EMPLOYMENT TRIBUNALS

Claimant: Mr J Mezgebe
Respondent: Christ's College Finchley

Heard at: Watford Employment Tribunal
On: 9,10,13,14 and 15 October 2025
16 and 17 October 2025 (panel only)

Before: Employment Judge Dick
Members: Mr D Sagar
Mr C Surrey

Representation
Claimant: Mr E Macdonald, counsel
Respondent: Mr M Magee, counsel

RESERVED JUDGMENT

The following is the judgment of the majority of the tribunal (Mr Sagar dissenting):

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

2. The complaint of failure to make reasonable adjustments for disability is not well founded and is dismissed.

The unanimous judgment of the tribunal is as follows:

3. The complaint of victimisation is not well founded and is dismissed.

4. For those parts of the complaint about failure to make reasonable adjustments which were out of time, it is just and equitable to extend the time limit. The remainder of the complaint about reasonable adjustments, and all of the other complaints, were presented in time.

5. The complaints of automatic unfair dismissal, direct discrimination because of race, and direct discrimination because of disability and detriment under section 44(1)(c) of the Employment Rights Act 1996 are dismissed upon withdrawal.

REASONS

1. Unless the context otherwise makes clear, the word "we" in these reasons refers to all three members of the tribunal and the words "the majority" refer to Employment Judge Dick and Mr Surrey.

INTRODUCTION; CLAIMS AND ISSUES

2. The respondent is a secondary school in North London. The claimant was engaged by the respondent as a Senior IT Technician. He began working for the respondent in December 2019 as an agency worker and was taken on as an employee in September 2020. He was dismissed on 25 February 2021, at the end of a six month probationary period.

3. The parties agreed that the claimant was disabled within the meaning of the Equality Act 2010 because of obstructive sleep apnoea, "OSA", at all material times, however the respondent's knowledge of that was in dispute. All agreed that on 18 May 2020, shortly after the start of the worldwide Covid-19 pandemic, the claimant had informed the respondent that he had sleep apnoea and that he was "clinically vulnerable". It was the respondent's case that that was all the claimant ever told the respondent about his sleep apnoea, or indeed any other impairment or health problem, and it accordingly denied that it knew, or should have known, that the claimant was disabled. The claimant's case was that, to the contrary, he had notified a number of members of the respondent's staff not only about the sleep apnoea, but that also that he was "*extremely* clinically vulnerable" (not simply clinically vulnerable) and that he had, on numerous occasions, asked to be allowed to shield, or to work from home, or for other adjustments to be made.

4. Between November 2020 and the end of his employment, the claimant took a number of periods of absence, including one which began on 29 January and continued until the end of his employment. During that final period of absence there was to have been what the respondent termed a capability meeting which, by virtue of the claimant's absence, never took place. It was the claimant's case that the dismissal amounted to unfavourable treatment because of a number of things which arose because of his disability: inability to attend work, the need to shield, and the need to work from home. The claimant also said that the respondent had failed to make reasonable adjustments by allowing him to stay at home or to work from home. He also claimed that the dismissal, and a number of other acts of the respondent, were detriments because he had done a number of protected acts. The protected acts included giving the respondent letters from the NHS which explained that he was vulnerable and needed to shield and also verbal requests for reasonable adjustments.

5. The respondent denied that the claimant had ever requested any reasonable adjustments and also denied that he had ever given any letters from the NHS to any members of the respondent's staff. There was no dispute that the claimant had been categorised as clinically *extremely* vulnerable during the course of the pandemic, but it was the respondent's case that he had never made the respondent aware of that. The respondent also said that any things arising had

not arisen in consequence of the claimant's disability.

6. The factual and legal issues for us to decide were, as the parties agreed, unchanged from the list of issues set out in the case management summary prepared by Employment Judge Quill following a preliminary hearing on 21 March 2022, save that a number of the complaints were dismissed upon withdrawal at the start of the hearing. The list of issues, omitting those complaints which were withdrawn, is appended to these reasons.

7. Before the evidence was called we explained to the parties that we would read the witness statements but that they should be sure to refer us to any documents of relevance in the agreed bundle during the course of the evidence or submissions. We did read in advance those documents which counsel suggested we should.

8. We were asked at the outset to deal with an issue about whether some evidence could be added, upon the respondent's application, to the agreed bundle. We made a ruling on that point, giving oral reasons. We have not been asked for written reasons for that decision and so those will not be provided unless a request is sent within 14 days of this document being sent out.

9. After reading the statements we heard evidence from the witnesses. In each case the usual procedure was adopted, i.e. their written statements stood as their evidence-in-chief and they were then cross-examined.

10. The claimant gave evidence and the respondent called the following witnesses:

    - Mr Samson Olusanya – the Head Teacher of the respondent school at the material time;
    - Miss Kate Maybanks (formerly Wainstein) – The HR and Staff Welfare Officer and Covid Co-Ordinator at the material time;
    - Mr Gary Davies – the Operations Manager;
    - Mr Chilli Reid – a parent Governor.

11. At the conclusion of the evidence we heard oral submissions from both counsel, supplemented by written submissions. We express our thanks to both counsel for their work on the case.

12. At the start of the case, we informed the parties that Mr Surrey, as well as being a former teacher, had obstructive sleep apnoea. The parties had no objection to Mr Surrey continuing on the case and we saw no reason why he should not continue on the case. We record here that Mr Surrey did not use his own personal knowledge about the condition of obstructive sleep apnoea in coming to his decision (and nor did the rest of the panel). Mr Surrey did ask the claimant during the course of his evidence whether he might be wrong to suggest, as he had, that sleep apnoea was a lung condition. The claimant did not dissent from that suggestion, though we did accept the claimant's evidence that at the material time he believed sleep apnoea to be a lung condition.

13. After submissions on day 5, we retired briefly to discuss the case and returned to indicate to the parties that we would be issuing a reserved judgment. We set a provisional date for a remedy hearing in case one should be necessary, but as will be evident from the above judgment, one is no longer necessary so that hearing will be vacated.

FACTS

14. We found the following facts on the balance of probabilities. Unless otherwise made clear they are the findings of all three of us. Where facts were not in dispute, we simply record them. Where we have needed to resolve disputed facts, we make that clear. We have not made findings on every factual dispute presented to us, but merely on those which assist us to come to a decision bearing in mind the list of issues.

Employees of the respondent.

19.1 As we have already said, Mr Olusanya was the Head Teacher at all material times. The Deputy Head was Mr Ali. Ms Joan Karanja was the HR Manager.

19.2 Although Ms Karanja and Mr Ali were heavily featured in the claimant's evidence, we did not hear from either or those witnesses. We did not hear formally in evidence about the reasons for those witnesses not being called. We were told in the course of submissions that Ms Karanja no longer worked for the respondent and that Mr Ali was abroad. Counsel for the claimant did not take issue with those assertions so far as they went but did point out that they were not necessarily good reasons for not calling those witnesses to give evidence. We deal below with our approach to that issue.

19.3 Mr Davies was the Operations Manager during the time of the claimant's employment. Before that role Mr Davies had done the role that the claimant ended up doing. As such, he supervised the claimant when he began work and was at least unofficially something of a mentor to the claimant. We accept the claimant's evidence that he believed Mr Davies to be his line manager but we accept the respondent's evidence that the claimant's line manager was in fact Mr Mike Hodges, the Assistant Head.

The claimant's previous work

19.4 We were provided with three written references relating to the claimant's work before he began work for the respondent. All three references related to his work as an IT Engineer, or IT Technician. Two covered brief periods of work – about a week or so – and the other covered a longer period of just over two months in 2018. All three references were unequivocally positive. We were not provided with any evidence about how similar the previous work was to the work that the claimant did for the respondent, but we infer that it would have been similar. Given the relatively short length of time covered by the references, we did not consider that they necessarily undermined the respondent's case as it

related to the claimant's performance (which we shall deal with in more detail below) given that even on the respondent's case the claimant's work for the respondent was perfectly satisfactory for at least the first few months of his engagement.

Start of the claimant's engagement, duties etc

19.5 In December 2019 the claimant was engaged to work for the respondent through an agency. Initially that was on a very short contract but he was eventually given an extended assignment until the end of August 2020. He was interviewed and appointed by the Head, Mr Olusanya, in respect of both his initial engagement and when he took on his role as an employee.

19.6 We accept the claimant's evidence that he was the only IT personnel running the IT Department, although there was no dispute that Mr Davies would step in on occasion where necessary given that he used to do the claimant's job. The claimant generally worked between 7 am and 3 pm but he worked outside of those hours on occasion. There was no dispute that the claimant worked on some Saturdays, voluntarily.

19.7 Although it seems clear that some of the work that the claimant did would have required him to be physically on site – for example, fixing printers and setting up computers – none of the respondent's witnesses suggested that it would not have been possible for him to work from home. So, clearly, even if there were aspects of the role that needed to be done in person, it would have been perfectly possible to accommodate the claimant working from home, presumably with others such as Mr Davies doing those parts of the role which required physical presence.

19.8 When the claimant was taken on as an employee of the respondent, from September 2020, his duties, and the work that he did, did not change. We find – and indeed there was no dispute about this – that up until September there had been no complaints about the quality of the claimant's work (with the possible exception of the issue about computers in the sixth form, on which see below). It is evident that Mr Olusanya was considering taking on the claimant as an employee as early as March 2020 (see page 497 of the bundle). The claimant completed forms relating to the application to become an employee on 3 and 10 August 2020, with Mr Olusanya as his referee. So, as Mr Olusanya conceded, he clearly had no concerns about the claimant's work before September. We were shown the forms the claimant completed. It should be kept in mind that although these were job application forms, they were of course being completed when the claimant had already worked for the respondent as an agency worker for some months. On the Equality and Diversity Monitoring form, when asked whether he considered that he had a disability, the claimant ticked the box to indicate "prefer not to say". It was the claimant's case that at that point he had not wanted to disclose a particular ongoing condition (which was not a condition in any way related to OSA). We do not accept the claimant's suggestion that having ticked prefer not to say, the respondent should have been on notice of the possibility that he had a disability. An

Equality and Diversity Monitoring form clearly has a different purpose. Another form we were shown was a post-offer questionnaire. Despite the claimant's evasiveness about this in cross examination, and his initially pointing to spurious points which he said bore upon the legitimacy or authenticity of the form, the claimant eventually accepted that he had completed the form. He did that on 3 August 2020. He ticked boxes to answer "No" to the following questions, amongst others.

> "Do you have any illness, impairment or disability (physical or psychological) that may affect you at work?
>
> Have you ever had any illness, impairment or disability that may be made worse by your work?
>
> Do you think that you need any adjustments or assistance to help you do your work?"

The claimant signed a declaration to say that he had completed the form to the best of his knowledge and belief and had answered the relevant questions as accurately and fully as possible

<u>17 March 2020 and the early part of the pandemic</u>

19.9 Moving back now to early 2020, at page 488 of the bundle was an email sent to the respondent's staff, including the claimant, by Mr Olusanya on 17 March 2020. It said this:

> "If you are in one of the "high risk" groups, you are kindly advised to seek advice from a doctor before attending work.
>
> Please do not take any risks with your health, anyone needing to refrain from work will be paid. Please contact Kate [i.e. Miss Maybanks] or me if you have any queries on this.
>
> PHE guidance below says those who are at increased risk include those who are pregnant…"

19.10 The email then contains what appears to be something cut and pasted from the PHE guidance. So far as is relevant it says:

> "We are advising those who are at increased risk of severe illness from coronavirus... to be particularly stringent in following social distancing measures.
>
> This group includes those who are [*sic*]...
>
> > chronic (long term) respiratory diseases, such as asthma, chronic obstructive pulmonary disease (COPD), emphysema or bronchitis
> >
> > …
> >
> > Diabetes
> >
> > ...
> >
> > being seriously overweight (a BMI of 40 or above)

...

19.11 No suggestion was made to us that the claimant ever responded to that email. We were shown examples of other members of staff who responded to the email and in each case, there was a response from Miss Maybanks answering the member of staff's query.

19.12 The first lockdown was announced on 23 March 2020. The school closed to all but a few staff and the rest were told to work from home. Initially, the school was entirely closed to children, although some weeks later some children – those with an EHC plan and who had parents who were key workers – began attending. So, from then, although there were some children attending the school, there were still far fewer than normal.

19.13 The day after the lockdown was announced, on 24 March 2020, the claimant received a message on his phone. The material part of the message said, "New rules enforced now: You must stay at home". We do not accept the claimant's suggestion that this message had any relation to his "vulnerable" status. It appears to us that it was a generic message sent to much of the UK population to inform them about the lockdown. We do accept that around this time the claimant went on the government's website and became worried. As the claimant put it, he was "petrified by this because being a person with respiratory illness, namely sleep apnoea and other medical conditions such as borderline diabetes, I felt that I had a higher chance of more severe Covid-19 symptoms." Putting aside for the moment whether it is strictly correct to describe sleep apnoea as a "respiratory illness", we accept that the claimant was genuinely concerned about the effect that Covid could have on him given all of his medical conditions as we have set them out above.

<u>General findings on credibility</u>

19.14 In addition to what we have already referred to above, it will be clear from what we write below that there were a number of other points on which we do not accept what the claimant said in his sworn evidence. We came to the overall conclusion that the claimant was not a reliable witness, whether in his written or his oral evidence. We therefore treated with considerable care any assertion which the claimant made which was not supported by any other source of evidence.

<u>April and early May 2020</u>

19.15 It was the claimant's case that the first protected act he did was giving a "NHS shielding letter" to Miss Maybanks in around April 2020 and telling her that he needed to shield due to "disability and black ethnicity". In his written evidence he said that he had given Miss Maybanks the letter when she came to school to collect the laptops (see below) on 21 April 2020. The claimant is clear about that date and clear about it being the date on which he says that he gave the letter to Miss Maybanks. And it is clear, from the following exchange of emails, that Miss Maybanks did indeed collect some laptops on 21 April:

19.15.1 First, on 17 April 2020 the claimant emailed Miss Maybanks to say:

> "I just saw [Mr Olusanya's] email for key worker pupils. Do you want me to come in when the sites open to either reset passwords or give out loaner laptops next week?"

19.15.2 Miss Maybanks replied on 20 April:

> "I can pop in tomorrow to collect. You are not required to supervise children, but can come in to work as long as you maintain safe social distancing. We expect to be open 9.30 am to 2.30 pm daily."

19.16 Three points of significance emerge from these emails in our judgment. First, on 17 April 2020, the claimant was, unprompted, volunteering to go in to the school. Second, the keyworkers' children must have started coming in to school around 20 April. Third, Miss Maybanks collected the laptops on 21 April.

19.17 That third point is significant for the following reasons. At page 937 of the bundle there was a note from the claimant's GP to say that on 30 April 2020 NHS Digital added the following codes to his medical record. "High risk category for developing complications from Covid-19 infection". It therefore seems unlikely to us that the claimant would have received a letter on 20 April or before 20 April telling him he needed to shield. The letter itself was not in the bundle, the claimant said because he had given the original to Miss Maybanks. Miss Maybanks, in her sworn evidence, was adamant to us that she had never been given a letter and that the conversation that the claimant set out had simply never taken place. In other words, the claimant had never said to her that he needed to shield because of disability and black ethnicity, or anything like that. The phrase "needed to shield due to disability and black ethnicity" was recorded in the agreed list of issues. The claimant's written evidence was that he told Miss Maybanks that he was at a high risk due to his sleep apnoea, borderline diabetic condition and also having various physical disabilities. He had a higher chance of dying from Covid-19 infection and therefore should be shielding or be allowed to work from home. The claimant said that after that conversation with Miss Maybanks he also spoke to Mr Ali (the deputy head) and Mr Davies together in a corridor. So, although we did not hear from Mr Ali we did hear from one witness, Mr Davies, who on the claimant's account would have heard the conversation. It was the claimant's case that he also told Mr Ali and Mr Davies that they should make reasonable adjustments if he could not shield at home and that they rejected this and placed pressure on him saying that he should not follow the NHS guidance. They had insisted, he said, that he should work at the school to keep his agency post. Like Miss Maybanks, Mr Davies denied any such conversation took place. We found Mr Davies to be an impressive witness and accept what he told us, that he had particular personal reasons why he would never have refused a request such as that. He also pointed out that he did not have the authority to refuse any such request. Any such decision would simply not have been his to make.

