stop herself hurting others. In any event, she said something which we find GS interpreted as her saying that.

December 2022 – May 2023

66. The claimant was then sent home "for her welfare" on 15 December 2022 as it was near the end of term.

67. The claimant was not off sick nor was she suspended at this time. GS and SM visited the claimant at home on 6 January 2023. It was intended that the claimant would work remotely, although given her role there was only a limited amount of work that she could do. SM and GS collected the claimant's key card, explained that she was not allowed on site and enquired after her welfare.

68. There was an occupational health referral and we conclude that at some point around this time, if not on 6 January 2023, the referral would have been discussed with the claimant.

69. There was an occupational health appointment at the claimant's home with a Dr Thomas on 15 February 2023. We make the following findings about that report

    a. The purpose of the referral was to establish whether the claimant was fit for her role, whether she was well enough to attend on site working and if a psychiatric assessment could be carried out.

    b. Dr Thomas's opinion was that it was possible that headaches with increased severity, frustration and some depressive symptoms could occur as side effects of the medication that the claimant was on and that it was likely that the impact of the severe constant headaches was one of the main drivers for this frustration.

    c. He said that the headaches were associated with frequent vomiting indicating a likely migraine episode that on one occasion was so severe the claimant had to attend A&E.

d. In respect of the self-harming incident Dr Thomas says this seems to have been to distract the claimant from the severity of the pain, based on the claimant's reporting of the reason, and that the self-harm is not due to psychological symptoms of depression or a more serious mental health condition such as psychosis.

e. He recounted the history and circumstances of the knife incident and said that the claimant's mood was, at the time of their meeting, reported as good and it seemed good throughout the consultation. There was no pressure of speech which would indicate mania, he could not identify any concern regarding thought disorder which would be seen in a psychotic disorder and there were no delusional phenomena. He said that the claimant seemed to be functioning normally physically and emotionally and appeared cognitively sharp and was able to give a good history.

f. At that time the claimant reported having a seizure around once a month so probably once every 2 to 3 months there may be a seizure in work.

g. Dr Thomas's opinion was that the claimant was fit to return to work with some temporary adjustments to a phased return.

h. In respect of the knife incident he said

   "I do acknowledge the issues and behaviour that was seen linked to the two incidents were unusual. Particularly finding a knife, on carrying this into work and stabbing it into a board seems very unusual indeed. This was put down to *severe frustration* [our emphasis] at the time of headaches and this could be the case, but it is very difficult in retrospect to understand exactly the reasoning that went into this. At this point however [the claimant] has been at home with the temporary remission of seizures and a marked improvement in headaches and is functioning normally. I could not identify any current significant risk to her or others on returning to work and therefore I would support a return to work, but this would be with the observation of her progress to ensure that there is no more unpredictable or unusual behaviour; if this were the case then I think you would deem unfit pending a formal psychiatry assessment, again based on the information we currently have she seems to be quite stable without features of concerning psychological ill-health."

i. He goes on to suggest a phased return to work starting at 50% for two weeks before going on to 75% and says "if the headaches remain in remission and seizures are relatively infrequent then I hope that her resilience will remain good. If she starts to have increased physical symptoms then we would need to know whether she has the resilience to cope with any frustration, and close follow-

up with regular one-to-one catch-up sessions will be helpful within the workplace".

j. Although he says that at that point he did not feel they would need to arrange a definite review appointment it appears that the respondent decided to obtain the claimant's medical records and re-refer with the additional information.

70. We observe at this point that the parties were given permission at a case management hearing before Employment Judge Wade to produce a joint expert report specifically about the link between the claimant's disability and her behaviour. No such report was produced. We asked the claimant why and she said "it was not considered". This is not a meaningful answer and, in fact, is not an accurate reflection of the circumstances, The claimant was advised by lawyers and represented at the hearing at the time. It manifestly was considered.

71. There was a subsequent occupational health report dated 14 March 2023, the purpose of which was to revisit Dr Thomas' opinion with the benefit of medical records, on 14 March 2023 by Dr Brennan. The whole material part of that report says:

> "Many thanks for referring this employee for an occupational health opinion. We corresponded with their GP/Specialist and are now in receipt of their response.
>
> You may want to refer to the previous reports and Dr. Owen Thomas' very detailed and insightful report.
>
> We wrote to the G.P as was important to do so. The report references some previous health issues and particularly musculoskeletal.
>
> The GP's analysis is fairly simple stating that his patient has ongoing problems with headaches and dizziness, low blood pressure etc too. She was under the Cardiologist. The last period of certification was said to be June to July 2022.
>
> She is on a mix of medication including those for epilepsy (as per Dr. Owen Thomas' assessment) and other medication for headache too.
>
> Dr. Owen Thomas' assessment seems to have gone further and I am not saying necessarily more accurate or insightful, but certainly considered wider options".

72. We find that there was no medical evidence before the respondent at the material time or the tribunal subsequently linking the claimant's disability or the side effects of her medication with her incident of self-harming, or her act of stabbing the knife into the whiteboard. In fact, we interpret Dr Brennan's report as indicating that Dr Thomas' report was very thorough and there was nothing to add to it and nothing relevant from the claimant's medical records to add any additional insight.