We reject all of the claimant's evidence about this. We do not accept that he provided a letter to Miss Maybanks, nor that he said anything about needing to shield or disability or anything of the sort to Miss Maybanks, to Mr Ali or to Mr Davies, in or around April 2020.

19.18 On 14 May 2020, the claimant was sent a text from the UK Government National Shielding Service to tell him to expect a call from them to "register any needs..." (the rest of the text was not reproduced in the bundle). Given that text and the 30 April record we have just referred to, and also the 4 November letter which we will set out in more detail later on, we accept the claimant's evidence that shortly after receiving that text he received a telephone call instructing him to shield. We do not however accept the claimant's evidence that he showed the text message to Mr Ali and Mr Davies and asked them to make adjustments to his schedule or to allow him to shield. Again, Mr Davies denied that any such conversation took place and we accept his account.

May 2020 survey

19.19 On 18 May 2020, Miss Maybanks sent an email to all of the respondent's staff asking them to complete a survey in preparation for a face-to-face return planned for years 10 and 12. The claimant completed the form at 11.29 am on 18 May. The first question was:

> "Are you defined as "clinically vulnerable"? If yes, please select which category you fall into."

19.20 One of the options was "no". Another option, which the claimant picked, was:

> "Chronic (long-term) mild to moderate respiratory diseases, such as asthma, chronic obstructive pulmonary disease (COPD), emphysema or bronchitis."

19.21 The next question asked:

> "Are you defined as "clinically extremely vulnerable"? If yes please select which category you fall into."

19.22 The claimant selected "no". The bottom part of the form said:

> "Please add your comments if you would like to expand on your above answers."

19.23 The claimant recorded:

> "Sleep apnea [*sic*]*"*

19.24 In his oral evidence the claimant initially sought to suggest that he would never use that American spelling of apnoea and that therefore someone had in some way forged this form on behalf of the respondent. After reflecting on the matter over the lunch adjournment the claimant withdrew those remarks. We consider that before the adjournment the claimant had not been honest in his evidence. He knew full well that he had completed that form and yet had made a serious allegation of fraud against the

respondent. This is one of the matters that substantially impacted our assessment of his credibility as a witness. He sought to deny what was obviously true. We find that he completed the form just as we have set out and that he quite deliberately ticked the box to indicate that he was not clinically extremely vulnerable.

19.25 We conclude that until the end of August the claimant wanted to attend work because he wanted to show willing in order to secure the permanent role. We base this finding upon that deliberate decision to tell the respondent he was not clinically extremely vulnerable – which would of course mean he could not have come into work – and also upon the email we have already set out which shows the claimant clearly volunteering for work. We further base that finding on the claimant's own oral evidence to us about wanting to be out of his home (see para 19.55 below).

19.26 Regarding the claimant's response to 18 May 2020 survey, Miss Maybanks told us, and we accept, that she had read the claimant's response and, not knowing what sleep apnoea was, had done some of her own research on the internet. We were shown at page 808 of the bundle a screen print from the Guy's and St Thomas' NHS Foundation Trust's website. Although this screen print had been obtained relatively recently, we accept Miss Maybanks' evidence that, to the best of her knowledge, the print represented what she found at the time that she had looked. Under the heading: "Does obstructive sleep apnoea increase the risk of Covid-19" the following is recorded:

> "There is no strong evidence that obstructive sleep apnoea (OSA) increases the risk for getting or developing complications of coronavirus… One study suggests an increased risk of complications. However, many patients with OSA may also have other long-term health problems that could increase the risk such as obesity, high blood pressure and diabetes…"

19.27 It is not clear to us whether the one study referred to there is the study that we examine in more detail below.

19.28 On the following page of the bundle was another extract which appeared to have come from the British Thoracic Society's website. Miss Maybanks was unsure whether she had read that particular extract at the time so we are not satisfied on the balance of probabilities that she had. In any case, that second extract is of little relevance to the case in that, on the subject of coronavirus risk, it does not add anything to the Guy's and St Thomas' extract we have just described; most of the extract concerns advice about the use of continuous positive airway pressure equipment used by people who have obstructive sleep apnoea.

19.29 We were shown clear evidence in the form of a number of emails which, in our judgment, shows that during 2020 and early 2021 the respondent was providing its staff with regular updates about the measures it was taking in relation to the pandemic and requesting them, the staff, to provide any medical information which was relevant to their particular situations.

1 June email

19.30 Further evidence for what we said above at paragraph 19.25 is to be found in an email sent on 1 June 2020, at page 508 of the bundle. The claimant was one of a number of recipients. The email was sent by Miss Maybanks. It said so far as is relevant:

> "You have been sent this email as you have all volunteered yourselves to be on site and likely to be so over the next two weeks, involved operationally or supervising children.
>
> I would be grateful if you could complete the short survey below on your current situation, so that we can further plan and evaluate our strategies on keeping our staff and pupils safe."

19.31 The claimant did not respond to this email. With the exception of the 18 May survey to which we referred above, there is no written record anywhere of the claimant notifying the respondent in any way about his health or making requests to anybody – his line manager, the head teacher, the deputy head – about reasonable adjustments or shielding.

September and early October 2020

19.32 On 17 September 2020, Miss Maybanks told us, she had a brief conversation with the claimant in a corridor outside her office and asked him how he was; he complained that he was waiting to see his physiotherapist and so she sent him "SAS" details (SAS was a "virtual GP service" available to the respondent's employees). The email, at page 566 of the bundle, confirms that Miss Maybanks sent the claimant an attachment called Wellbeing Poster 2019, on that date We accept that that attachment would have contained details of the virtual GP service which the respondent had reminded its employees about in an earlier email (17 March 2020, page 490 of the bundle). We accept Miss Maybanks' evidence that a conversation such as she described took place on 17 September 2020 about the claimant's health and we would have expected that had the claimant wanted to raise his clinically vulnerable status or need to shield, he would have taken the opportunity to do so. But he did not.

19.33 It was the claimant's case that on 28 September 2020 he received another letter from the NHS identifying him as a clinically extremely vulnerable person at high risk of severe illness from Covid-19, advising him to shield and work from home. The claimant further said that he gave his copy of the letter to Ms Karanja on 29 September 2020, which was why he was unable to produce a copy. He then informed Miss Maybanks, Mr Ali and Mr Davies about this in person. He was later told, he said, by Mr Ali and Mr Davies that they could not allow him to shield at home or to make adjustments to his work schedule. We do not accept what the claimant says about what he told any of those four people and what they said to him. Although, as we have said, we did not hear evidence from Ms Karanja or Mr Ali about it, both Miss Maybanks and Mr Davies were firm and clear in their denials that any such conversations had taken place and

we prefer their evidence.

19.34 It was the claimant's case that during the second week of October 2020 he felt unwell and informed Mr Davies and Mr Ali about that, and that Mr Davies told him he did not look that sick and not to worry about being in close contact with a member of staff who had tested positive for Covid-19. He also said that on 15 October he was unwell and had to leave school early. Before doing so, he said, he told Mr Ali and Mr Davies that he was identified as an extremely vulnerable person with underlying health issues and should be allowed to work from home or to shield. He says that request was refused. He also says that having left early on 15th he did a lateral flow test with a negative result. He was still unwell on 16th, and when he went back to school on 16th he asked Mr Davies about doing a PCR test but Mr Davies told him not to worry and to continue working. Mr Davies, in his evidence, denied that any of the conversations that we have just referred to took place and we accept Mr Davies's evidence on this point. We do not accept the claimant's evidence that he was told he was still under the probation period and needed to be at school to complete that process. We do accept that the record shows that the claimant left school early on 15 October. We do not accept that the claimant complained to Mr Ali on 16 October 2020 that he needed to be shielding and was not allowed to do a PCR test. We do accept that the claimant may, as he says, have been advised by 111 to do a PCR test having returned a negative lateral flow test. But we do not accept that the claimant made any request to Mr Davies or to Mr Ali to be allowed to shield or to work from home. Indeed, all of the evidence we saw and heard led us to the conclusion that any member of staff who made a request to the respondent to shield and or to work from home had that request granted, and was paid while they were away.

<u>The data breach</u>

19.35 We accept the claimant's contention that in late 2020 Mr Ali informed him there had been a data breach and that he, Mr Ali, would be doing an internal investigation – we know the investigation happened (see below), so it is likely that Mr Ali informed the claimant about it. We do not however accept the claimant's uncorroborated evidence that during the course of this conversation the claimant asked Mr Ali whether this was a punishment for him raising health concerns and that Mr Ali became angry and told him to leave his office

19.36 Mr Davies told us that on 15 October 2020, during a remote staff briefing using the video call service Google Meet, he noticed there was an unfamiliar name on the invite list. Mr Davies investigated the respondent's logs and discovered that the person who had been added was one of the pupils at the school. Mr Davies also discovered that the pupil was added at precisely the same time as five members of staff. The addition of the pupil had been an error whereas the addition of the staff had been intended – it was in response to a "ticket" that had been raised. Although Mr Davies at one point described the staff briefing as taking place on Zoom rather than Google Meet, we accept that he was using the word Zoom

there in a generic context, much as someone might use the word hoover to describe a vacuum cleaner. We reject the implied suggestion made in the claimant's witness statement that Mr Davies had been responsible for the error. The logs clearly show that the pupil was added at precisely the same time, to the second, as the five members of staff had been added. All six were clearly added by the same person. That person was the claimant. The claimant himself accepted that he had added the five members of staff. We also note that the implied suggestion that Mr Davies had been part of some sort of conspiracy to frame the claimant for the data breach was explicitly not put by counsel for the claimant during the course of cross-examination of Mr Davies.

19.37 As we understand it from the evidence, the ticket (i.e. request to add the members of staff) would have shown up on a platform called Spiceworks, whereas adding the new people would have taken place on a different Google platform. We reject the claimant's suggestion that, as the logs show he was on Spiceworks, he could not also have been using the other platform. We consider that a deliberate attempt to pull the wool over our eyes. As Mr Davies explained, it is quite possible for someone to have two windows open at the same time, one for each platform. What quite clearly happened, as the respondent's investigation was to find, was that the claimant accidentally added the pupil. The claimant's attempts during the course of the investigation and, indeed, during the course of these proceedings, to suggest that Mr Davies and/or hackers could have been responsible, were not credible.

19.38 On 21 October 2020, the claimant was sent an invitation to attend an investigation interview to address the concern that on or about 7 September 2020, he had added the pupil to the internal staff circular email account. The meeting eventually took place on 30 October 2020. It was conducted by Mr Ali with the claimant of course present, as well as Ms Karanja. We were shown a lengthy written record of the meeting, which shows that, despite at one point conceding that he could have made the error, as we have said, the claimant went on to suggest that hackers or others could also have been responsible.

19.39 Note that other significant events, unrelated to the data breach, occurred between 21 October and 22 November but for the sake of narrative clarity we deal with the rest of the events relevant to the data breach before returning to early November further below.

19.40 Having also interviewed Mr Davies, Mr Ali produced a written report headed "Disciplinary investigation report" dated 22 November 2020. The report noted that the matter of concern was regarded as a potential breach of the respondent's Data Protection Policy because sensitive data had been shared with the pupil, who had confirmed he had received emails he should not have (though he had also said that he had not read any and had deleted them). Mr Ali concluded that there was a disciplinary case for the claimant to answer and suggested that the formal disciplinary procedure be invoked and the claimant given an opportunity to respond to the allegation that the email address had been added with the claimant's

actions resulting in a "reportable data breach".

19.41 The matter was taken up by Mr Olusanya who spoke to the claimant on 2 December 2020 and wrote to the claimant with an outcome on 4 December 2020. Mr Olusanya described the meeting as an informal meeting (in contrast to the formal disciplinary procedure that had been suggested by Mr Ali). Mr Olusanya concluded that there was no malicious conduct on the claimant's part and no intention to cause harm, but that it was clear that the data breach had occurred "on your watch and is therefore your responsibility". Although it is not quite explicitly said, it is clear that Mr Olusanya had concluded that the matter was the claimant's fault. Although, as we have said, the matter was described by Mr Ali as a reportable data breach, we were in fact shown evidence that the respondent had been advised that the matter did not need to be reported to the ICO. Mr Olusanya's letter instructed the claimant to speak to April Elsmore (the Assistant Head Teacher for Staff Training) regarding training with an experienced senior technician at another school or with Mr Davies. The claimant was told to report back to Ms Karanja by 18 January with details of the training planned and the actions he had taken to ensure that the breach would not be repeated. There was no dispute that the claimant, in fact, did not follow that instruction. The letter concluded by saying that Mr Olusanya would ask Mr Ali and Mr Davies to continue monitoring the claimant's performance and for Ms Karanja and Ms Elsmore to support his training needs. Mr Davies told us that that process took the form of him keeping an eye on the claimant; there was no suggestion of any formality to it.

19.42 We find that the respondent's treatment of the data breach issue was proportionate and reasonable. Although the matter could have had potentially serious consequences, in fact it did not. We observe that if the respondent had at this point been looking for a reason to dismiss the claimant, this would have been the perfect opportunity.

<u>The 4 November 2020 shielding letter</u>

19.43 We accept that the claimant received a letter dated 4 November 2020, which was in the bundle at page 583. The letter was from the Secretary of State for Health and Social Care and the Secretary of State for Housing, Communities and Local Government. It began with the claimant's name and NHS number and was headed "Important advice for you about new guidance for clinically extremely vulnerable people". The letter said that the claimant was being written to as he had previously been identified as someone thought to be extremely vulnerable and at highest risk of becoming very unwell if he caught Covid-19. The letter did not set out the basis for that conclusion. It did set out the new restrictions which were to apply to everyone from 5 November until 2 December and said that in addition the government was issuing new guidance to clinically extremely vulnerable people which was set out on the pages that followed. It was not a return, said the letter, to the very restrictive shielding advice that the claimant may have followed earlier in the year, but he was strongly advised to follow the extra precautionary

shielding measures to help keep himself safe. He was advised to stay at home as much as possible but encouraged to go outdoors for exercising and attending health appointments. He was strongly advised to work from home and told that if he could not work from home, he should not attend work. The letter was, it said, a formal shielding notification and could act as evidence to show an employer that the claimant could not work outside his home until 2 December.

19.44 It was the claimant's case that he gave a copy of this letter (which we refer to below as the shielding letter) to Ms Karanja on 18 November 2020. Despite the way issue 9.24.4 is phrased, the claimant made no suggestion in his evidence that in November 2020, i.e. at the time he said he handed the letter over, he had spoken to anyone other than Ms Karanja about reasonable adjustments and working from home etc, and we all find that he did not do that in November.

19.45 The majority find that the claimant did not hand the letter to Ms Karanja on 18 November or indeed on any other date. Dissenting, Mr Sagar finds that the claimant did give the letter to Ms Karanja on 18 November 2020 and that Mr Olusanya and Miss Maybanks must have had some knowledge of the November letter. The majority took the view that although the claimant had produced a copy of the letter in evidence, there was no independent evidence to show that he had handed the letter over – no record, for example, made by the respondent of what would be a highly significant event, no copy kept of the letter. Given the claimant's unreliability as a witness, we did not accept what the claimant said about that even though we had not heard a contrary account from Ms Karanja. Mr Sagar took the view that there was some evidence to support what the claimant had said. At page 714 of the bundle there was a log of the claimant's absences set out in an email prepared by Miss Maybanks. Miss Maybanks told us that the entries recorded in that email would either have been made by her or by Ms Karanja. The entries that Mr Sagar considered to be significant were for a day's absence on 5 November 2020 recorded as "coronavirus shielding possible C19 symptoms" and an entry for 6 November 2020 saying, "Coronavirus shielding awaiting covid test results". Mr Sagar considered that the use of the word "shielding" by whichever of Miss Maybanks or Ms Karanja had made the entry suggested the claimant had told somebody that he was shielding in accordance with the letter of 4 November 2020. In contrast, the majority considered that that did not support the claimant's contention that two weeks after those entries were made, he had handed the shielding letter over. The majority considered that the use of the word "shielding" there referred simply to the fact that the claimant was staying away from work from 5 November – as we shall explain in a moment – because he was feeling unwell and had been in contact with somebody who might have coronavirus. The majority also noted that the claimant had been in email correspondence with the respondent around this time about his health and considered that if he had wanted the respondent to know about the 4 November letter, he would at least have mentioned it in the correspondence, which we refer to in the following paragraph.

The claimant's absence from 5 to 17 November

19.46 All were agreed that the claimant was absent from work from 5 November to 17 November (although the record at page 714 did not record an absence on 14 and 15 November, we note that those days were Saturday and Sunday). Shortly before 7 am on 5 November 2020, the claimant emailed Ms Karanja to say that he was feeling "a little rough". He said he had been in contact with a staff member who had since self-isolated and would "book a test and let you know if I am clear." That email was forwarded to, amongst others, Mr Olusanya who replied, cc'ing the claimant, asking Ms Karanja to advise the claimant to "call the absence line before 7.30 am in line with policy". Clearly, it was the respondent's practice to require members of staff to phone the absence line, although we note that the respondent's written policy in fact says (at page 777 of the bundle) that support staff were to notify the head teacher, or in their absence the deputy head teacher, by 7.30 am on the first day of any sickness absence by telephone. The policy does make clear that emails left with colleagues would not satisfy the absence notification requirements although we do note of course Ms Karanja was not just a colleague of the claimant but worked in the respondent's HR Department. Nonetheless, we accept that this was a technical, though plainly insignificant, breach of the respondent's Reporting Absence policy. (Given the time on the email, it may well be that the shielding letter of 4 November had not reached the claimant by that point, but the majority did consider that the claimant's failure to mention it in later correspondence was significant. Everything else we have said in this paragraph was the findings of all three of us.)

19.47 On 9 November 2020, the claimant emailed Miss Maybanks and included in the body of the email text relating to a negative coronavirus test which included the following:

> "You only need to self-isolate if: you get symptoms of coronavirus (you'll need a new test), […], someone you live with tests positive, or you have been traced as a contact of someone who tested positive".

Otherwise, it said:

> "You may return to work if you've not had a high temperature for 48 hours and feel well. Talk to your employer first."

19.48 Before including the test result, the claimant had said in the email "My test result is below but still feeling unwell."

19.49 About a week later, the claimant had clearly arranged a second test. On 15 November 2020, he emailed Miss Maybanks and Mr Olusanya to say:

> "This is the result of my test below. I am still feeling unwell. Kate please call me […] and let me know what I need to do and when to return back to work? Still have no sense of smell and taste."

19.50 The claimant obviously had intended to include a test result in the email

but had in fact mistakenly included the notification for the test, i.e. text explaining the arrangements for him to take the test. Miss Maybanks replied to say she was sorry to hear that the claimant was feeling unwell but pointed out that he had not attached a covid test. She continued:

> "Assuming it's negative you should follow the usual absence reporting procedure if you feel too unwell to come to work.
>
> My records show you were tested for Covid-19 on 6th and 11th November, both of which were negative (again assuming your most recent test was negative). I am not concerned about your returning to site once you feel well enough to do so, even if you are still experiencing a loss of smell or taste. You should not, however, come in if you develop a fever."

19.51 We were not shown any evidence about whether the claimant had or had not managed to in fact provide the last of those test results although little turns on it as the parties agree that the result was negative.

19.52 The majority considered that had the claimant wanted the respondent to know about his shielding letter, his email of 15 November 2020 would have been the ideal time to mention it given that he was explicitly asking about what he needed to do and when he should return to work. This was, in our judgment, entirely inconsistent with somebody who wanted to shield, in other words, not to go to work. As we have already recorded, Mr Sagar, dissenting, accepted the claimant's evidence that he had given Ms Karanja the letter upon his return to work.

19.53 We all agreed that on the balance of probabilities, we were not satisfied that the claimant in fact had Covid-19 over the period of the November absence given the negative test results. We do accept that he was unwell, but it is not possible to say, on the balance of probabilities, that it was Covid-19 that caused the illness. We accept that in the circumstances it was reasonable for him to have stayed away from work in November given that he was awaiting test results and had symptoms which were consistent with Covid-19 and continued to have those symptoms even after his negative test result. So, in that limited sense, we accept that the reason for the absence was connected with Covid-19, even though we are not satisfied that the claimant in fact had Covid-19.

19.54 We do not know whether the claimant provided a fitness for work certificate to the respondent (which the respondent's policy required be provided for any absence lasting more than seven calendar days) but it was not suggested to the claimant that he had breached that policy and so we do not find that there was a breach beyond the technical breach that we have already described.

<u>The claimant's personal circumstances around November 2020</u>

19.55 In cross-examination the claimant said that he had separated from his wife and that she had left, taking the children with her, in November 2020. Before the children had left, he said that he considered that it was safer

for him to be at the school than at home because of the presence at home of his two school-aged children. After they had left, he said he was dealing with his marriage breakup, was at home alone staring at four walls so he went into school to get away from things. We note that this is of course in total contradiction to the claimant's stance that he was petrified about going into work because of the fact that he had been told he was clinically extremely vulnerable and with the claimant's assertion that he was making clear to a number of the respondent's employees that he did not wish to be working on site

4 December absence

19.56 An email record at page 621 of the bundle shows that on 4 December 2020 – i.e. two days after his disciplinary meeting with Mr Olusanya – the claimant contacted Mr Olusanya to say that he had slept in until 2 pm due to being exhausted with the pressures of the hearing and orders (it was never explained to us quite what was meant by "and orders", but this did not appear to be particularly relevant). Strictly, again, there is a breach of the respondent's Reporting Absence Policy in that the claimant clearly cannot have called the head teacher before 7.30 am to notify him of the absence because he was asleep. More significantly, of course, there is no suggestion that this absence was in any way related to Covid-19 or to the claimant's disability.

The 7 January 2021 shielding letter

19.57 The claimant received another "shielding" letter from the government dated 7 January 2021. The first page of that letter was in the bundle at page 632. The letter again began with the claimant's name and NHS number and it was headed "Important advice for clinically extremely vulnerable people during the national lockdown." The letter referred to a new national lockdown which had been announced on 4 January. It set out the restrictions that applied to everybody and then said that the government was advising all clinically extremely vulnerable people to take extra shielding measures to protect themselves. It mentioned the claimant's previous identification as someone thought to be clinically extremely vulnerable. It said that, whilst the claimant was strongly advised to follow the extra precautionary shielding measures, that was advice not the law.

19.58 It was the claimant's case that he gave this second shielding letter to Ms Karanja on 8 January and that he then informed both Mr Ali and Mr Davies in Mr Ali's office that he needed to shield as he was considered to be a clinically extremely vulnerable person. It was also his case that Mr Davies and Mr Ali told him that he needed to continue working at the school, not following the government's guidance, in order to complete his probation. Again, although we did not hear evidence from Ms Karanja or from Mr Ali, we did hear from Mr Davies – who was of course said to have been a witness to the conversation with Mr Ali – and we all accept Mr Davies' evidence on this point, which was that no such conversation took place. We all find that the claimant did not tell us the truth about his

conversion with Mr Ali and Mr Davies. We therefore all do not accept his evidence either that he gave the letter to Ms Karanja around that time. Mr Sagar noted in particular the absence of any record about shielding in contrast to what had happened in November.

The bases for our conclusions so far

19.59 In summary so far then, we all accept that the claimant filled in the survey on 18 May as we have set out above. The majority found that that was the only information which the claimant provided to the respondent about his health. Mr Sagar, dissenting, found that the claimant had further provided the November shielding letter to the respondent. We all accepted the respondent's case that the claimant had not made requests to shield or to work from home to any of Mr Ali, Mr Davies or Miss Maybanks. In making our findings on this subject we all declined to draw an adverse inference against the respondent for failing to call Mr Ali or Ms Karanja. The majority took the view that the claimant had, given the poor quality of his evidence, failed to establish a prima facie case on these points and so considered it was not appropriate to draw inferences for the failure of the respondent to call some of the witnesses who might address it, although we further noted, of course, that Mr Davies was able to give evidence on very many of the subjects which Mr Ali might or might not have been able to tell us about. Mr Sagar, having come to the conclusion too that he accepted Mr Davies' evidence, did not consider it appropriate to draw an adverse inference for the failure to call Mr Ali. As regards the failure to call Ms Karanja, Mr Sagar considered that he was able to reach conclusions about whether Ms Karanja had or had not had the letters without the need to draw inferences, having accepted the claimant's evidence on one point. In coming to its conclusions, the majority took account of what it found to be inconsistencies between the accounts the claimant gave us and the accounts he set out in a formal grievance letter sent to the respondent on 22 March 2021. We note, for example, that the claimant asserted:

> "I am disabled for the purpose of the Equality Act 2010 *because of my lack of mobility* [our italics]. *As a result of my condition, I was required to shield* during the pandemic under government guidance and I first approached the school about this in April 2020."

19.60 In that grievance the claimant did not mention the November 2020 shielding letter, referring only to a shielding letter which, from the context, it is clear that he was asserting was provided in January 2021.

19.61 We all took account of the following points in coming to our conclusions:

19.61.1 We accepted as a general proposition the submission made on behalf of the claimant that it would be highly unusual for someone in receipt of shielding letters not to have provided them to his employer. However, we balance that against what we considered to be the unlikelihood of those letters not finding themselves onto the respondent's personnel file, and

three of the respondent's witnesses denying to us, on oath, that they had any knowledge of any of this. With the exception of Mr Sagar's findings on the November letter, we all considered that it was simply inconceivable that, had the respondent been notified that the claimant was at severe risk of contracting Covid-19, it would have insisted on him coming into work nevertheless. We say that in the context of our findings that the respondent was supportive to its staff during this period and very clearly allowed all members of staff who requested not to come to work to work from home, and formally indicated that staff not attending work would be paid and did in fact pay them.

19.61.2 We all took account of the claimant's clear offer to attend work on 17 April 2020 and the fact that he had positively volunteered to be on site around 1 June 2020. We note that an email was sent to staff on 17 March 2020 saying that staff without contracts who had been working on a casual basis would be paid if they were sick or had to refrain from work or if the school closed. This would, of course, have included the claimant.

19.61.3 We all agreed – notwithstanding Mr Sagar's findings about the November shielding letter – that none of the shielding letters had, in fact, found their way onto the respondent's personnel file. We note no evidence whatsoever of the claimant having made any written request for reasonable adjustments, working from home, shielding etc nor any written attempt to, for example, appeal to the head teacher when the claimant says that others refused his requests.

13 January 2021 absence

19.62 From 13 January the claimant was absent for three days having told the respondent that he had eaten something funny. No suggestion was made to us that there had been any breach of the respondent's Reporting Absence Policy on this occasion. Clearly, this absence was not related to the claimant's disability or to Covid-19.

27 January – Invitation to capability meeting

19.63 On 27 January 2021, the claimant was sent an invitation to attend an "informal capability meeting". The invitation came in the following context. Shortly after 10 am on 26 January, Miss Maybanks emailed Mr Olusanya to say that the claimant had rung reception saying he was on his way in and had overslept. At 10.18 am Miss Maybanks emailed Ms Karanja to ask if the portal was up to date so that she could look at the claimant's absence/triggers. A few minutes later, Mr Olusanya replied to say "Overslept? That is not really an explanation." At 10.36 Miss Maybanks emailed Mr Olusanya summarising the claimant's absences since his contract began on 1 September 2020. At 11.35, Mr Olusanya emailed

Miss Maybanks to say that he had asked Ms Karanja and Mr Ali to invite the claimant to an informal capability meeting so "We can have a frank exchange". The invitation letter was sent to the claimant just after 4 pm on 27 January, though it was dated 26 January. It was signed by Mr Ali and said that the meeting would be to discuss significant concerns regarding the claimant's performance at work. It continued:

> "We have concerns regarding a number of aspects of your job description which you have not been performing to an acceptable standard which include:
>
> - Providing the appropriate first line support to users as and when required.
> - Having a flexible approach and to adapt to developing situations.
> - Demonstrating a grasp of the technical skills that we consider reasonable to expect from someone employed in this role.
> - Being able to work with a reasonable degree of independence to resolve problems.
>
> Other areas of concern include:
>
> - Maintaining reasonable levels of attendance and punctuality (some of the reasons given for absence and lateness have not been acceptable and have created difficulties for staff and pupils).
> - Making appropriate and effective use of working hours."

The claimant was informed that he could be accompanied by a trade union representative or colleague of his choice.

19.64 We all consider that – whatever the particular concerns that were outlined in the letter, which we examine in more detail below – the immediate trigger for the respondent sending the claimant that letter was his absence due to lateness, saying he had overslept, on the morning of 26 January. We note at this stage that, with the exception of the data breach issue, which we have already dealt with, this letter is the first written record of the respondent stating that it had concerns about the claimant's performance. Clearly, the claimant's performance was not being formally monitored before this letter was sent. We do however accept that the respondent did have some concerns about the claimant's performance before the letter was sent. We note, for example, an email that Ms Elsmore sent to the claimant on 22 January 2021. She referred to something she had asked the claimant to investigate which related to a potential safeguarding issue and said that she was concerned that the claimant had not emailed her to discuss progress on it (we should say that there was no suggestion the claimant was responsible for the safeguarding issue). Ms Elsmore followed that email up on 26 January saying that it was now a week since she had requested action, saying that it was extremely important and urgent. No response from the claimant appears in the evidence and we do not accept his evidence that

he was unaware of these emails. We also note an email sent on 25 January 2021 (the day before the invitation to the capability meeting was drafted) by Ms Elsmore to the claimant, cc'ing in Ms Karanja, which made clear that the claimant had failed to arrange log-ins and email addresses for the new student teachers who had started that day. She complained that she had been left to look unprofessional having completed their induction nearly two weeks ago and that they were becoming stressed. She asked the claimant to set up their emails as a matter of urgency.

29 January onwards – The final absence

19.65 On Friday 29 January 2021 the claimant contacted the respondent's absence line to say that he was unwell. This was, of course, two days after he received the letter inviting him to the capability meeting. We were not shown a formal record of the claimant's call to the absence line but at least some of its contents are made clear by an email that Miss Maybanks sent the claimant that morning. It said:

> "I'm sorry to hear you are not feeling well. I understand you have a cough? If so, you will need to book a Covid-19 test. Please let me know if you have any questions or need help booking the test."

19.66 On Tuesday 2 February 2021, Ms Karanja emailed the claimant shortly after 4 pm to say the following:

> "I hope you're keeping well and feeling better. Myself and Kate have emailed you several times and we are yet to hear from you. Kindly respond to enable us to support you."

19.67 The claimant responded the following day, which was the date that had been arranged for the claimant's capability meeting. He said:

> "[…] I am afraid I am still feeling unwell, loss of smell and taste had the test waiting in agony for the results. Coughing all the time I will try and check my emails from time to time. It's very difficult to get back to you or anyone as I am still bed ridden unable to focus. Everything is aching.
>
> Ps. When someone is off sick are they expected to be answering emails?"