Return to work and investigation

73. The claimant returned to work at the end of May 2023 on 50% hours for two weeks. At this point there had been no investigation into the knife incident and no decision by the respondent about why the claimant had acted the way she did. It is said that risk assessments were undertaken about the claimant's return to work and although they were in the bundle, we were not taken to them.

74. It seems to us surprising that the claimant should be allowed back to work in a school when she did not dispute that she had brought a large knife onto the school site, not reported it to any one senior or involved in safeguarding, and had stabbed it into a whiteboard and left it there for a whole day.

75. We asked the respondent's witnesses about the decision to allow the claimant to return to work. None of the people who gave evidence were responsible for line manging the claimant or the decision for her to return to school. They could not explain the decision but we find that HS certainly and JN probably, felt a degree of discomfort about that decision. As far as we could understand, it was a de facto decision of someone in the HR department on the basis of the Occupational Health reports.

76. When the claimant returned to work as part of the job she was required to undertake an audit of the premises with an external auditor. As we understand it the audit relates to the maintenance of the Academy.

77. In the course of that audit, the claimant told the auditor that she had tested the windows – by which we understand the claimant meant the window restrictors preventing the opening of the windows beyond a certain amount – with a hammer. This test with a hammer was carried out in around November 2022. The auditor was concerned about this, but did not include it in her audit report. Instead, she reported it directly and informally to the operations manager (HB) apparently out of concern for the claimant.

78. The claimant did not dispute that she had used a hammer to test window restrictors or that she had said something to the auditor about that. We have no direct record of what the auditor said.

79. It appears from the investigation interview with HB that she provided a document to TN (the investigating officer) setting out a number of additional allegations potentially including this one, but we have not seen that document. We note at this stage that there were additional matters raised around this time about the claimant relating to a fire alarm and fire doors but we do not need to consider those further as they were not upheld in the disciplinary meeting and do not form part of the list of issues.

80. The date of the incident with the auditor is unclear but the claimant then went off sick with anxiety shortly after it from around 11 July 2023 until 4 September 2023, so we conclude that it was shortly before 11 July 2023.

81. In the meantime, TN was appointed to investigate the allegations against the claimant. TN conducted interviews with HB, GS, RT, AB and the claimant on 5 July 2023. At this point the allegations against the claimant were

    - "On 14th December 2022 the Operations Manager & Principal of the Academy entered the site office to find a torch, and whilst speaking to one of the Site Operatives on the phone to aid in locating one, found a large knife stuck in the wall, with a further stab mark beneath it. The Site Operative had confirmed that the Site Manager had carried this out.

    - In the days prior to this incident the Site Manager had declared to her Line Manager, the Cluster Asset Manager, that she had taken a hammer to her hand in an act of self harm, "so she did not do it to others"."

82. We make the following findings about the investigation meetings:

83. The claimant was accompanied and had the opportunity to put her case and explain the situation.

84. In respect of the self-harming allegation the claimant said that self-harm was a short sharp shock and said it was just because of how bad the headaches were. She said it was nothing to do with the respondent when she whacked her hand with the hammer. It was never her intent to hurt anyone else – it was purely against her. She said she planned it all to the letter to hurt herself and that she had even told SM prior to the incident that that's what she was going to do.

85. The claimant described the impact of her epilepsy. She said:

    "The consultant decided to change my medication, in August 2022. The withdrawal from previous medication meant I had headaches they started they were fine to start with, then I had loads with more severity along with vomiting. That meant I had multiple seizures and vomiting and I couldn't keep medication down either. I didn't sleep either and work was hard. [SM] will tell you I am paranoid about the kids seeing me having a fit. I ended up calling my GP and going to A&E because of the headaches. It took a long time to sort this out. I did tell my line manager all this time I was in the back room I was having seizures I was panicking. The type of seizures I was having felt like I was frozen I couldn't move or talk, when I came round I couldn't move my hands. The migraines would then come. This [A] would stop existing, then [A] part 2 who doesn't remember her name appeared and I end up wandering around Immingham. [GS] dropped me off at home once and I couldn't work out how to use the key to my house I fell asleep on my doorstep".

86. Although the claimant described confusion and forgetfulness, as she did on a number of occasions in the tribunal hearing, she did not describe any pattern or other incidents of bizarre or unusual behaviour.

87. In respect of the whiteboard incident, the claimant gave the explanation that we have set out in this judgement. Specifically she said

> "As soon as I got to the office you walk past the site section before my area. I go straight into site staff mode I check what repairs have been done I forget what has been done I then forget about the knife. I put my hand in the trolley and stabbed myself I had vomit on my shirt I thought can anything else go wrong. I ended up picking up the knife and apparently twice I stabbed it in the whiteboard. I came in early as there were tight deadlines with kids coming in. I had the same mentality about breaking my hand, I had to check temperatures, do gritting otherwise I would get in trouble. I did all that then went back into the office, Alan came in and he had conversation with me. He said there is a knife in the board and that was basically it. I know for a fact a contractor maybe a window contractor phoned me to check I was OK as I must have had a seizure"

88. It is from this account, together with the written representations referred to above, that we concluded that the claimant had stabbed the knife into the whiteboard early in the morning. The claimant confirmed that she sat in her office with a knife behind her all day (accepting that there would have been periods when the claimant was working elsewhere on site). The claimant did not report the knife to anyone. The claimant said that it was pure frustration that caused her to stab the knife into the whiteboard.