19.68 Shortly after 10 am the same morning, 3 February, Miss Maybanks replied to say that she did expect to receive some kind of communication about the claimant's health as they had a duty of care towards not just him but the rest of the school. She noted that she had received "zero communication" from him about his symptoms, booking a test, or the results, which she said was a great concern to her. The claimant replied, apologising for not following up with an email after calling the absence line and saying he had had a test and was waiting for the results. Miss Maybanks replied to ask him what his symptoms were and when they presented and asking him also to forward confirmation that he had booked a test, as these things were necessary for the respondent to log and to process his sick pay. The claimant forwarded a confirmation of a test which had been sent to him on 2 February (page 672 of the bundle).

Miss Maybanks reminded the claimant that she had also asked him to say when his symptoms had presented and he responded to say Friday morning, when he called and booked the test. He then recorded that he had sent the test kit back that morning, i.e., 3 February. The 2 February confirmation which we have just referred to appears to have been a reminder to complete the test so it is not inconsistent with the claimant having requested the test, as he said, on Friday 29 January.

19.69 Although in his emails of 3 February the claimant had not specifically mentioned the meeting that he was due to be attending, we find that he had clearly made the respondent aware that he was too ill to be in a position to attend a meeting. He had said he was bedridden. That is the proper context in which to view the respondent's concern that the claimant had not complied with its written request to confirm whether he would be attending the meeting. That confirmation was due by 1 February, by which time he was already off sick. In the circumstances we think it was unreasonable of the respondent to purport to hold against the claimant the fact that he had never formally replied to say he was coming to the meeting. We do however consider it reasonable for the respondent, through Miss Maybanks, to have been requesting the claimant to keep it informed about his illness.

19.70 At 7 pm on 4 February 2021 the claimant sent a text message to Mr Ali. It included the following:

> "If I don't make it through this weekend, please name one of the IT rooms after me."

19.71 Mr Ali replied to ask the claimant what was wrong, saying he had not heard from him in a few days and asking whether it was Covid. The claimant responded to say that he did not know but he had the symptoms. He said that he had a test when asked. Mr Ali told the claimant to make sure that he got some medical advice, referring him to the virtual GP service we mentioned above. The following day, Mr Ali asked the claimant how he was feeling and whether he had his test result yet. We consider this to be evidence of a reasonable reaction on Mr Ali's part, being as supportive as he could be.

19.72 The claimant's evidence was that he rang the absence line on 8 February to say that he was still ill. On 10 February 2021 Miss Maybanks emailed the claimant to say that the respondent had not heard from him since his communication with Mr Ali by text on 4 February. She said:

> "We have since tried to contact you on your phone on Monday 8th and Tuesday 9th February without success (your phone does not allow voicemails) and contacted your sister on 9th February 2021 but have yet to hear from you. We are concerned about your whereabouts and welfare and would ask that you please make contact with either [Mr Olusanya, Miss Maybanks or Ms Karanja] as soon as you receive this."

19.73 We accept that what Miss Maybanks sets out here about the contact the respondent had had with the claimant is correct.

19.74 On 11 February Mr Olusanya emailed the claimant to say that he had received a voicemail message from the claimant saying he was still feeling unwell and was following government guidelines. Mr Olusanya said that he had tried to call the number the claimant had left but it was saying currently unavailable. The claimant was asked to advise what time he could take a call.

19.75 There followed the next day, 12 February 2021, the first of three calls between Mr Olusanya and the claimant which were logged at page 680 of the bundle. The claimant told Mr Olusanya he was still ill, saying he had never felt so run down, although he was not as ill as he had been at the weekend when he thought he might die. He said he had been told to stay at home until his symptoms had gone (the record says by 911 but we take that to mean 111). The claimant was reminded that he would need to get a GP's note. There was a discussion about a Covid test. The note is a little unclear but it appears that the claimant was saying that he had sent the test to the test centre and was awaiting the result. It was agreed that the claimant and Mr Olusanya would speak again on 16 February.

19.76 In that second 16 February call, the claimant said that he was feeling better than before but still had loss of taste, smell, high temperature, aching, loss of appetite and coughing. He was expecting to speak to his GP that day and had not received a Covid test result. He had been told they would not send another kit and had been told not to leave the house until the symptoms had gone.

19.77 The following day, 17 February 2021, the claimant emailed Mr Olusanya to say that he had been signed off work by his GP until 23 February with a potential chest infection and Covid symptoms. He had been prescribed antibiotics. He asked who he should send his fitness to work note to. He sent the note to Mr Olusanya and Ms Karanja on 18 February 2021. The note, at page 685 of the bundle, recorded that the claimant's case had been assessed on 16 February 2021. He was not fit for work because of "suspected covid infection prolonged symptoms." The note covered the period 6 February to 23 February and was dated 16 February 2021. There was no doctor's signature on the note but it was never suggested to the claimant that the note was not genuine during the course of his evidence. The absence of a doctor's signature appears to have caused a certain amount of scepticism on Mr Olusanya's behalf, but we accept that, given the circumstances existing at the time, it is not unusual that the note was not physically signed by a doctor.

19.78 The third call between the claimant and Mr Olusanya took place on 22 February, i.e. four days after the claimant had sent that note. The claimant told Mr Olusanya that he believed he had Covid and insisted that the fit note was valid, presumably in response to something Mr Olusanya had said. Mr Olusanya also noted that "the Covid test appears to have been lost", which was not uncommon according to the practice. We take this to be a reference to what the claimant said he had been told by his GP's practice. The note of the call ends as follows: "Joe believes

he should be fit to return Wednesday as long as symptoms have subsided." Wednesday would have been 24 February 2021.

19.79 Just after midday on that Wednesday, 24 February 2021, the claimant sent Mr Olusanya and Ms Karanja another doctor's note. This is at page 687 of the bundle. Again, it is not signed by the doctor but again, there is no suggestion that it was not a genuine note. The note records that the claimant's case had been assessed on 23 February 2021 and he was not fit for work because of "presumbed [*sic*] covid infection". The note covered the period 23 February to 2 March and was dated 23 February.

19.80 As the claimant points out, the respondent did not ask him about the capability meeting that he had not attended during any of the communications that we have just set out. Nor did the claimant himself mention it.

19.81 We were never provided with any positive Covid-19 test results. However, given that the claimant was reporting symptoms which were consistent with Covid-19, and given, more significantly, the doctor's presumption that the claimant had Covid-19, we consider that it is more likely than not that the claimant had Covid-19 from 29 January 2021. Since the first doctor's note covered the claimant for the second week onwards of his absence (and indeed for slightly before that) and since the claimant had contacted the respondent's absence reporting line at the start of his illness, there do not appear to be any breaches of the respondent's absence reporting policy during this period of the claimant's absence. Although we do accept that the respondent found it difficult to contact the claimant over that period, it appears to us that there was a reasonable explanation for that given how ill the claimant was.

<u>The respondent's concerns about the claimant's performance</u>

19.82 Before we deal directly with the circumstances of the claimant's dismissal, it will assist if we summarise the written reasons given to the claimant for his dismissal by Mr Olusanya in a letter of 25 February 2021 (at page 689 of the bundle). Mr Olusanya told the claimant that he had been unsuccessful in completing his probationary period and set out the reasons for that in the form of seven bullet points.

19.83 The first six of these broadly mirrored the six bullet points we have set out above (para 19.63) which were included in the letter of 26/27 January inviting the claimant to the informal capability meeting. A little more detail was added in the second letter however. Firstly, three sub-bullet points were added to the first bullet point about the claimant failing to provide "appropriate first line support":

19.83.1 The first sub-bullet point said that the claimant had repeatedly failed to follow protocols requesting and passing on quotes for laptops despite high levels of support from the deputy head. Although we were not shown any documentation in support of these concerns, we do accept that Mr Olusanya genuinely held

concerns about this, though we note the point was never raised with the claimant since the meeting that was to have taken place never did take place.

19.83.2 The same could be said about the concern raised in the second sub-bullet point, which was that the claimant had failed to support the head teacher with an issue about emails. We heard particular evidence from Mr Olusanya on that point and again accept that he may genuinely have held that concern. However, again, this was not a concern the claimant had the opportunity to address with the respondent.

19.83.3 The third sub-bullet point concerned the claimant's failure to set up PCs in the sixth form block in July, with the result that they were not ready in September when the school reopened. Again, this does not appear to be a concern that was raised with the claimant and it also clearly did not prevent the respondent from taking the claimant on as a full-time employee from September. We also note that the concern would have related to work he did before he was a full-time employee.

19.84 The second bullet point, about the claimant lacking a flexible approach, was somewhat nebulous and we were not provided with any particular evidence about that. Like the next two concerns, this was not something that was ever addressed with the claimant aside from it being set out in the invitation letter we have already mentioned.

19.85 The next two bullet points, concerning the claimant's grasp of the technical skills required and his ability to work with a reasonable degree of independence, were again not points we heard specific evidence about, although we do accept that Mr Olusanya had a genuine concern about those points. We accept as well the evidence of Mr Davies which is relevant to those points. Mr Davies told us that his perception was that although there was no change to the claimant's duties when he became a full-time employee, there had been a change for the worse to his "drive". We consider that Mr Davies was in a position to make such a judgment since he had previously done the same role as the claimant and since, also, he had continued to so some of that work afterwards, presumably when the claimant was away.

19.86 The next concern was that the claimant had been unable to maintain reasonable levels of attendance etc. In the dismissal letter a further line was added to explain that this had negatively impacted on the respondent's online learning programme. In light of the history of the claimant's absences which we have already outlined, we consider that it was reasonable of the respondent to have been concerned about this.

19.87 The next bullet point/concern was that the claimant had failed to make appropriate use of his working hours. In reality this added little to those concerns which have already been set out. But again, we consider that it was not unreasonable for the respondent to have this concern. When

he told us about the claimant's work, Mr Davies told us that there had been a marked change in the claimant from September. We also agree that, however it might have been set out in bullet point form, the respondent reasonably had concerns about the claimant's performance in light of, for example, the emails sent by Ms Elsmore which we set out above. These were detailed in fact in a new seventh bullet point in the dismissal letter, which specifically referred to an issue raised by Ms Elsmore and referred also to what was described as the reportable data breach in November 2020. As Mr Olusanya had to concede in his evidence, it was not quite correct to describe it as a reportable data breach for the reasons we have already explained, but it clearly was a data breach.

19.88 Taking all of those seven concerns in the round, we do accept that, cumulatively, they were sufficient to fairly justify dismissing the claimant at the end of his probationary period, provided, that is, he had been given the opportunity to address the respondent's concerns, even if any of the points would, on their own, have been insufficient to justify dismissal.

19.89 After the bullet points, the letter continued by pointing out the claimant's supposed failure to reply to the invitation to the 3 February meeting and his failure to attend the meeting. The letter said that this gave rise to a concern about the claimant's attitude. We regard that criticism as entirely unjustified given the respondent's knowledge that the claimant was too ill to attend the meeting and also the respondent's knowledge that the claimant had become ill before the time for replying to the invitation had expired.

19.90 The letter went on to criticise the claimant for his failure to abide by the sickness absence reporting procedures and his poor communication about that in recent weeks. Again, we consider that to be unjustified criticism. Where there were breaches of the reporting procedure, they were, as we have set out above, relatively trivial.

19.91 Although Mr Olusanya did not say so in his oral evidence, we detected a certain scepticism on Mr Olusanya's part about whether the claimant had genuinely been ill. We consider it likely that that scepticism was a material factor in Mr Olusanya's decision to dismiss the claimant. We also consider that Mr Olusanya's assertion, that at times other members of staff had found it difficult to find the claimant, to be lacking in substance. The nature of the claimant's role was that he would not necessarily be in his office at any particular time and so members of staff might well not have found him when they went looking for him.

19.92 In summary, the respondent took into account, in our judgment, some relatively trivial and some unfair concerns about the claimant but that was in combination with some concerns which were perfectly genuine and might fairly have resulted in his dismissal, had he been given the opportunity to address them. The respondent had, of course, intended to give the claimant the opportunity to address them in the meeting of 3 February which the claimant could not attend because he was unwell.

The respondent's performance policy

19.93 The respondent's witnesses exhibited some confusion about whether the respondent's performance policy applied to someone on probation. Indeed, at one point, there was confusion as to whether there had been a separate probationary policy but, in fact, it was established during the course of the hearing that there was no such policy at the time. A particular policy about probationary periods was introduced later, quite possibly, we infer, because of the uncertainties that this case showed up. The policy that was in force, headed "Policy for appraising performance and dealing with capability issues" did not specifically exclude probationary staff. But it did clearly set out an appraisal performance period of 12 months which, of course, is somewhat inconsistent with a probationary period of six months. The policy did, at paragraph 8.2, clearly state that where there were concerns about any aspect of the employee's performance, an appraiser or senior line manager would meet with the employee to (in short) discuss the matter and allow time for improvement. As was pointed out to us during the course of the evidence, the policy also clearly said that the informal capability meeting process – which the respondent purported to apply in this case – would only apply to employees about whose performance there were serious concerns that the appraisal process was unable to address. In our judgment, there was no reason why the appraisal process could not have addressed the respondent's concerns about the claimant.

19.94 We do also note that in contrast to some of the terms of the policy that we have already set out, at paragraph 1.3, the policy said that:

> "Employees would not normally be dismissed for performance reasons without previous warning. However, dismissal without previous warning may be appropriate in any case involving an employee who had not yet completed their probationary period."

19.95 That term did not specifically exclude any of the other terms we have set out above. We therefore can see why the respondent's witnesses were confused about what procedures were applicable to the claimant and also why the respondent appears to have seen fit to write a separate probationary policy after all of this had happened. Given what we find to have been genuine confusion on the part of the respondent's witnesses, we do not draw any adverse inference against the respondent for the failure to apply the policy.

The claimant's dismissal

19.96 The dismissal letter was sent to the claimant at midday on 25 February 2021. In the accompanying email Mr Olusanya referred to a conversation on Wednesday, i.e. 24 February. That conversation, in which we accept that Mr Olusanya informed the claimant that he was going to be dismissed, clearly took place, as the claimant said, shortly after he had sent the second doctor's note to Mr Olusanya.

19.97 It was the claimant's case that during that call Mr Olusanya told him that he was firing him as he was not prepared to pay for someone who was ill and lying in bed. The majority do not accept the claimant's evidence on this point, preferring Mr Olusanya's oral evidence where he denied using any such language. The majority accept that Mr Olusanya would have raised the matter of the absence as of one of the reasons for the dismissal but do not accept that it was put in the terms that the claimant says it was. Mr Sagar, dissenting, accepts what the claimant said about that as it largely accorded with the account he gave in his later grievance letter.

19.98 The claimant further said that during the call Mr Olusanya had told him he was an incapable IT Technician and was not flexible in his working hours. Given that that is essentially a summary, if somewhat pithy, of the reasons in the dismissal letter, we all accept that something to that effect was said. We also all accept the claimant's evidence that he said during that call that he had not had the opportunity to attend the first stage capability meeting. We further accept that the claimant might well have been left with the impression, as he told us, that Mr Olusanya had said he did not need to follow the capability procedures, since that did appear to be Mr Olusanya's view given the claimant's probationary status.

19.99 Mr Olusanya was asked about the reasons for dismissing the claimant in his oral evidence and he told us the following, all of which we accept. He had had no concerns about the claimant's performance before he gave him a permanent contract. Before the permanent contract he had kept the claimant on and paid him during the lockdown even though he was under no obligation to do that. He had genuinely wanted the claimant's employment to work out. But when the data breach occurred the claimant's response was unsatisfactory. He did not seem to understand the gravity, did not take responsibility and ignored the request to seek training. There was then a pattern of poor punctuality or attendance. Ongoing concerns had been raised by numerous members of staff including Ms Elsmore, Mr Davies and Mr Ali.

19.100 Mr Olusanya conceded in his oral evidence that the fact that the claimant was very close to the end of his probationary period meant that the process of dismissing him was shorter than it might have been – he said that if the respondent had had more time and an employee who was able to attend, then it might have taken longer. In other words, it seems to us that if the claimant had not been so close to the end of his probationary period the respondent might have considered giving him more time to improve. Mr Olusanya told us that he did consider extending the claimant's probation period but decided against it. He said that he considered that he had to make a decision as they were getting near to the end of the claimant's probationary period. In the circumstances we find it hard to see why the claimant could not have been given a little more time in order that the meeting could have taken place.

19.101 We do not accept Mr Olusanya's assertion that the claimant's absences

were only a small part of his decision to dismiss the claimant. Given the timing, we consider that, although the claimant's absences were not the sole factor in the decision, they were a significant factor. The decision to dismiss the claimant was clearly made very soon after he had submitted the doctor's note. Indeed, we consider that the claimant's final absence was most likely the predominant reason for the dismissal, taking account of what we find to have been Mr Olusanya's suspicion that the claimant was not absent for legitimate reasons.

19.102 Mr Olusanya was asked in his evidence whether at the time of his dismissal he was aware that the claimant had sleep apnoea. Mr Olusanya was somewhat uncertain about this but he did concede that he must have been provided with that information. We find on the balance of probabilities that at the time he made the decision he did know about the claimant's sleep apnoea. Having heard his evidence we do accept that he genuinely did not believe that that meant the claimant met the legal definition of disability. We accept Mr Olusanya's evidence that at the time the information would have been passed to him he was focussing on those members of staff who were clinically extremely vulnerable and therefore, given what the claimant had written in the response to the May 2020 survey, the claimant's condition would, although known to Mr Olusanya, not have been a particular concern to him. We accept that Mr Olusanya would not have been thinking about the claimant's sleep apnoea when he came to make the decision to dismiss him. Indeed, no such suggestion was made to the contrary.

<u>The grievance</u>

19.103 Following his dismissal the claimant submitted a written grievance challenging the dismissal. That grievance was considered by Mr Chilli Reid, one of the School's Governors. Mr Reid set out his findings in a detailed letter dated 6 May 2021. In short, Mr Reid did not uphold the claimant's grievance.

19.104 The grievance itself was not referred to in the list of issues and we did not find it necessary to make detailed findings about it. But we would make three observations:

19.104.1 First, it is surprising in our judgment that Mr Reid was not, as he told us and as we accept, informed about the claimant's response to the May 2020 survey, given that the grievance concerned the claimant's assertion that he was required to shield, albeit that, as we have already set out, in his grievance the claimant said that he was disabled because of lack of mobility. Mr Sagar considered that the failure to tell Mr Reid about that assisted him in reaching the conclusion that Mr Olusanya and Miss Maybanks must have known about the November shielding letter. Employment Judge Dick and Mr Surrey did not consider that that was a conclusion that followed, finding no evidence to conclude that the failure to provide Mr Reid with the survey answer was deliberate.

19.104.2 Second, whatever flaws there were in the original decision to dismiss the claimant, they were not corrected by the grievance outcome.

19.104.3 Third, we do not accept the suggestion that Mr Reid approached the task in such a way as to simply rubberstamp the respondent's decision. We find that Mr Reid conducted a genuine consideration of the grievance.

The claimant's health and disability

19.105 We were provided with the claimant's medical records and we note some of the following entries.

19.105.1 2013: Obstructive sleep apnoea.

19.105.2 2012: Upper airway resistance syndrome.

19.105.3 2021: Airways obstruction reversible March 2021.

19.105.4 2012: High risk of diabetes mellitus.

19.106 It was evident from the claimant's written evidence and, indeed, from what we saw ourselves, that he has, as he termed it, "mobility issues". He uses crutches, we understand as a result of an accident in 1999 which resulted in a fracture of his vertebrae. The claimant also told us that at the time he was employed by the respondent he was overweight (for the relevance of this, see below).

19.107 Disability itself was not in dispute, but we still needed to make factual findings on a number of points relating to the claimant's disability, which would inform our decisions about the following:

19.107.1 *What the respondent knew, or should have known, about the claimant's disability*. It was not in dispute that the claimant was disabled at the material time because of OSA. Nor was there any dispute that the respondent knew, from the May survey 2020, that the claimant had OSA. But there was still an issue about whether the respondent knew enough to conclude that the claimant was disabled. The knowledge must relate to both the existence of the condition/impairment (knowledge of which was not really in dispute) and to its "adverse effect", i.e an adverse effect on the claimant's ability to carry out normal day-to-day activities (knowledge of which was in dispute). On the claimant's case, the respondent knew not only that he had OSA, but that he was clinically extremely vulnerable and needed to shield – the adverse effect being obviously apparent in those circumstances; on the respondent's case, all it knew was that the claimant had OSA and was clinically vulnerable, which would not lead to the conclusion that the OSA had the adverse effect.

19.107.2 *Whether there was a connection between the claimant's*

disability and the things said to have arisen from his disability. We have already found that two of the claimant's absences were connected with Covid-19, but were they connected to his disability? Likewise, if the claimant had a need to shield (as reflected by the status of being clinically extremely vulnerable) was that connected to his disability? The answer to either of those questions will depend on whether the claimant was at greater risk from Covid-19 *because of his disability*.

19.108 In the following paragraphs we make factual findings which will assist us in our ultimate findings on those two points. (The ultimate findings themselves are best viewed as questions of mixed law and fact, and so are dealt with in the later *Conclusions* section below.)

What the claimant told the respondent about his disability

19.109 We all agree that from 18 May 2020 the respondent knew the claimant had obstructive sleep apnoea. As we have already recorded, in the 18 May 2020 survey the claimant also informed the respondent that he was defined as "clinically vulnerable". (We all accept that he had indeed been told that he was clinically vulnerable.) The claimant ticked the box to indicate that the category he fell into was "chronic (long-term) mild to moderate respiratory diseases, such as asthma, chronic obstructive pulmonary disease (COPD), emphysema or bronchitis." In answer to a question "Please add your comments if you would like to expand on your above answers", the claimant entered the words "sleep apnea". We consider that on a reasonable reading of that form the claimant was informing the respondent that he had sleep apnoea and that it was a chronic mild to moderate respiratory disease etc, as opposed to the claimant informing the respondent that he had sleep apnoea and some other chronic mild to moderate respiratory disease etc. Although it does not seem to us that sleep apnoea should technically be described as a disease (as opposed to a disorder), it may be that not much turns on that point for the purposes of what the claimant had informed the respondent. Clearly, obstructive sleep apnoea is respiratory in the sense that it has to do with respiration. Whether the claimant was in fact clinically vulnerable *because of* sleep apnoea is another question which we address below. Since there was no "other" category it does seem clear that the claimant ticked the box which best fit the condition he was trying to tell the respondent about.

19.110 Mr Sagar (only) also found that the claimant had given Ms Karanja a letter on 18 November, which although it stated that there was not to be a return to the very restrictive shielding requirements of the past, was telling the claimant unequivocally not to go to work. Mr Sagar also found that the respondent (i.e. Mr Olusanya and Miss Maybanks) knew about this letter. We all agreed that the claimant never gave the respondent any other information about his OSA or any other health condition and that he never requested any adjustment or to work from home. In particular, in the post-employment questionnaire – which in the circumstances of this case was of course filled in many months after the

18 May survey (in August 2020, para 19.8 above) – the claimant specifically asserted that he did not have any disabilities.

19.111 The claimant did not ever provide the respondent with any information about the effect of the OSA on his ability to carry out normal day to day activities. The only actual knowledge potentially relating to that the respondent in fact had was gathered as a result of Miss Maybanks' research which, to summarise, had revealed that there was no strong evidence that OSA increases the risk of getting or developing complications of Covid-19. Though it is not the answer to the questions we have to answer about knowledge, we do accept, through Miss Maybanks' evidence, that the respondent did not believe that OSA amounted in law to a disability.

Adverse effect and vulnerability

19.112 The list of issues records an agreement that the claimant was disabled. During the course of the proceedings the claimant asserted that the disability was OSA and the respondent took no issue with that. So the respondent has conceded that at the material time the claimant's OSA had the required averse effect. We do not know the basis of the respondent's concession on that point. Detailed evidence was not called about it, no doubt for the very good reason that the concession had been made. But it is still necessary to consider the adverse effect since the respondent has not conceded that it knew about the adverse effect at the material time. We were assisted somewhat by a GP's letter about the claimant at page 845 of the bundle which had been prepared for these proceedings. The relevant part of the letter read as follows:

> "He has several conditions which impact upon his health:
>
> 1. Chronic back pains, which cause limited mobility and he walks short distances with stick or crutch; takes regular painkillers.
>
> 2. Sleep Apnoea which causes daytime tiredness and sleepiness due to poor sleep at night; has a CPAP machine at night.
>
> 3. [This refers to an unrelated diagnosis which was made after the relevant time]"

19.113 Also of some relevance to the issue of the adverse effect (and so the respondent's knowledge of it) is the following. Although the status of "clinically vulnerable" and the status of "clinically extremely vulnerable" are not the same as the legal definition of disability, they may nevertheless be relevant in that they might assist someone, for example the respondent, to make an assessment of a person's ability to carry out normal day-to-day activities, or of course they might alert someone like the respondent to the need to make enquiries about that. At some points in the pandemic people who were not clinically extremely vulnerable could leave the house whereas those deemed clinically extremely vulnerable were told to shield, in other words, to stay at home all of the time – strong evidence, it might be said, of an adverse effect on their

ability to carry out normal day-to-day activities. So if someone was clinically extremely vulnerable because of a particular impairment, there is a strong inference that that person was disabled because of that impairment (provided that the impairment was long-term, and in this case, there is no suggestion other than that the claimant's impairment, OSA, was long-term). We should add that we were never provided with an official definition of clinically vulnerable or clinically extremely vulnerable and we would also note that the parties agreed that the official definition of those terms changed over time during the course of the pandemic.

19.114 Keeping all of that in mind we consider first whether the claimant was clinically vulnerable. We all find that he was and that the respondent knew that (as a result of the May 2020 survey). We accept the claimant's submission in this case that the natural meaning of clinically vulnerable was to indicate that someone had a greater risk from Covid-19 infection than the general population. We would add that this would naturally mean either that the person was at greater risk of getting a Covid-19 infection and/or was at greater risk of severe illness if they were to get a Covid-19 infection. As to the consequences of this, we accept Miss Maybanks' understanding was correct. At the material time, she thought that the measures which applied to everyone (e.g. social distancing) adequately addressed concerns about those people who were clinically vulnerable, provided that any particular clinically vulnerable person had taken their doctor's advice and had informed the respondent should that advice have been that they should not go into work. We consider that this position of the respondent was set out in the email of 17 March 2020 at page 488 of the bundle to which we have already referred. Although that email uses the term "high risk groups" and "those at increased risk of severe illness from Covid-19", it then goes on to set out categories similar to those in the survey which the claimant filled in which were referred to as categories related to someone being clinically vulnerable. In that same email of 17 March, the respondent had made clear that any employee who needed to refrain from work would be paid. The email also said that the respondent was advising those who were at increased risk of severe illness from Covid-19 to be particularly stringent in following social distancing measures. It said that this included people who had chronic long-term respiratory diseases etc. It also included, amongst others, those who were seriously overweight (with a BMI of 40 and above) and those with diabetes. As we have already noted, the claimant said that he had pre-diabetes and told us that at the relevant time he was overweight, although he did not tell us what his BMI was.

19.115 The claimant, it is to be recalled, did not respond to the email of 17 March Of course, when the claimant filled in his form on 18 May he provided information sufficient to alert the respondent to his contention that he fit into one of the groups listed in the 17 March email. We find that the respondent believed therefore:

1. That the claimant needed to seek advice from his doctor before coming into work;

2. That he might receive advice not to work (and would inform the respondent if that was the case);

3. That he should carefully follow social distancing measures.

19.116 We next consider whether the claimant was clinically extremely vulnerable. Clearly, the claimant had been told he had met that description some time before the 4 November letter (page 583 of the bundle), because that letter referred to him having been previously identified as someone thought to be clinically extremely vulnerable. The November letter went on to say that the claimant should stay at home as much as possible. He was encouraged to go outside for exercise and to attend health appointments but was strongly advised to work from home and if he could not work from home then he should not attend work. We also note that as we have already said (page 937 of the bundle) on 30 April 2020 a code was added to the claimant's medical record to reflect that he was "high risk category for developing complications from Covid-19 infection." We accept that as of 30 April 2020, the claimant was in a high risk category for developing complications from Covid-19 and that this categorisation was interchangeable or identical with the categorisation of clinically extremely vulnerable.

19.117 An important further question in this case is: why was the claimant clinically extremely vulnerable? Aside from the claimant's own assertion that it was because of his disability (i.e. OSA), we were provided with no evidence relating to this question either in the GP's letter which we refer to above or, indeed, anywhere else. We have already noted that in the grievance which the claimant was later to raise, he said the following:

> "I am disabled for the purpose of the Equality Act 2010 because of my lack of mobility. As a result of my condition I was required to shield during the Covid-19 pandemic…"

19.118 We also note a number of other factors that could have led to a clinical finding that the claimant was clinically extremely vulnerable. In the claimant's own written evidence (at paragraph 16) he said that due to being of: "…black heritage with serious underlying health issues as identified by the NHS" he had a higher chance of dying from Covid-19 infection. From the evidence that we have heard therefore it seems clear that the claimant's "black heritage" as well as him being overweight and having a high risk of diabetes, or borderline diabetes, could all have contributed to a finding that he was clinical extremely vulnerable. In that same paragraph for example, the claimant asserts that he was in a high risk group due to: "…my sleep apnoea, borderline diabetic condition and also having various physical disabilities". Clearly the reference to physical disability there is to the claimant's impaired mobility amongst other things. So, a consideration in this case will be whether the claimant's obstructive sleep apnoea contributed to the finding that he was clinically extremely vulnerable, whilst keeping in mind the ultimate question is about the legal definition of disability rather than clinical extreme vulnerability.

19.119 We were shown a study entitled "Sleep apnoea is a risk factor for severe Covid-19" published in the "BMJ Open Respiratory Research" journal. It was common ground that this was a publicly available document, although there was no suggestion that Miss Maybanks saw it at the material time. The copy we were shown was downloaded on 29 September 2025 but it recorded that it had first been published on 12 January 2021. Although we note that the article says that it had been corrected since it was first published, those corrections appear to have related to provenance and peer review rather than to the substantive findings. On behalf of the claimant we were invited to draw the conclusion that the study shows that the claimant's disability – i.e. obstructive sleep apnoea – effectively triples the risk of hospitalisation for Covid-19.

19.120 An important distinction here is between correlation and causation. A person with obstructive sleep apnoea might be more likely to be hospitalised with a Covid-19 infection but that does not necessarily mean that the OSA caused that increased risk. For example, persons with OSA might also have conditions, such as obesity, which would cause an increased risk of hospitalisation. We reproduce now some of the passages from the study which appear to be relevant to the distinction between causation and correlation:

> "Here, we examined the role of obstructive sleep apnoea as a risk factor for Covid-19 leading to hospitalisation. Our analyses revealed 2.93-times higher risk for Covid-19 hospitalisation in patients with obstructive sleep apnoea, independently of BMI and other known risk factors for obstructive sleep apnoea or those for severe Covid-19 suggesting that obstructive sleep apnoea is an independent risk factor for Covid-19."