89. Later on in the meeting, the claimant said

> "I have been sick for a long time before that, I felt so alone I felt like nobody here was listening. No one to talk to here, I had spoken to [SM] and I speak to the lads first thing in morning. Talking to my dog is better than staying in school. The only people I speak to tell me off for not doing things. There are no positive comments coming from people. At one point I was so sick in toilets I was vomiting on 3 walls. I still don't have the fire evacuation support sorted, I have to chase it. I have been sick in the office from pure frustration. I am not defending my actions I put a knife in the board yes, did I tell [SM] I don't know. I would never ever hurt the kids. I would never hurt any of my kids"

90. The claimant did not seek to argue at any point that she had acted reasonably in either harming herself or stabbing the knife into the whiteboard. The claimant did say that she had been experiencing vomiting and headaches since August 2022 but that since having a lot of time off she had been feeling much better.

91. In his investigation meeting, RT said that he did not see the knife and he referred to the claimant giggling or laughing at lunchtime as already referred to. He said that the claimant seemed okay before the knife incident and fine after.

92. In his interview, AB said that he saw the knife in the whiteboard at dinnertime. He also said that the claimant was laughing and joking saying

she stabbed the whiteboard. He said that he told her to remove the knife and assumed that she would do.

93. We have already addressed what GS said to TN as far as it is relevant except that GS said that he kept in contact with the claimant while she was away from work by phone call and text. The claimant disputes the amount of contact that she had from GS, but we do not need to make any findings about that.

94. As already indicated in her interview HB raised further allegations including the one about the auditor. TN did not speak directly to the auditor about that allegation. She did put the allegation to the claimant. Although all the interviews were on 5 July 2023, it appears that TN must have spoken to HB first because the audit allegation is referred to in the main interview with the claimant. The claimant did not deny making the comment to the auditor but said it was taken out of context and in the hearing the claimant explained that she had used a hammer as the first available tool to test whether it was possible to lever the window restrictors open as this was something that students might be inclined to do.

95. On 20 July 2023 TN prepared an investigation report setting out findings and recommending that there was a case to answer in respect of a total of five allegations.

Disciplinary hearing

96. The claimant was, on 9 August 2023, invited to a disciplinary hearing. The allegations were set out in the invitation letter and the claimant was given the right to be accompanied. The hearing was originally arranged for 16 August 2023 but was postponed until 8 September 2023. The claimant provided detailed written submissions to the disciplinary panel setting out her case in respect of the allegations. Particularly she referred to the medical background and the change in medication and side effects arising from that which included headaches and periodic vomiting.

97. The claimant produced some written representations for the disciplinary hearing. The claimant again explicitly agreed that she had stabbed the knife into the whiteboard, and said it was

> "due to frustration at the time due to the side effects of illness caused by change in medication required due to my disability. This was repeated vomiting, severe headaches and multiple seizures (with associated post-ictal confusion) - often at work".

98. In respect of the self-harm incident, the claimant said the intent was for a short, sharp shock to distract her form the pain she was in at the time. She said

> "After the knife incident about a week later, I was approached by my line manager [GS] to discuss the self harming and [GS] subsequently concluded from the discussion that I had hurt myself so as not to hurt

> others. Whatever I had said at the time, this was never my intent. Self harming was just that and nothing to do with anyone else. I believe that I expressed myself very badly when talking to [GS] because I was in the aftermath of a seizure (post-ictal confusion) and due to the genuine attempt to avoid discussing the fact that I had self harmed which I had, up to that point, successfully avoided out of embarrassment".

99. In respect of the window incident, the claimant put her conversation with the auditor down to being very anxious after a long period away from work.

100. The claimant referred to her medical treatment and the effects of her disability and the medication. She says that her medical support team will be able to confirm that her anxiety has been exacerbated by seizures. That evidence does not appear to have been presented to the disciplinary hearing and it was not presented to the Tribunal. She refers to low mood, increasing anxiety, vomiting and headaches as side effects or symptoms of her disability and medication.

101. In respect of the suggestion that RT and AB had seen the claimant laughing/giggling the claimant suggests that they might have misremembered and in fact it was in relation to when she had broken her finger – she tried to laugh it off, she said, as a careless accident.

102. In respect of the difference in the time at which the knife was seen by AB, the claimant said:

> "● I know the knife was on the board before he started. We are trained to notice anything out of the ordinary - a knife sticking out of the board would be hard to miss.
>
> ● When I came back from gritting he specifically asked me "why have we got a knife in the board" and my glib response was something like "doesn't everyone". This was because I was embarrassed and didn't want the discussion. [AB] has a tendency to gossip and I definitely didn't want everyone to know what I had done".

103. This suggests, and we find, that the claimant was at the point of that conversation fully conscious of what she had done and how it would be perceived. In any event, that was certainly what she said to the disciplinary panel in that document.

104. We do not set out in detail the whole of that document. In broad terms, the claimant recognises what she has done, apologises, and refers to the impact of her disability on her – that it causes her anxiety, that she had been trying to minimise the impact on her at work to her colleagues and that she was at the time of writing it broadly seizure free. The claimant also raises concerns about the level of support she believes she has had from the respondent for her disability. She discusses, and we heard evidence about, alleged failures to make reasonable adjustments in respect of lone working, support in the event of a seizure and where the claimant should be based.