19.121 The majority put the particular emphasis there on the use of the word "suggesting" and also considered that the "key message panel" at the head of the document was considerably less conclusive. We reproduce that key messages panel in full now:

> "• Is obstructive sleep apnoea an independent risk factor for severe Covid-19?
>
> - Patients with OSA have a higher risk to be hospitalised when affected by Covid-19 than non-OSA individuals.
>
> - In assessment of patients with suspected or confirmed Covid-19 infection, OSA should be recognised as one of the comorbidity risk factors for developing a severe form of the disease and patients with OSA with suspected or confirmed Covid-19 infection should be monitored closely."

19.122 In the body of the article the researchers also considered previous studies. They said the following:

> "All studies showed a significant association with Covid-19 severity and obstructive sleep apnoea. However, only one study showed a statistically significant association between obstructive sleep apnoea and severe Covid-19 after adjusting for BMI. These findings suggest that while OSA is likely a risk factor for Covid-19, evaluating the magnitude of this association would benefit from harmonised analyses across different cohorts where comorbidities are

> similarly assessed."

19.123 A question of fact for us here was: does OSA cause an increased risk of severe Covid-19, as opposed to merely being associated with such a risk, and, if so, to what degree is that risk increased? That might be broken down into two sub-points. First, does this study conclude that? Second, if that is the conclusion of the study, is it appropriate for us to reach the same conclusion in the absence of expert opinion evidence on the subject? An expert might have been able to tell us, for example, whether there were other studies which took a different view. Although we deal with most of the law in a separate section below, it will assist if we refer now to one authority which we considered in making our factual findings about OSA and Covid-19. In Connor v Chief Constable of South Yorkshire Police [2024] EAT 175 the EAT decided that a Tribunal had been wrong not to take into account a report, that had been prepared by a qualified person and which dealt with issues that the Tribunal was required to resolve, simply on the basis that the report had been prepared for internal disciplinary proceedings rather than for the tribunal proceedings. We would stress two important points from this decision. First, all the EAT was saying was that the Tribunal should have taken account of the report – it specifically said that the Tribunal was not bound to accept its conclusions, though it would have to have provided substantive reasoning for rejecting those conclusions. Second, and most significantly, the case dealt with an expert report. It seems to us that the journal article we were provided with is a materially different document to an expert report.

19.124 The claimant made the point that the article had been placed in the bundle and that the respondent had had the opportunity to call evidence contradicting it, although of course we note that the brief summary on the Guy's and St Thomas' website that we were shown (the one which Miss Maybanks had seen) appeared to have come to a different conclusion – that there was no strong evidence. Although it appears to us that the respondent was wrong to suggest that the BMJ research postdated this case and that there was no evidence of peer review (albeit that the peer review may have taken place sometime later), the respondent is right to say that there was no expert opinion evidence on the quality or cogency of the BMJ research.

19.125 The claimant also relied upon an extract from what is known as the Green Book, the relevant extracts being at page 1017 of the bundle. As we understand it, this is Coronavirus vaccination information for public health professionals, prepared by the UK Health Security Agency. Table 3 of the extract identifies clinical risk groups for individuals aged 16 years and over. One such group is "Chronic respiratory disease", described as follows:

> "Individuals with a severe lung conditions, including those with poorly controlled asthma and chronic obstructive pulmonary disease (COPD) including chronic bronchitis and emphysema; bronchiectasis, cystic fibrosis…"

19.126 We all considered that this was of no assistance to us in answering questions we had to answer. Although OSA is chronic and respiratory, as we have

already observed, a disease is not necessarily the same thing as a disorder and, as the claimant conceded, would not be considered to be a lung condition let alone a severe lung condition.

19.127 Turning back to the question we had to answer: was the claimant clinically extremely vulnerable because of obstructive sleep apnoea? The majority considered that we could not conclude that on the balance of probabilities, nor could we conclude that OSA materially contributed to the claimant's categorisation as clinically extremely vulnerable. We came to that conclusion in the absence of any direct evidence that said that the claimant had been categorised as clinically extremely vulnerable because of his OSA. The majority did not consider that it was appropriate to conclude, as the claimant asserted, that his OSA effectively tripled the risk of hospitalisation from a Covid-19 infection. The only basis for that conclusion, and therefore also for the conclusion that the claimant was clinically extremely vulnerable because of OSA, or that OSA contributed to his clinically extremely vulnerable categorisation, could have come from our own analysis of the BMJ report. The majority considered that it was simply inappropriate to embark upon our own analysis of the BMJ report in the absence of any expert assistance on the point. We do not know whether there has been later research that came to different conclusions; we do not know whether there are points to be made about the quality of the research – though of course we are not making any suggestion that, in our view, the research was not of good quality. We are simply not in a position to make that judgement because we are not experts. Even if we were to embark upon our own analysis of this study, although, in part, it would appear to accord with the claimant's suggestion, we note that in other parts it is less certain. We have already noted the use of the word "suggesting" above and we also note that the key messages are in the form of three bullet points, one of which is a question, the second of which simply states that there is a correlation; and the third of which states that obstructive sleep apnoea should be recognised as a comorbidity risk factor without any expert explanation for us about what that means. Had the majority conducted our own analysis we would also have taken into account that the extract from the Guy's and St Thomas' website that we were shown is far more equivocal on the question. Ultimately, the majority conclude that the claimant has not shown, on the balance of probabilities, that OSA makes someone more vulnerable to a severe Covid infection. The majority would also stress the important point that even if we are wrong about that, we have still not been provided with any evidence that would allow us to conclude whether the illness which the claimant in fact experienced in January 2021 was made worse or prolonged by his OSA. Even if his OSA had put him *at more risk* of a prolonged or severe illness, that would be some way from a finding that on the balance of probabilities that illness in January was, in fact, made worse or prolonged by the claimant's OSA. Even had we accepted the central proposition that we were asked to, that the disability effectively tripled the risk of hospitalisation, that tripling figure would have been of no assistance given that the claimant was not in fact hospitalised, even were we to be inclined to embark upon what would amount to our own statistical analysis on the likely effect of a tripled risk.

19.128 Mr Sagar took a different view to that of the majority. He considered that it

was appropriate to take account of the BMJ study given that the respondent knew it was in the bundle and had not taken the opportunity to produce any research in conflict with it. The words in the study were, he thought, perfectly clear, and formed a sound basis for a conclusion that having OSA makes someone materially more vulnerable to a severe Covid infection and, indeed, also for the proposition that the claimant's disability effectively tripled the risk of his hospitalisation for Covid-19. Taking account of that, Mr Sagar considered that it was appropriate to conclude on the balance of probabilities that the claimant's OSA contributed to his categorisation as clinically extremely vulnerable and that further, it was reasonable to conclude that on the balance of probabilities the claimant's January illness had been worsened or prolonged because of his disability.

LAW

Discrimination

20 The Equality Act 2010 ("EqA") prohibits discrimination on the grounds of various "protected characteristics", set out at sections 5 to 18. An employer must not discriminate against (or harass or victimise) an employee by dismissing them or by subjecting them to any other detriment (sections 39 and 40). The Tribunal's jurisdiction to hear complaints about contraventions of the provisions prohibiting discrimination in employment is established by s 120. There was no dispute here that the claimant was the respondent's employee within the meaning the Act. Nor was there any dispute that the respondent would be liable under s 109 for any contraventions of the Act done by its other employees.

21 The Equality and Human Rights Commission Employment Code ("the EHRC Code" provides a detailed explanation of the EqA. The Tribunal must take into account any part it that appears relevant to any questions arising in proceedings (s 15 Equality Act 2006).

22 Discrimination may be sub-conscious. As Lord Nicholls said, in the context of a case about race discrimination, in Nagarajan v London Regional Transport [1999] IRLR 572:

> "All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn."

23 S 136 of the EqA makes provisions about the burden of proof. If there are facts from which the Tribunal could decide, in the absence of any other explanation, that there was a contravention of the Act, the Tribunal must hold that there was a

contravention, unless the respondent proves that that there was not a contravention. S 136 requires careful attention where there is room for doubt as to the facts necessary to establish discrimination, but has nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or another (Hewage v Grampian Health Board [2012] UKSC 37). The burden of proof does not shift where there is no evidence to suggest the possibility of discrimination (Field v Steve Pye and Co (KL) Ltd [2022] EAT 68). Guidelines on the application of s 136 were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142. One important point to note is that the question is whether there are facts from which a Tribunal could decide… It is not sufficient for the employee merely to prove a difference in protected characteristic and a difference in treatment. Something more is required (Madarassy v Nomura International Plc [2007] EWCA Civ 33). Unfair or unreasonable treatment on its own is not enough (Glasgow City Council v Zafar [1998] IRLR 36). If the burden of proof does shift, under the Igen guidance the employer must prove that the less favourable treatment was "in no sense whatsoever" because of the protected characteristic. Because the evidence in support of the explanation will usually be in the possession of the employer, tribunals should expect "cogent evidence" for the employer's burden to be discharged.

Discrimination arising from disability

24 By s 15 EqA:

> (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.

25 In T-Systems Ltd v Lewis EAT 0042/15 the EAT said that the phrase "something arising in consequence of" the disability should be given its ordinary and natural meaning. "Unfavourably" is not defined in the EqA, but it was not in dispute in this case that dismissal amounts to unfavourable treatment.

26 As Langstaff J explained in Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, two separate causative steps need to be established for a claim to succeed under s 15: (i) the disability had the consequence of "something", and (ii) the claimant was treated unfavourably because of that something. In Pnaiser v NHS England and anor 2016 IRLR 170 and then again in Sheikholeslami v University of Edinburgh 2018 IRLR 1090 Simler J, as she then was, approached the issue in the other order (which is, as was made clear in Weerasinghe, open to the Tribunal). In Sheikholeslami, her Ladyship said:

> "On causation, the approach to S.15… is now well established... In short, this provision requires an investigation of two distinct causative issues:

> (i) did A treat B unfavourably because of an (identified) something? and
>
> (ii) did that something arise in consequence of B's disability?
>
> The first issue involves a [subjective] examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment (it need not be the main or sole reason) then stage (i) is satisfied. The second issue is a question of objective fact [i.e. it will not depend on the person's thought processes] for an employment tribunal to decide in light of the evidence."

27 The person's reasons for the unfavourable treatment are to be distinguished from their motive, which is irrelevant. While a broad approach applies when considering stage (ii) there must still be a connection of some kind. As Simler J said in Sheikholeslami, the critical question is whether the 'something' arose "in 'consequence of' (rather than being caused by) the disability… This is a looser connection that might involve more than one link in the chain of consequences."

28 The respondent will have a defence if it can show either of the things set out in ss (1)(b) or (2). As to knowledge, see below. So far as whether the treatment was a proportionate means of achieving a legitimate aim is concerned, although business needs and economic efficiency may be legitimate aims, the EHRC Code states that an employer simply trying to reduce costs cannot expect to satisfy the test (see para 4.29). As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see para 4.31). A critical evaluation of the evidence is required, entailing a weighing of the needs of the employer against the discriminatory impact on the employee; the Tribunal must carry out its own assessment on this matter, as opposed to simply asking what might fall within the band of reasonable responses of the reasonable employer (Gray v University of Portsmouth EAT 0242/20). It will be necessary to consider whether the treatment was an appropriate and reasonably necessary way to achieve the legitimate aim, and whether something less discriminatory could have been done instead.

Reasonable adjustments

29 The requirements of the duty to make reasonable adjustments are set out in s 20 EqA and, by s 21, a failure to comply with the duty amounts to discrimination. For the purposes of this case, the duty applies where a "provision, criterion or practice" ("PCP") puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. The disadvantage must be linked to the disability. The duty is to take such steps as it is reasonable to have to take to avoid the disadvantage. "Substantial" means "more than minor or trivial" (s 212 EqA). Paragraph 6.8 of the EHRC Code says that the duty to make reasonable adjustments applies at all stages of employment including dismissal. The employer is not subject to the duty if it shows that it did not know, and could not reasonably be expected to know, that the person had a disability and was likely to be placed at the relevant disadvantage (Sch 8 Para 20

EqA) – see below for more on knowledge.

30 The EHRC Code (para 4.5) says that the term "provision, criterion or practice" should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. In Ishola v Transport for London [2020] EWCA Civ 112, although the Court of Appeal accepted that the words "provision, criterion or practice" were not to be narrowly construed or unjustifiably limited in their application, it considered it significant that Parliament had chosen these words instead of "act" or "decision". The words "provision", "criterion" and "practice" all carry the connotation of a state of affairs indicating how the employer generally treats similar cases or how it would deal with a similar case if it occurred again. The Court also pointed out that a PCP must be capable of being applied to others. Although a one-off act or decision may amount to a PCP it is not necessarily one.

31 So far as the burden of proof is concerned, it is for the claimant to establish that the duty has arisen and that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. It will then be for the respondent to show that it did not fail to comply with the duty (Project Management Institute v Latif UKEAT/0028/07).

Knowledge

32 So far as the issue what the respondent could not reasonably have been expected to know is concerned, we were referred to three particular authorities which are on point. Where appropriate, we adopt the summaries provided by one of the parties in written submissions where that summary was not disputed by the other party. In Department of Work and Pensions v Hall UKEAT/0012/05 it was said that constructive knowledge can arise for example where there are "warning signs" and where an employer fails to make enquiries. In Lamb v The Garrard Academy UKEAT/0042/18/RN the EAT said that the right question is "What would the respondent have concluded if it had taken reasonable steps?" In Gallop v Newport City Council [2013] EWCA Civ 1583 the Court of Appeal said the employer should not ask general questions, but instead specific practical questions about the existence of an impairment and its effects.

Victimisation

33 By s 27 EqA, victimisation occurs when a person A subjects another person B to a detriment because B does a protected act (or because A believes that B has done or may do a protected act). One type of protected act is doing a thing for the purposes of or in connection with the EqA. Detriment for these purposes does include dismissal. An employee suffers a detriment if, by reason of the act or acts complained of, a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11).

34 The detriment need not have been solely or mainly because of the protected act. Rather, the question is whether the protected act had a significant influence on the employer's decision, a significant influence being one which is more than trivial (Igen Ltd and ors v Wong and other cases 2005 ICR 931).

Time limits

35 By s 123(1) of the EqA, discrimination etc. claims to the Employment Tribunal may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks just and equitable. That period of three months is subject to provisions which extend it to take account of the mandatory early conciliation involving ACAS. Also, s 123(3) provides that conduct extending over a period is to be treated as done at the end of the period.

36 There was no dispute that the practical effect of all those provisions in this case is that any complaint about an act done before 1 January 2021 would be out of time unless (i) it was part of conduct extending over a period which ended on or after that date or (ii) we thought it was just and equitable to extend time.

37 A distinction is drawn between a continuing act (i.e. a policy, rule, scheme, regime or practice that continues to be applied) and an one-off act that has merely continuing consequences. But in Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, the Court of Appeal said that 'policy, rule, scheme, regime or practice' should not be treated as a complete statement of what amounts to a continuing act; the focus should be on the substance of the complaint. This was approved in Aziz v FDA 2010 EWCA Civ 304, where the Court noted that, in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents.

38 So far as the discretion to extend time is concerned, it has been said that the exercise of the discretion is the exception not the rule (Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434). But an extension does not require exceptional circumstances. In exercising the discretion a Tribunal may (not must) have regard to the checklist contained in S.33 of the Limitation Act 1980, as modified by the EAT in British Coal Corporation v Keeble and ors 1997 IRLR 336. As summarised by the authors of the *IDS Manual*, this suggests the Tribunal consider the prejudice that each party would suffer as a result of the decision reached and have regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the respondent has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the complaint; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

Authorities

39 Where we have set out the law above, we do include some authorities which were not formally cited in argument before us. Where we do so we are confident

that no unfairness is caused to the parties since the authorities merely establish points of law which are uncontroversial and/or which counsel did address us on in substance even if each case was not specifically referred to.