105. This is not a reasonable adjustments claim and we do not need to make any findings about that for reasons we set out in our conclusions, below.

106. The claimant attended the disciplinary meeting on 6 September 2023. The panel comprised:

    a. HS (Regional Director – NE Secondaries)

    b. SP (NE Regional Finance Manager)

    c. DS (Cluster Asset Manager – London & SE).

107. AD, Interim Regional PD Business Partner from the respondent's Human Resources, attended to provide advice on the process and to the panel. TN attended as Investigating Officer to present the management report. There was also a notetaker.

108. The claimant attended with her trade union representative. By the time of the disciplinary hearing there were five allegations. We are concerned only with the knife incident, the self-harm and the window restrictors allegations.

109. The claimant does not take any issue with how the disciplinary hearing was conducted.

110. HS agreed in cross examination that the claimant had explained that confusion and memory problems were part of her condition, and that the claimant had had a seizure at some point before coming in to work on 14 December 2022 (although whether that was in the morning or the day before has never been made clear) and that it was possible that the events of that day were a result of the claimant's disability. However, HS said it was very unclear and that the knife had been left in the whiteboard all day, despite the claimant being told or asked to remove it and the claimant went about her daily tasks.

111. HS agreed that some of the claimant's behaviour on 14 December 2022 was related to her disability, but that she thought the main reason for the claimant stabbing the knife into the board was frustration.

112. HS did not agree that Dr Thomas' report draws a link between the claimant's physical symptoms and frustration.

113. It was suggested to HS that there were a number of occasions when the claimant could and should have been sent home – for example following the self-harm and following the smooth wall incident. HS said that you could not force someone to go off sick and the respondent did what they thought best at that time. She also said that if someone is unwell, they have a responsibility to report that. We also asked the claimant why she had not informed the respondent of her difficulties with confusion and memory during periods she was feeling better and the claimant said that at the time she did not recognise that she was not well. On balance, however, we find

that there were opportunities for the claimant to let the respondent know about the extent of her difficulties at the time.

114. The claimant's general evidence was that she tried to keep it from people, but that is not wholly consistent with her declaration to SM that she intended to harm herself, and the long conversation she had with a cleaner while off sick on around 30 November 2022 about the problems she was having at that time.

115. In respect of the disciplinary hearing, we find that the claimant had the opportunity to put her case effectively and she produced detailed written submissions that HS considered.

116. The disciplinary panel set out their decision in a detailed letter which we find represents their real reasons for the decision. In respect of the knife allegation they found:

> "You admitted stabbing the knife in to the whiteboard and bringing a knife that you found into the school grounds, you said that you were unwell that morning and forgot that you had a knife you could not recollect where you found it, cut your hand on the knife and out of frustration stabbed the knife in the wall, you think you may have had a seizure that morning and you said a change in medication had made your health deteriorate, however you did not report feeling unwell or your sickness to anyone or report finding the knife. The knife was left in the wall for a period of time.
>
> Panel outcome: In line with the findings of the disciplinary hearing, the allegation management process has been concluded and the outcome is as follows:
>
> The allegation is substantiated and it is gross misconduct of serious and deliberate damage to property and a failure of duty of care to protect pupils/students by placing them at a significant risk by bringing a knife onsite an act that is in breach of the Offensive Weapons Act".

117. The self-harm allegation was found to be misconduct and a low-level safeguarding concern so was not a part of the reason for dismissing the claimant.

118. In respect of the window restrictors incident the panel said

> "The auditor from the external company …, advised the Operations manager, post visit, that a comment made by [the claimant] was inappropriate and concerning. The comment was that [the claimant] checked the window restrictors with a hammer.
>
> You said that the Auditor would not know if the window was unbreakable and that's why you used a hammer. That it was the first tool you picked up. You had to reactively check the restrictors as you had not kept any records of previous checks and you used the hammer to do this. You

could not recall what you told the auditor as you said you were worried and anxious.

The panel heard that it is not usual to use a hammer to do this and that visual checks are conducted and if issues are identified then the appropriate tool would be used.

Panel outcome: In line with the findings of the disciplinary hearing, the allegation management process has been concluded and the outcome is as follows:

The allegation is substantiated and is gross misconduct of a serious breach of health and safety, misuse of facilities using a hammer to test window guards and bringing the school in to disrepute by telling an auditor that you had taken this action".

119. They concluded

> "I must advise you that your conduct for allegation 1 and 5 constitutes gross misconduct and your explanation for your actions was not acceptable. Having taken all of the facts and circumstances into consideration the panel has decided to summarily dismiss you from your employment with immediate effect".

120. We prefer HS's evidence that the panel went through all the options in the policy for dealing with gross misconduct – they did not just immediately leap to dismissal. However, they concluded that the incident with the knife was so serious that dismissal was an appropriate sanction. HS referred to the impact on the school in general if it became well known about the knife incident, and the safeguarding risks to children from even seeing the knife in such circumstances. It could be "triggering" for adults or children who had experienced domestic violence by way of example.

121. HS is a senior leader in the respondent. Even if those considerations were not explicitly set out as part of her reasoning, we consider that these concerns will have been, and we find that they were, part of her deliberations. We find that HS genuinely considered that the claimant's actions were not due to her disability and that she interpreted the report of Dr Thomas as not showing a link between the claimant's disability and/or medication and her actions.

122. In respect of the fact that the claimant was allowed to return to the school in May 2023, we prefer HS's evidence that the fact that the claimant had done what she had done was enough to amount to gross misconduct justifying dismissal, regardless of any future risk. We think, though, that in reality HS was not wholly comfortable with the decision to allow the claimant to return to school in that period in any event.

123. The decision was set out in writing but was communicated orally to the claimant in a meeting at the school. The claimant demonstrated an unusual level of frustration when receiving the outcome by deliberately repeatedly

hitting the leg of the table at which she was sitting. Although the claimant denied this – she said she was shaking and banging against the table – we prefer HS's evidence. Although this was not a matter that was taken into account in dismissing the claimant, it does in retrospect tend to support the respondent's view that the claimant's actions at the time of the knife incident were a reaction to frustrating circumstances unrelated to her disability. The claimant's condition was well controlled by that time and she was not experiencing the side effects she had described.

124. The claimant was dismissed with effect from 11 September 2023.

Appeal

125. The claimant was given the right to appeal and did so on 26 September 2023, setting out detailed grounds of appeal. The appeal referred to procedural irregularities and conflicting evidence and then addressed the allegations.

126. In respect of the window allegation, the claimant gave context for what had happened and then said that her actions were proportionate and did not present any risk. We do not need to address this any further as this was downgraded on appeal to a final written warning and the claimant does not take any issue with that outcome.

127. In respect of the self-harm allegation, we agree with JN's summary of the basis of the appeal that the claimant felt the outcome was too harsh and the evidence was unreliable. Although that appeal was not upheld, it remained as misconduct and was not a basis for the claimant's dismissal. We do not need to consider that any further.

128. The main issue in dispute was the knife incident. The claimant's grounds for appeal against her dismissal for gross misconduct on that basis were, as far as is relevant:

    a. The allegation of a failure of duty of care to protect pupils and students by bringing a knife onto site is categorically untrue

    b. The claimant clarified that she found the knife near the school

    c. That the CCTV had not been reviewed

    d. The claimant was unable to report the knife immediately as it was too early and no one senior was at school

    e. The claimant was unable to report the knife as she says she had a seizure that morning

    f. That AB's statement about timing was unreliable

    g. That the claimant was unwell at the time.

129. More generally, the claimant said that she was struggling with uncontrolled epilepsy at the time, which the respondent knew, and her behaviour was very out of character. The claimant said that she was now in full health and did not present a safeguarding risk and that she was not adequately supported by the respondent.

130. The appeal was heard by JN, Director of Safeguarding who chaired the panel together with PN, National Asset manager and in the claimant's line management hierarchy and the National Lead of Secondary Improvement.

131. JN had first heard about the knife incident in his role as national safeguarding lead shortly after it happened. He had advised on the management of the situation initially but had no involvement thereafter. The claimant took no issue with the fact of his previous involvement. At that time, JN did not advise that any external referrals needed to be made in respect of the claimant's actions – whether to the Local Authority Designated Officer, the DBS service or anywhere else.

132. The claimant was represented by her Trade Union representative, and we find that the claimant had the opportunity to present her case and make representations. In the hearing, the claimant said that she believed her epilepsy had not been taken into account, there was inadequate support in place from the respondent and that the actions of the respondent may amount to discrimination.

133. HS said that the disciplinary panel had taken into account the fact that the claimant has epilepsy but that the decision to dismiss the claimant was a proportionate means of achieving a legitimate business aim to protect the health, safety and welfare of others and property. In respect of the claimant’s appeal HS said, effectively, that the claimant was producing new and different information to the appeal panel.

134. The claimant also referred to her medical records evidencing the number of seizures she had. She said that Occupational Health did not have access to her records, although that seems to be inconsistent with the contents of the March 2023 Occupational Health report.

135. The panel did not uphold the appeal against the decision to dismiss on the knife allegation. JN set out detailed reasons in the appeal outcome letter. It is not proportionate to set out all the reasons, but we find that the reasons set out in the appeal letter reflect the actual reasons for the decision.

136. We find that the panel considered that the absence of CCTV was not relevant as it was not relevant as to whether the knife was found on or near the school. Once the claimant brought it onto the school grounds she had a responsibility to deal with it safely.

137. We also find that the appeal panel did consider that the claimant's actions presented a risk to pupils and students. JN’s evidence about this was not initially clear, but we find that there were three main considerations: damage to property (the whiteboard), the failure to report the knife at all, and the

potential risk to someone else in having to remove it. He also added a potential fourth risk of children or parents seeing the knife potentially being triggered (as referred to above).

138. He said that Dr Thomas' report was equivocal and we conclude he felt that there was insufficient evidence to link the claimant's disability with the knife incident. He did say that had the knife incident occurred during a post-ictal phase the outcome might have been different, but this was before the claimant had a seizure and the chronology was confusing. In any event, we understand him to have said that the knife should have been reported at some point, and not stuck in the whiteboard.

139. JN accepted that the claimant did not seem to continue to present a risk – he had not reported the claimant to the LADO, DBS or anyone else and said he would not consider the claimant unsafe to work in a school now.