40 We were also directed to a number of other authorities during the course of written and oral arguments by both counsel. We do not set out all of those authorities but we do refer to some of them below in the particular parts where they helped us on the points which we had to decide. As before, we have, in some cases, adopted the summary provided by one counsel when that summary was not disputed by the other.

CONCLUSIONS

Knowledge and constructive knowledge of disability

41 A significant issue in this case is whether the respondent did not know and could not reasonably have been expected to know that the claimant had the disability. There is no dispute that the respondent knew about the impairment, OSA, from 18 May 2020. The majority found that was the extent of the respondent's actual knowledge, save for what we have already set out in the Guy's study which Miss Maybanks saw (see para 19.26 above), with the minority finding also that the respondent was aware later that the claimant had been classified as clinically extremely vulnerable.

42 The suggestion made by the claimant was that the respondent's knowledge of his OSA and his clinically vulnerable status as indicated by what he had filled in on the 17 May form either gave the respondent knowledge of his disability or put it on sufficient enquiry such that constructive knowledge arose. The claimant submitted that actual knowledge was established by the statement that the claimant's condition gave rise to clinical vulnerability, linked back to the respondent's own understanding set out in its 17 March email about those at risk. In the alternative, the claimant said constructive knowledge of the substantial disadvantage was established by the shielding letters which the claimant had provided (though of course that particular point will only be relevant so far as the minority's findings are concerned). The claimant further submits that if the respondent had made enquiries, in other words, if it had asked the claimant, it would have discovered not only that he was clinically vulnerable but also that he was clinically extremely vulnerable.

43 As a general point, we all accept that in the circumstances of this case, had the respondent been aware of the claimant's clinically extremely vulnerable status, in other words that he needed to shield, it would or should have had the required knowledge. We do not consider that the same can be said simply about the status of clinically vulnerable. The fact that someone was clinically vulnerable does not alone lead to the conclusion that there is or may be the necessary impact upon their day-to-day activities.

44 The respondent had clearly been able to agree for the purposes of this litigation – in other words after further enquiry – that the claimant was disabled. A point made on behalf of the claimant was that if they could have reached that conclusion as part of the litigation then they could equally have reached that conclusion

earlier. But litigation is a very different process to the process that was going on in 2021 in this case.

45 The fact that the respondent had enquired about clinically vulnerable status, and not merely about clinically extremely vulnerable status, indicates that the respondent could and should have done something upon receiving a positive answer about clinically vulnerable status. The question is what should it have done.

46 We all agreed that it was appropriate to take into account the circumstances prevailing at the time in deciding what the respondent should reasonably have done. In other words, what is reasonable in an individual case outside the context of the pandemic may be different to what is reasonable in the context of the pandemic where the science was uncertain and the respondent had to assess, in a short period of time, the risk posed to all its members of staff.

47 We all considered that it would not have been proportionate for the respondent to have sent everyone who ticked the clinically vulnerable box in the May survey to an occupational health appointment, and in the particular context of the claimant, who had not provided any information other than ticking that box, it would not have been proportionate to have sent him for an occupational health assessment. There was, in our judgment, no reason for an occupational health referral at that point.

48 We all agreed that it was a significant consideration that, regardless of what he had indicated on the form, the claimant was voluntarily coming into work without telling anybody that there was any need for him not to come into work. As we have already said, the claimant had also explicitly told the respondent he was not disabled on the forms he completed around August 2020.

49 Otherwise, the members of the Tribunal did not agree about the effect of the box that the claimant had ticked in the 18 May form upon the respondent's constructive knowledge of the claimant's condition. Mr Sagar and Mr Surrey were of the view that the fact that the claimant had ticked a box saying he had a chronic mild to moderate respiratory disease etc. should have led the respondent to make further enquiries of the claimant in the context that there were people volunteering to be on site. Mr Surrey and Mr Sagar considered that the respondent should have asked the claimant more questions having considered his response to that form. In considering what was reasonable for the respondent to do, Mr Surrey and Mr Sagar took account of the point that, although the respondent was undoubtedly in a difficult situation, it had sufficient resources to deal with that situation given in particular that it was able to appoint Miss Maybanks as a "Covid coordinator". Employment Judge Dick, in the minority on this point, took a different view. Although there was clearly a reason for the respondent enquiring as to whether people were clinically vulnerable as opposed to only enquiring whether they were clinically extremely vulnerable, Employment Judge Dick considered that in the wider context that we have just set out, it was reasonable in all the circumstances for the respondent to conclude, in the absence of any medical information provided by a particular person who was clinically vulnerable, that that person was able to attend work on site, provided that the social distancing measures etc. which applied to everyone, were also applied to them. Employment Judge Dick

considered that since the respondent had earlier made clear, in the 17 March email, that anybody in a high risk group should seek advice from a doctor before attending work, it was reasonable for the respondent to conclude that in the absence of that information it did not need to make any further enquiry of the claimant. Employment Judge Dick was of the view that what steps the respondent did take were sufficient given that Miss Maybanks did her own brief research into the subject, which yielded the conclusion that there was no strong evidence to suggest an increased risk for getting or developing complications.

50 All three of us agreed that if the respondent had in fact asked the claimant for further information, he would not have provided any further material information. We concluded that the claimant had deliberately kept his clinically extremely vulnerable status from the respondent (at all material times on the majority's findings; until the point that he provided the shielding letter on the minority's findings).

51 The first significant question for us is: Did the respondent know that the claimant's OSA (i.e., the only medical condition of which the respondent was aware) had a substantial and long-term adverse effect upon his ability to carry out normal day-to-day activities? On the basis of the findings, we have set out above, the majority concluded that the answer to that question was "no," not at any time. Mr Sagar, dissenting, took the view that the answer to that question was "yes", but only from 5 November, in other words when the claimant informed the respondent, on Mr Sagar's findings, that he was clinically extremely vulnerable.

52 The second significant question for us is: If the respondent did not know, should it have known? On the basis of the findings that we have set out above, the majority reached the conclusion that the answer to that question was "no", not at any time, albeit arriving at that conclusion by different routes. Employment Judge Dick took the view that the respondent was not required to make any further enquiries. Mr Surrey took the view that had the respondent made the enquiries it should have, it still would not have found out anything else and so the majority considered that the respondent should not be imputed with knowledge of the claimant's disability. Mr Sagar, dissenting, took the view that the respondent should have known from the date that the claimant completed the survey on 18 May 2020.

53 In short, the majority concluded that the respondent did not have actual or constructive knowledge of the claimant's disability at any material time. Mr Sagar, dissenting, concluded that the respondent had constructive knowledge of the claimant's disability from 18 May 2020 and actual knowledge of the claimant's disability from 18 November 2020.

54 We now deal with each complaint in turn addressing the issues to be decided as they are set out in the list of issues, save that we consider the point about time limits at the end.

<u>Disability</u>

55 **Issue 9.9** – There is no need for us to reach any further conclusions on this point.

Discrimination arising from disability

56 **Issues 9.13 to 9.15** – There was no dispute that the respondent treated the claimant unfavourably by dismissing him. The question was whether one or more of three identified 'somethings' arose in consequence of the claimant's disability and, if so, whether the unfavourable treatment – the dismissal – was because of the thing that arose. We kept in mind that in T-Systems (above) the EAT held that the phrase "Something arising in consequence of the disability should be given its ordinary and natural meaning." We also took note that the EHRC Employment Code states that the consequences of a disability "include anything which is the result, effect or outcome of a disabled person's disability."

57 The first "something arising" was "inability to attend work." We all agreed that the claimant was unable to attend work in November 2020 and in January/February 2021. On the basis of our previous findings, none of the claimant's absences before November can have had anything to do with his disability. So far as the claimant's November absence is concerned the majority find that the absence did not arise because of the claimant's disability. Although, for the reasons set out above, all members of the Tribunal accepted that the absence was Covid-related, the majority did not accept that the claimant had proved that *his disability* led to increased susceptibility to Covid infection or to increased susceptibility to worse or prolonged Covid infection. Further, as we found, although the claimant had Covid-like symptoms in November, we were not satisfied on the balance of probabilities that he had Covid-19. His absence was only Covid-related in the sense that he had been told to stay at home in case he should infect others with Covid (albeit that we have found that, on the balance of probabilities, he did not have Covid). His absence arose because he had been told to stay at home so that he did not infect others, not because he was clinically extremely vulnerable or clinically vulnerable or because he had OSA. So the claimant's absence did not arise from his disability, on the majority view. Put another way, the claimant did not have Covid, as we have found, but he was displaying Covid-like symptoms. Anyone in that situation would have been given the same advice regardless of whether they had a disability, or were clinically vulnerable, or were clinically extremely vulnerable, or none of those things applied to them. The absence therefore cannot have been related to the claimant's disability. Mr Sagar, dissenting, took the view that the claimant's November absence was inextricably linked to his fear of getting Covid. The claimant knew by now that he was clinically extremely vulnerable which, as Mr Sagar found, was linked to his disability. And, so, on the minority view, giving it its ordinary and natural meaning, his absence arose because of his clinically extremely vulnerable status and, therefore, because of his disability.

58 So far as the claimant's January/February 2021 absence is concerned, we all accepted that it arose because of a Covid-19 infection – the claimant was too ill to go in to work. However, the majority concluded that the claimant had not shown that the Covid infection arose because of his OSA or was made worse or prolonged because of his OSA. The majority therefore concluded that the January and February absence did not arise because of the claimant's disability. Mr Sagar, dissenting, took the view that it was reasonable to conclude that the claimant had Covid, and a bad case of it, because of his disability. The majority in contrast took the view that even if the claimant had been able to establish –

which he had not – that his disability placed him at a higher risk of prolonged or worse bouts of Covid, that would still not establish that the particular bout of Covid that the claimant experienced in January or February was in fact made worse, or prolonged, by the claimant's OSA. To put it another way, we have no way of knowing whether, if the claimant had not had OSA but was otherwise in exactly the same circumstances, including having all of the other medical conditions we refer to above, his illness would have been any less severe or for any shorter a duration.

59 The next "something arising "relied upon was the "need to shield". We all agreed that the need to shield arose from 4 November 2020, i.e. the date of the letter in which the government informed the claimant that people in his position were once again being advised to stay away from work. However, for the reasons already set out, the majority concluded that the claimant had not shown that the need to shield arose in consequence of his disability, in other words, his OSA. Mr Sagar, dissenting, concluded that the claimant had needed to shield because he was clinically extremely vulnerable and that, in turn, he was clinically extremely vulnerable because of his disability.

60 The third "something arising" relied upon was the "need to work from home". We all accept that the claimant, when he was not unwell, had a need to work from home at least after receiving the 4 November letter. However, for the reasons that have already been set out, the majority were of the view that that need did not arise in consequence of the claimant's disability. The claimant needed to work from home because of his clinically extremely vulnerable status but the majority were of the view that his clinically extremely vulnerable status was not in consequence of his disability and therefore the need to work from home could not itself be a consequence of the claimant's disability. Mr Sagar, dissenting for the reasons that have already been set out, took the view that the need to work from home did arise in consequence of the claimant's disability.

61 On the majority view then, the complaint of discrimination arising from disability fails because none of the "somethings" arose in consequence of the claimant's disability. Because Mr Sagar, in the minority, found that those things had arisen in consequence of the claimant's disability, it is necessary for us to set out Mr Sagar's reasoning on the next steps in the list of issues relating to the discrimination arising claim. Where we do so we also set out what the majority view would have been had the majority needed to consider these points. Mr Sagar considered, and the majority would have agreed, that the claimant was not dismissed because of his need to shield and was not dismissed because of his need to work from home. On the majority view, quite simply the claimant had never made the respondent aware of a need to shield or a need to work from home and so the respondent's decision to dismiss the claimant could not possibly have been in any way because of those things. Although on the basis of Mr Sagar's findings the respondent would have been aware of the claimant's need to shield and to work from home as a result of its receipt of the November letter, Mr Sagar nevertheless found that the dismissal was not because of either of those things. Whatever the merits, Mr Olusanya's decision to dismiss was based upon the concerns set out in the dismissal letter or at least some of them. The claimant's need to shield or to work from home were simply not any part of the reasons for his dismissal. However, Mr Sagar took a different view when it came

to the claimant's inability to attend work and the majority would have agreed on this point. The claimant was, we find, dismissed because of his inability to attend work during his January/February absence. The absence was plainly the result of the claimant's inability to attend work and, as we have already found, the claimant's absence was not the only reason for the dismissal but it was a reason – indeed, we found that it was the main reason operating on the mind of Mr Olusanya. Put another way, had the claimant not been off work he would not have been dismissed.

62 **Issue 9.16** *Has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim*? Mr Sagar found, and the majority would have agreed, that the respondent's dismissal of the claimant was not a proportionate means of achieving a legitimate aim. We all accepted that it was a legitimate aim for the respondent to ensure that the staff that it employed in permanent roles had the necessary skills, attitude and performance and that performance in this context could legitimately have included regular attendance. However, we do not consider that the respondent's actions in dismissing the claimant were a proportionate means of achieving that aim. We are not of course applying the band of reasonable responses test at this point but instead arriving at our own view. The respondent had decided that the claimant should be the subject of a meeting in which his performance was reviewed. That would have given the claimant the chance to address the respondent's concerns about his performance and, of course, it would have given him the chance to improve his performance. The only reason the claimant did not attend that meeting was that he was unwell. While in some circumstances it will, of course, be appropriate for an employer to say enough is enough, even when someone is genuinely off sick, we do not consider that that stage had been reached in this case. The respondent had numerous other options which could have been taken before dismissing the claimant. The most obvious one which, in our judgment, was not given due consideration, was extending the claimant's probationary period. Only a short extension of that period might have been necessary. Other options of course, included giving the claimant a warning or similar. Further disproportionality was introduced in our judgment when the respondent held it against the claimant that he had not attended the meeting when, as we have found, he was genuinely unable to attend and had made that fact very clear to the respondent.

63 **Issue 9.17** *Has the respondent shown that it did not know and could not reasonably have been expected to know that the claimant was a disabled person*? We have already set out our answer to this question above. The majority were of the view that the respondent had shown that it lacked the necessary knowledge and imputed knowledge. Mr Sagar, dissenting, was of the view that the respondent had not shown those things.

64 On the majority view therefore, the complaint of discrimination arising from disability failed on two essential points. First, as a question of objective fact, none of the "somethings" arose in consequence of the claimant's disability. Second, the respondent lacked the actual or imputed knowledge required of the claimant's disability. Mr Sagar, dissenting, was of the view that all the essential elements of the complaint of discrimination arising from disability had been made out.

Reasonable adjustments

65 **Issue 9.18** *Did the respondent not know and could it not reasonably have been expected to know that the claimant was a disabled person*? For reasons which will already be clear, the majority view was that the answer to that question was, no, and so the complaint of failure to make reasonable adjustments fell at this first hurdle. As will be equally clear, in dissenting, Mr Sagar found that the respondent did not lack the requisite knowledge or imputed knowledge.

66 As we have done above, we now consider the next steps in the list of issues setting out the minority view and whether the majority would have agreed had it been necessary to make the findings.

67 **Issue 9.19** *The PCPs*. The claimant relied on two PCPs:

67.1 (Issue 9.19.1) A requirement to be working (rather than be off work). There was in fact no dispute about this. The respondent had in place sickness or absence policies which were there to encourage regular attendance. Plainly, the respondent, as would any other employer, generally required its staff to be working rather than taking time off.