140. We find that the appeal panel properly considered the claimant's appeal, all the evidence it had and came to the conclusion that the knife incident could not be explained by the claimant's disability – there was insufficient evidence to link the two things – and that the claimant had committed gross misconduct which justified dismissal.

Law

Discrimination arising from disability

141. Section 15 Equality Act 2010 says:

(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.

142. Paragraph (1)(a) includes the following elements.

143. The respondent must have treated the claimant unfavourably. Unfavourable treatment is usually straightforward to identify. There is no need for any comparison with another person – it is simply a question of whether the claimant was treated unfavourably. The unfavourable treatment relied on in this case is dismissed the claimant and then not upholding her appeal against dismissal. It has not been argued that those acts do not amount to unfavourable treatment.

144. The unfavourable treatment must be because of something arising in consequence of the claimant's disability. This part comprises of two

elements – there must be 'something arising', and that something must be 'in consequence of' the claimant's disability. The tribunal must ask two questions (*York City Council v Grossett* [2018] IRLR 746):

a. Did the respondent treat the claimant because of an identified "something"?

b. Did that something arise in consequence of the claimant's disability?

145. The question as to whether the "something" actually arose in consequence of the disability is an objective test. It is for the tribunal to assess on the evidence it has and it does not matter of the respondent was aware of the causal link at the time.

146. Mr Langley set out the law in his submissions which Ms Ahari adopted and we refer to his summary of *Pnaiser v NHS England* [2016] IRLR 170:

"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 …the causal link between the something that causes unfavourable treatment and the disability may include more than one link"

147. This can lead to a causal chain comprising several links.

148. Even if all these elements are present, the actions of the respondent will not amount to discrimination under this section if they can show that the unfavourable treatment of the claimant was for a legitimate aim and that treatment was a proportionate means of achieving that aim.

149. For an aim to be legitimate it must be real, lawful and not discriminatory. The aim relied on in this case is maintaining appropriate standards of conduct in the workplace, safeguarding employees and pupils, and the claimant agrees that this is a legitimate aim. The real question is whether the unfavourable treatment is a proportionate means of achieving that aim. Again, Mr Langley set out a summary of the relevant law which was agreed by Ms Ahari.

150. In *Hensman v Ministry of Defence* UKEAT/0067/14, the EAT, citing *Hardy & Hansons plc v Lax* said

"I accept that the word 'necessary' . . . has to be qualified by the word 'reasonably'. That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the Appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. 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, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject [the employer's] submission . . . that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances".

151. This means that the proportionality is an objective question for the tribunal. We must consider if the unfavourable treatment is sufficiently linked to the aim, and whether something less discriminatory could have been done instead.,

152. Finally, the actions of the respondent will not amount to discrimination if the respondent did not know and could not reasonably have been expected to know that the claimant had the disability on which the claim is based. The respondent agrees that the claimant was disabled by reason of epilepsy at the relevant time and they knew that.

Unfair dismissal

153. A person has the right not to be unfairly dismissed. Section 98 Employment Rights Act 1996 provides (as far as is relevant) that

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

…

(b) relates to the conduct of the employee

…

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

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

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

''A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'.' *Abernethy v Mott Hay and Anderson* [1974] IRLR 213, [1974] ICR 323:

154. In terms of reasonableness, *British Home Stores Ltd v Burchell* [1978] IRLR 379, [1980] ICR 303, provides valuable and regularly used guidelines:

''What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further".

155. It is trite law that the tribunal must not substitute its own decision as to whether the decision of the employer to dismiss the employee was fair but must decide whether the actions of the employer in dismissing the employee were within the range of reasonable responses of a reasonable employer.

156. If the dismissal amounts to discrimination, it is likely to be unfair but one does not necessarily follow form the other. In considering the fairness of the dismissal, the tribunal is required to consider what the respondent reasonably knew at the time, whereas the question of discrimination arising from disability is predominantly objective as explained above.

Conclusion

Discrimination arising from disability

157. The claimant's claim is that the decision to dismiss her and the decision not to uphold her appeal against dismissal were each unfavourable treatment because of something arising in consequence of her disability. We find, to the extent necessary, that being dismissed and not having the appeal against dismissal upheld are unfavourable treatment.

158. It is uncontroversial that the reason for the claimant's dismissal was what has been referred to as the knife incident and, initially, the comments to the auditor.

159. In our view both parties focussed on the knife issue on the basis that the respondent had agreed that the decision to dismiss the claimant also on the basis of the auditor incident was unsustainable. We heard evidence about it, predominantly on the basis that the initial decision did include the auditor issue.

160. We will address the auditor issue, but for reasons that will become apparent we address the knife incident first.

161. The finding of the disciplinary panel that caused them to dismiss the claimant was:

> "You admitted stabbing the knife into the whiteboard and bringing a knife that you found into the school grounds, you said that you were unwell that morning and forgot that you had a knife, you could not recollect where you found it, cut your hand on the knife and out of frustration stabbed the knife in the wall, you think you may have had a seizure that morning and you said a change in medication had made your health deteriorate, however you did not report feeling unwell or your sickness to anyone or report finding the knife. The knife was left in the wall for a period of time".

162. The first question is did these circumstances arise in consequence of the claimant's disability.

163. In our judgment, they did not for the following reasons.

164. We have found that the claimant was experiencing significant and very unpleasant symptoms or side effects from epilepsy or the medication for it. It does not make any difference to our reasoning whether the headaches, vomiting, confusion and forgetfulness were a direct symptom of epilepsy and the period after a seizure, or side effects from the medication, a consequence of changing the medication or a combination of some or all of those factors. In any case, they arise from the claimant's disability as part of a chain of causation

165. However, none of those side effects in themselves explain the acts of the claimant for that day of 14 December 2022. The claimant gave a clear explanation of how she was feeling at the moment she stabbed the knife into the wall. She was frustrated by how she felt and what she had experienced that morning. If she had then removed the knife and reported it, it may well be arguable that the frustration from the day, including the headaches and vomiting, arose in consequence of her disability.

166. However, the claimant then left the knife there all day. We simply do not accept in the absence of clear medical evidence that the claimant was in such a state of confusion throughout the whole of the day that at no point – even when prompted by her colleague – did she reflect on her actions and

take steps to report the knife. This is because the claimant worked – without any apparent issue – throughout the whole of the day. We have found that the claimant likely did have another seizure that day, but again that, or the aftermath of it, did not impact enough on her work for anyone to comment.

167. In our judgment, there was something else that caused the claimant to act in the way she did. We do not know what that was. We could speculate but that would be unfair and is unnecessary. In our judgment, Dr Thomas came to the same conclusion which is why he said, “it is very difficult in retrospect to understand exactly the reasoning that went into this”.

168. We are mindful that Dr Thomas did say that it is possible that headaches, depressive symptoms and frustration could occur with the medication the claimant as on. However, we agree with JN that this was far from an equivocal statement – Dr Thomas appears to be being cautious rather than expressing a firm view.

169. We weigh against that the fact that the claimant has produced no medical evidence to support the link in circumstances when her lawyers (at the preliminary hearing with EJ Wade) obviously thought expert evidence was an avenue worth exploring. The claimant has given an inadequate explanation for that, and the claimant has not produced anything from her doctors when she said in the disciplinary hearing that there was supporting evidence.

170. We draw adverse inferences from these facts which aid us in our interpretation of Dr Thomas’ report. The inference is that the claimant believed that expert medical evidence would not have been supportive of a link between the claimant’s disability and her behaviour.

171. We have also considered the fact that there was undoubtedly a period between July or August 2022 and December 2022 when the claimant exhibited unusual behaviour, and this coincided with her medication change and a change in the nature and frequency of her seizures.

172. However, correlation does not equal causation and we refer to HS’s evidence about how the claimant reacted to the disciplinary outcome. This tends to demonstrate a consistent or existing propensity to react in an extreme way to difficult circumstances and this was at a time when, again, the claimant's epilepsy was well controlled and she was experiencing no side effects.

173. When we consider all these factors, we go back and review the evidence about the claimant's act of stabbing the whiteboard in the first place. In the context of what we have set out, we conclude that the claimant’s acts of stabbing the whiteboard, leaving it there, and then telling her colleagues about it, were in fact just part of the claimant's existing propensity to react extremely to difficult situations. In the absence of any clear medical evidence demonstrating a link to epilepsy or the medication used to treat it, we find that the claimant has not shown that her conduct on 14 December 2022 arose in consequence of her disability.

174. We now go on to consider the auditor allegation. The specific allegation that the respondent said amounted to gross misconduct was

> “a serious breach of health and safety, misuse of facilities using a hammer to test window guards and bringing the school into disrepute by telling an auditor that you had taken this action”

175. This was in two parts - the first was actually testing the window with the hammer, the second was telling the auditor about it. In respect of the second part, we have heard no evidence from which we could conclude that there was anything about the claimant's disability that caused her to tell the auditor about that. The claimant was back at work by then and her epilepsy was well controlled with no side effects.

176. In fact, the claimant's explanation was that she panicked about the lack of records. This, as far as we can tell, was because she had been off for a long time which was because of the knife incident.

177. We have found that the knife incident itself did not arise in consequence of the claimant's disability. Consequently then, neither did her subsequent absence. Although it was said to be because of the claimant's wellbeing, the absence was undoubtedly because of the knife incident, whatever the respondent calls it.

178. In respect of the first part of this allegation, we heard little evidence that it was connected to the claimant's epilepsy other than that it occurred around the same time as the other unusual behaviour. This is not enough, in our view, to demonstrate that the claimant's decision to test the window restrictors with a hammer arose in consequence of her disability. The claimant’s explanation for it was that she quite reasonably wanted to test the restrictors and the hammer was the first tool that came to hand. On this basis, even the claimant does not say that this decision was connected in any way to her disability.

179. For these reasons, therefore, nether of the acts that formed the reason for the claimant's dismissal at the disciplinary hearing arose in consequence of her disability.

180. Similarly, the decision to uphold the appeal was because of the respondent’s view that the knife incident amounted to gross misconduct. Because the knife incident did not arise in consequence of the claimant's disability, the refusal to uphold the appeal was not because of something arising in consequence of the claimant's disability.

181. We considered whether it would be helpful in the event that we are wrong about the causal link, to consider whether dismissal was a proportionate means of achieving a legitimate aim. In our view, however, it is not realistically possible to do that in circumstances where we have said there is no causal link. We cannot balance any hypothetical discrimination against the pleaded aim where we are not able to set out the nature of the casual link (when we have found there is none).