67.2 (Issue 9.19.2) A requirement to be at the workplace, rather than working from home. On the basis of our factual findings above, we all accept the respondent's submission that it did not have a policy requiring physical attendance at the workplace during the course of the pandemic. Those who needed to shield or work from home were permitted to do so. To the extent that Mr Sagar found that the respondent had sought to have the claimant work on its premises, that was something that applied to the claimant only and so could not amount to a PCP.

68 Since none of the members of the Tribunal consider that there was such a PCP as set out at 9.19.2, we do not go on to consider it any further. We do go on to consider the next question in the list of issues with regard to the other PCP.

69 **Issue 9.20** – *Did the PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time in that the claimant was at greater risk of serious symptoms and/or death from Covid?* Mr Sagar concluded as follows. On the basis of Mr Sagar's earlier findings, the claimant took more time off work because of his disability and was therefore inevitably placed at a disadvantage by any policy which took attendance into account. Someone who was not disabled would not have taken so much time off and would not have been put at a disadvantage in the way that the claimant was. The majority would not have agreed. The claimant had not shown that he was at greater risk of serious symptoms and/or death from Covid in comparison with persons who were not disabled, i.e. in the context of this case persons who did not have OSA. Further, the requirement was to work, not to work on site. The claimant could have complied with the requirement by working from home which, on the basis of the majority's findings (and indeed the minority's) he could have asked for, but chose not to. Working from home would not have put him at any greater risk of serious symptoms or death from Covid and so the PCP did not put him at a substantial disadvantage.

70 **Issue 9.21** *Did the respondent know or could it reasonably be expected to know the claimant was likely to be placed at any such disadvantage*? Although this is a separate question to the respondent's knowledge of the claimant's disabilities, on the facts of this case the questions overlap substantially. On Mr Sagar's findings the respondent in fact knew, following receipt of the November shielding letter, and should have known earlier than that, on receipt of the claimant's answers to the May questionnaire. On the majority view, since (in answer to question 9.20) the claimant was not at a disadvantage, the respondent clearly did not and could not reasonably have known that he was at such a disadvantage. Even if there had been such a disadvantage, for the same reasons as the majority's conclusion on knowledge and imputed knowledge of disability, the majority would have concluded that the respondent did not know or could not reasonably have been expected to know about the disadvantage.

71 **Issue 9.22** *Were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage*? Mr Sagar took the view that the respondent could and should have made any number of reasonable adjustments such as allowing the claimant to work from home, postponing the capability meeting, allowing him to go part-time, extending his probationary period, and allowing him more time off. The majority view was that even if those steps had been taken, they would not have avoided the disadvantage which was pleaded. In other words, they would not have put the claimant at any lesser risk of serious symptoms or death from Covid in the context that, on the majority finding, if the claimant had ever asked to work from home he would clearly have been allowed to do so. Mr Sagar took the view that the adjustments should have been made even where the claimant had not requested them given that, on Mr Sagar's findings, the respondent was aware that the claimant was clinically extremely vulnerable from November. That consideration, of course, does not arise on the majority findings. The specific steps that the claimant suggested should have been taken were allowing him to shield at home or allowing him to work from home. On the basis of Mr Sagar's findings, those steps plainly could have been taken to avoid the disadvantage. On the majority view there was no disadvantage and so attempting to answer that question is somewhat artificial.

72 **Issue 9.23** *Would it have been reasonable for the respondent to have to take those steps at any relevant time?* On the majority view the answer to this question would have been, no. It is not reasonable in the circumstances, as the majority have found, to have expected the respondent to impose shielding or working from home on the claimant when it had no knowledge that either of those things were required. If the claimant had ever asked to work from home he would have been allowed to. Mr Sagar was of the view that on the circumstances as he found them to be it would have been perfectly reasonable for the respondent to take those steps, particularly as there was, of course, never any suggestion that there was any good reason why the claimant could not have worked from home.

73 On the majority view, the complaint of failure to make reasonable adjustments therefore did not succeed for two principal reasons. Firstly, the respondent lacked the required knowledge or imputed knowledge that the claimant was disabled. Secondly, where there was a PCP, it did not put the claimant at a substantial disadvantage in comparison with persons who were not disabled. Mr Sagar, dissenting, found that each element of the complaint of failure to make reasonable

adjustments had been made out.

Victimisation

74 **Issue 9.24** *Did the claimant do a protected act*? We all considered that the claimant had not, as a matter of fact, done any of the things set out at issues 9.24.1,9.24.2 and 9.24.3 which were said to amount to protected acts. The majority took the same view of the matters set out at 9.24.4. On the majority view therefore that finding disposes of the complaints of victimisation. The claimant did not do any protected acts.

75 On Mr Sagar's findings, 9.24.4 was made out in part. In November 2020 the claimant received an NHS notification and gave a hard copy of it to the school. In doing so, on Mr Sagar's finding, the claimant had made an implied request to work from home. Mr Sagar was just persuaded that this amounted to doing a thing for the purposes of the Equality Act, on the basis of Mr Sagar's previous findings that the shielding letter related to the claimant's disability and that what was being requested must therefore have been a request for a reasonable adjustment.

76 **Issue 9.25** *Did the respondent subject the claimant to any detriment*?

76.1 Detriment 9.25.1 was "Failed to follow capability procedures". As a matter of fact, the respondent did fail to follow some of its capability procedures. For example, as we have already identified, the claimant's performance was not appraised over a 12 month period and nobody in fact met with the claimant to address the respondent's concerns about him (see paragraph 8.2 of the policy for appraising performance etc).

76.2 Detriment 9.25.2 was "Failed to allow the claimant to attend the first capability hearing." The respondent did not prevent the claimant from attending the first capability hearing although, of course, it did not give him the opportunity to attend a further hearing when he was too unwell to attend the first.

76.3 Detriment 9.25.3 was "Failed to provide additional training opportunities to improve performance". The respondent did not fail to do this. In fact, it told him who to contact to make the arrangements to do the training and he did not contact those people.

76.4 The final detriment, 9.25.4 was that the respondent dismissed the claimant. Clearly that happened. In the list of issues that detriment was broken down into three sub points.

76.4.1 One of them (9.25.4.3) was that the claimant said that he had been "set up to fail". On the basis of our findings above, we do not accept that the respondent set the claimant up to fail.

76.4.2 Another of the points (9.25.4.2) was that two allegations were said to have been decided by Mr Olusanya based on Mr Ali's incorrect information. The two allegations here appear to be a reference to the claimant's allegations that someone else was responsible for

the data breach and/or that Mr Davies gave false information about the data breach. As we have found above, neither of those things were true. Mr Ali therefore did not give incorrect information to Mr Olusanya on which Mr Olusanya then based his decision.

76.4.3 The other sub point (9.25.4.1) was that one of the allegations against the claimant was fabricated, in other words, that the Head Teacher, Mr Olusanya, did not genuinely believe it to be true. The list of issues specifies that the allegation was that the claimant had not fixed the sixth form computers in July 2020. The majority consider that the respondent's concern about the claimant not fixing the sixth form computers was not fabricated. It was a genuine concern of Mr Olusanya, albeit that we consider he gave it too much weight, given in particular that the claimant was never asked about it and, even more significantly, that the conduct had clearly taken place before the claimant was given a permanent employment contract and the respondent nevertheless went on to employ him. Dissenting, Mr Sagar took the view that the allegation had been fabricated as the claimant would never have been given the full-time employment contract had it been true.

77 **Issue 9.26** *Was it because the claimant did a protected act*? Mr Sagar was of the view that none of the detriments which he found to have occurred had occurred because of the protected act that he found the claimant to have done, i.e. handing the respondent his letter about shielding. The claimant had not gone to work for some time and his probationary period was soon to come to an end. The respondent decided to end the claimant's employment given the impending end of the probationary period, because he was not coming into work and also because of its concerns about his performance. What procedural flaws there were, were related to the respondent's haste in dealing with matters before the end of the probationary period. Those failures had nothing whatsoever to do with the fact that the claimant had, on Mr Sagar's findings, handed the respondent a letter about the shielding and in doing so, had requested reasonable adjustments. The procedural failings were not related to that request and nor was the decision to dismiss the claimant. Even if there was a later failure to provide additional training opportunities, in other words, sometime after the respondent told the claimant to arrange his own further training, Mr Sagar found, and the majority would have found, that that had nothing to do with the claimant having submitted the November letter to the respondent. In coming to that conclusion, Mr Sagar applied the test as set out in Peninsula Business Service Ltd v Baker [2017] ICR 714 (the test is why the respondent subjected the claimant to the detriment, i.e, what, consciously or unconsciously, was the reason for the treatment).

78 We all therefore considered that the complaint of victimisation failed, albeit Mr Sagar reached that conclusion for different reasons to those applied by the majority.

Time limits

79 As had already been set out in the list of issues, the "cut-off date" in this case was 1 January 2021. The claimant's dismissal took place well after that date. The

complaint of discrimination arising from disability was therefore in time since the unfavourable treatment relied upon was the dismissal.

80 So far as the victimisation complaint is concerned, almost all of the detriments relied upon were after the cut-off date. The one possible exception to that was the failure to provide additional training opportunities. We have found that the respondent did not in fact fail to provide additional training opportunities and so no question of time limits arises.

81 So far as the complaint about failure to make reasonable adjustments is concerned, had the full Tribunal adopted the analysis of Mr Sagar, then the duty to make reasonable adjustments would have arisen before the cut-off date of 1 Janaury 2021, and at least in some cases the respondent would have acted inconsistently with that duty or made it clear that it was not going to act in accordance with that duty before 1 January 2021. However, to the extent that any extension of time was required, we all would have granted it. It would have been, in our judgment, just and equitable to have done so given the adjustments related to what were in reality concerns that remained ongoing after 1 January 2021 and were never finally resolved until after the claimant's dismissal when his grievance was finally not upheld.

Reverse burden

82 We have already dealt above with the points that we did not consider it appropriate to draw adverse inferences against the respondent for its failure to call Mr Ali or Ms Karanja.

83 So far as the complaints of failure to make reasonable adjustments is concerned, in coming to the minority finding in favour of the claimant, Mr Sagar was able to reach factual conclusions without the need for the burden having passed to the respondent. The majority took the view that the claimant had not shown, on the balance of probabilities, that he was substantially disadvantaged, nor had he suggested an adjustment that the employer should have made in sufficient detail for the employer to deal with it, nor in the circumstances was there evidence at least capable of leading to a conclusion that the proposed adjustment would be reasonable and would reduce or eliminate the disadvantage. For the reasons the majority have already set out, the proposed adjustments would not have reduced or eliminated the disadvantage and could not have done so. Even if the burden had shifted, then, in this case, the majority would have found that the respondent had proved that the proposed adjustment was not reasonable since the respondent did not know there was a reason for the adjustment. And, had it done so, or the claimant in fact asked for the adjustment, the respondent would have granted it. In coming to these conclusions, we applied the case of Project Management Institute v Latif (above).

84 So far as the discrimination arising complaint is concerned, the majority found that the burden of proof had not shifted to the respondent because the claimant had not shown that any of the things arising arose in consequence of his disability. There was therefore no question that the claimant had proved facts on the balance of probabilities from which a Tribunal could conclude, in the absence of an adequate explanation, that there was discrimination arising from his disability. If

the burden had shifted, it might have shifted in such a way as to require the respondent to prove that its treatment of the claimant was not because of the claimant's inability to attend work. But we in fact found, or in the case of the majority would have found, that the dismissal was in fact because of that, without recourse to the shifting burden. So far as whether the dismissal was because of the need to shield or the need to work from home, we were able to make clear factual findings that those things had nothing whatsoever to do with the dismissal.

85 So far as the complaint of victimisation is concerned, on the majority findings, the claimant had simply not established any facts which could lead to a Tribunal to conclude that there was discrimination given that the claimant did not do any protected acts. Mr Sagar, although finding on a limited basis that there had been a protected act, concluded that he was in the position to make clear factual findings that the detriments complained of had nothing whatsoever to do with the protected act.

ANCILLARY MATTERS

86 At the time the case was adjourned for a reserved decision, a date for a remedy hearing was set in case one should be needed. Employment Judge Dick will now order that the hearing date is vacated.

87 Finally, Employment Judge Dick apologises to the parties for the time is has taken him to prepare this decision, and wishes to make clear that the other members of the Tribunal were in no way responsible for the delay.

APPENDIX – Extract from the list of issues prepared by Employment Judge Quill following the preliminary hearing of 21 March 2022

Time limits / limitation issues

9.1. Were all of the claimant's complaints presented within the time limits set out in
9.1.1. section 123 of the Equality Act 2010 ("EQA")
[…]

9.2. Dealing with this issue may involve consideration of subsidiary issues including: when the treatment complained about occurred; whether there was an act or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended.

9.3. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 1 January 2021 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it, subject to consideration of the matters mentioned in the previous

paragraph.

[…]

Disability

9.9. It is admitted that the claimant was a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times.

[…]

EQA, section 15: discrimination arising from disability

9.13. Did the following thing(s) arise in consequence of the claimant's disability:

9.14. Did the respondent treat the claimant unfavourably as follows:

9.15. In each case, if the respondent did treat the claimant unfavourably then was that because of the thing arising consequence of the claimant's disability?

	Unfavourable Treatment	Something Arising
A	Dismissing the Claimant	Inability to attend work
B	Dismissing the Claimant	Need to shield
C	Dismissing the Claimant	Need to work from home

9.16. If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?

9.17. Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

Reasonable adjustments: EQA, sections 20 & 21

9.18. Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?

9.19. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

9.19.1. Requirement to be working (rather than be on time off)?

9.19.2. Requirement to be at the workplace (rather than working from home)?

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

9.20.1. the Claimant was at greater risk of serious symptoms and/or death from Covid?

9.21. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

9.22. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

9.22.1. Allow shielding at home
9.22.2. Allow working from home

9.23. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Equality Act, section 27: victimisation

9.24. Did the claimant do a protected act? The claimant relies upon the following:

9.24.1. That he informed Kate Wainstein (HR) in around April 2020 that had an NHS shielding letter and that he needed to shield due to "disability and black ethnicity".
9.24.2. That in around September 2020, he saw the same HR person and made similar remarks about shielding / shielding letter and gave her hard copy of letter.
9.24.3. In September 2020, he also made similar comments to 2 managers Mr Ali (deputy head) and Mr Davies (line manager).
9.24.3.1. In September 2020 he spoke to Mr Ali in Mr Ali's office, and he also believes he may have sent an email to Mr Ali in September.
9.24.3.2. In September 2020, he spoke to Mr Gary Davies in corridor outside his office.
9.24.4. In November 2020 and January 2021, the Claimant received NHS notifications and gave hard copies to school. Each time, he told HR and senior colleagues that he required reasonable adjustments and said these were: to work from home; to change his working hours; to come to work after the end of the school day; to start earlier in the day, before the school was busy (the school being open from 6am); to remain inside his office while working (he is not sure if he expressly suggested/requested this); to reduce contact time with others.

9.25. Did the respondent subject the claimant to any detriments as follows:

9.25.1. Fail to follow capability procedures
9.25.2. Fail to allow the Claimant to attend first capability hearing
9.25.3. Fail to provide additional training opportunities to improve performance
9.25.4. Dismissed the Claimant
9.25.4.1. One of the three allegations against the Claimant was fabricated – that is, the allegation is that the head did not genuinely believe it to be true. This is the allegation that the Claimant did not fix 6th form computers in July 2020. (Amongst other things, the Claimant relies on an assertion that this which was pre-probation.)
9.25.4.2. The other two allegations are said to have been decided by head based on Mr Ali's incorrect information to the head. (The Claimant alleges someone else may have committed the data breach and/or that Mr Davies may have given false information).
9.25.4.3. The Claimant alleges that he was set up to fail.

9.26. If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act?

[…]

Approved by:

Employment Judge Dick

12 January 2026

JUDGMENT SENT TO THE PARTIES ON
13 January 2026

FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. 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:

www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/