182. For these reasons the claim of discrimination arising in consequence of disability is not well founded and is dismissed.

Unfair dismissal

183. It was not disputed that the reason relied on was conduct and we would find in any event that conduct was the reason. HS did genuinely believe that the claimant was guilty of misconduct for the reasons set out above. The question is whether the decision to dismiss the claimant was fair and reasonable in al the circumstances. The claimant relies on a number of matters in her claim form and we address each of them in turn.

184. The Respondent's decision to dismiss the Claimant was not fair and reasonable in all the circumstances and does not fall within the range of reasonable responses that a reasonable employer would make for the following reasons:

185. <u>At the time of her dismissal the Claimant had no live formal warnings in relation to her conduct;</u>

186. In our view this is not relevant. The respondent reasonably believed that the claimant was guilty of gross misconduct. We have set out our findings about the investigation and HS's decision. She was entitled to find that the acts of 14 December 2022 were gross misconduct. We are not satisfied that the auditor allegation was made out – there were obvious gaps in the investigation and the appeal panel reduced the seriousness in any event.

187. This question is really was the decision to dismiss within the band of reasonable responses. Given that we have found that the decision was not discriminatory, in our view it manifestly was. We gave serious consideration to the fact that the claimant had been allowed to return to work for 4 months (albeit that she was off sick for a substantial part of that time) in respect of how much of a risk the respondent really thought the claimant posed.

188. However, the absence of a risk of further misconduct (if that was in fact the case) does not detract from the fact that the claimant acted in a way that undoubtedly amounted to a repudiatory breach of contract. We have set out our findings and observations about the seriousness of knife crime, the nature of the area in which the respondent's school was situated and the risk to staff and pupils from even seeing the knife.

189. The absence of existing warnings in these circumstances is not relevant.

190. <u>The Respondent failed to consider mitigating factors such as those listed below when deciding that the incident amounted to gross misconduct;</u>

191. <u>The Claimant did not bring the knife into school herself, she found it outside on school premises and brought it in to prevent a pupil finding it;</u>

192. In light of our findings which we do not repeat, we cannot see any basis on which this amounts to mitigation. The claimant's motivations initially were

laudable – it was what happened afterwards which was the basis of the allegation. In any event, it clearly was taken into account in the appeal. JN's evidence was that he considered it and discounted it as relevant.

193. The act of the knife being stabbed into the whiteboard posed no risk to the pupils of the school;

194. This is not what the respondent believed and we have set out our findings about that. The respondent was, in our judgment, entitled to take into account the risk of "triggering" adults and children who had had experience of domestic violence or other knife crime. The knife was in an aggressive position – it was not just lying on a table. The view of the respondent was well within the band of reasonable responses.

195. The knife was left in the whiteboard in a restricted room which only limited personnel had access to with a fob;

196. We repeat our observations about the impact of seeing the knife and what the respondent's view of that was. We have also found that pupils and adults did have access to the corridor and this was what the respondent believed. This cannot amount to significant mitigation.

197. The room the knife was left in also had other tools such as hammers and

198. There was already another knife in the room which was used as a tool in other circumstances

199. We repeat our findings in the previous paragraph.

200. The decision to dismiss was not one of a reasonable employer considering all the circumstances and the Claimant's mental health at this time of the incident.

201. We do not agree for the reasons set out above in paragraph 187 – 188 (above).

202. The Respondent failed to carry out a fair investigation by not suspending the Claimant in accordance with their disciplinary policy.

203. In our judgment, the investigation was reasonable overall. Particularly in circumstances where the claimant did not dispute that she had stabbed the knife into the whiteboard and left it there and that she did tell the auditor she had tested the windows with a hammer. The respondent did all it was required to do.

204. The claimant has not explained why not being suspended impacted on the fairness of the investigation and we cannot see any way in which it did.

205. The Respondent has automatically proceeded to dismissal after deciding that the knife incident amounted to gross misconduct;

206. The Respondent did not consider any alternatives to dismissal or lesser sanctions. A reasonable employer in the circumstances would have considered, conscientiously, whether a lesser sanction such as a formal warning given the Claimant's service and clean disciplinary record was appropriate

207. We found as a matter of fact that HS considered all the available options and came to a well-reasoned conclusion. This was, in all the circumstances, a decision to which the respondent was entitled to come.

208. This is re-enforced by the thorough and well-reasoned appeal which did, in fact, reduce the outcome of the auditor allegation.

209. The fact that the Respondent relied upon their belief that the Claimant presented a risk to health and safety or the welfare or others or property (despite it being an isolated incident) affected the overall fairness of the dismissal.

210. Again, the respondent's reasoning on this point was subtle but considered. It was a decision they were entitled to come to and was well within the band of reasonable responses for the reasons we have already set out.

211. The Claimant's dismissal was substantively and procedurally unfair. In deciding to dismiss the Claimant, the Respondent's actions fell outside the range of reasonable responses of a reasonable employer in the circumstances.

212. For the reasons we have set out, we do not agree. The decision was a reasonable one which was reached after a reasonable investigation and was within the band of reasonable responses of a reasonable employer. For these reasons, the complaint of unfair dismissal is not well founded and is dismissed.

Approved by

Employment Judge Ian Miller

Date: 13 March 2025