mf

EMPLOYMENT TRIBUNALS

Claimant: **Ms S Fox**

Respondent: **South Essex Academy Trust**

Heard at: **East London Hearing Centre**

On: **18-21, 24-28 September & 15 October 2018 (in chambers)**

Before: **Employment Judge Ross**

Members: **Ms M Long**
Mr D Ross

Representation

Claimant: In person

Respondent: Mr Heard (Counsel)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

1. **The complaints of disability discrimination under sections 20-21 Equality Act 2010 are not upheld.**

2. **The complaints of harassment contrary to section 26 Equality Act 2010 are not upheld.**

3. **The complaint of unfair dismissal is not upheld.**

4. **It is declared that the Respondent made unlawful deductions from the Claimant's wages between 1 September 2016 and 15 May 2017.**

REASONS

Complaints and Issues

1. The complaints and issues were set out in an agreed List of Issues. During the evidence of the Claimant, it was agreed that the issue at 6e had been included by mistake. Further, the Claimant explained that the allegation within issue 19 had been resolved by further disclosure (the Claimant having raised this allegation in good faith); and, accordingly, this complaint (a claim that the sick pay had been reduced so as to amount to an unlawful deduction) was dismissed on withdrawal.

2. The Tribunal also noted the further particulars of the complaints [51-53] which Mr. Heard explained had been used to draw up the List of Issues. The further particulars provided further information upon some of the issues, such as the complaints of the failure to make reasonable adjustments. We directed ourselves to these particulars when making our findings and conclusions.

The hearing and adjustments made

3. The nature of the Claimant's impairment is set out below in detail. At the outset of the hearing, the Tribunal investigated what if any adjustments were sought by the Claimant. It was agreed that there would be both a morning and afternoon break in order to overcome any disadvantage that the Tribunal's usual hours would produce.

4. On the second day of her evidence, an adjustment sought was that the witness stand desk was moved by about 45 degrees so that the Claimant could face the Tribunal more directly, rather than the Public seats (there was no suggestion that the Respondent's witnesses had done anything to provoke this). The Claimant was distressed particularly during her evidence on Thursday 20th September and there were two breaks during the morning session. This day of hearing ended at 12.50 (it was due to end at 1300 due to other commitments of the Tribunal in any event).

5. On 21st September, during the morning session, there were two breaks. The second was at the end of the main cross-examination, when the Claimant was released from her affirmation to see if the parties could agree that some further disclosure (produced late by the Respondent) could be agreed to be added to the bundle and to see whether the unlawful deduction from wages issues (issues 19-20) could be agreed.

6. After this break, the parties indicated that issue 19 was resolved (see above) but that issue 20 remained in issue. Mr. Heard required further instructions to ask further questions on this issue; a further adjournment was refused as contrary to the overriding objective but the Tribunal permitted the Respondent to re-open cross-examination limited to this issue after lunch, having first asked its own questions.

7. The Claimant completed her evidence at about 3pm on Friday 21 September. When asked whether she had anything to add by way of re-examination, she stated that she felt "*crushed*" and that she could not plan to add anything, but it may be she could do so on Monday in cross-examination. In the light of that, and the Claimant's request to begin the Respondent's case on Monday 24 September, and in fairness to the Respondent's main witness who would be under oath all weekend if the

Respondent were to start its case, the Tribunal adjourned the case to continue on 24 September.

8. The case proceeded with the Respondent's case. Breaks were given as required, sometimes where the Tribunal anticipated that a break would allow the Claimant to avoid becoming distressed. There were a number of case management issues where the Respondent sought to add or replace documents in the bundle. These were dealt with by agreement for the most part.

9. The exception was an application by the Respondent to adduce further evidence concerning issue 20. This application was made on the morning of 26 September 2018, long after the Claimant had closed her case. It was refused for reasons given at the time. The Respondent's application had relied on the fact that it had not understood the Claimant's case on this issue prior to the evidence. This was rejected in view of the overriding objective, not least because of the timing of the application coupled with the unfairness to the Claimant, and because the Respondent knew or ought to have known of the Claimant's case given the contents of the Preliminary Hearing Summary of Employment Judge Foxwell (paragraph 5), and the contents of the Schedule of Loss, filed in 2017.

10. On 25 September, at the end of the day, the Tribunal enquired how the parties proposed to make submissions. This was in part because the Claimant had explained how part of her symptoms affected her ability to plan and prepare; and the Tribunal wanted her to have time to process information and to have a chance to plan and prepare for submissions.

11. The use of written submissions as an option was explained to the Claimant, and that these could be added to orally. The Tribunal directed that any written submissions should be exchanged in advance. Mr. Heard properly indicated that he would prepare written submissions and would provide a copy in advance.

12. In the event, the Respondent's evidence was not completed until 15.45 on 27 September 2018. The Tribunal decided to hear submissions at 10am on 28 September 2018. The Respondent was prepared to provide its submissions in advance; but sought to do so early on 29 September 2018 despite Counsel having stated that they would be ready on 28 September. In any event, the Claimant agreed to this; and the Claimant indicated that she had written submissions, which she would improve upon. The Respondent was directed to provide its submissions to the Claimant and Tribunal by 7am on 29 September at the latest by email; it was agreed by the parties that the Claimant would serve and file her submissions in hard copy by 09.30.

13. Mr. Heard filed and served his written submissions before 07.00 on 29th September. They ran to more than 40 pages. The Claimant provided written submissions on the morning of 29th September. The start of submissions was put back to give the Claimant further time to read and digest the Respondent's submissions. The Tribunal proceeded as set out below in the Submissions section.

The Evidence

14. There was an agreed bundle of documents prepared by the Respondent's solicitor. This consisted of four lever arch files (pages 1 to 1834). Unfortunately, one box of files was missing at the start of the hearing, and various bundles had pages missing. These defects were resolved with practical steps during the first and second days of the hearing, and no party was disadvantaged. The bundle was added to during the hearing.

15. In this set of Reasons:

15.1. Numbers in brackets refer to pages in the bundle.

15.2. Winter Gardens Primary School is referred to as "the School".

15.3. The Equality Act 2010 is referred to as "EA 2010".

16. The Tribunal read witness statements for, and heard oral evidence from, the following witnesses:

16.1. The Claimant;

16.2. Catherine Stalham, Head Teacher;

16.3. Crystal Wiggs, Director of South Essex Academy Trust;

16.4. Simon Harbrow, Executive Head;

16.5. Dominic Carver, Director of South Essex Academy Trust;

16.6. Paloma Grande-Imbernon, Senior Human Resources Consultant for EES for Schools;

16.7. Gemma Cahalane, School Business Manager.

17. In addition, the Tribunal read the documents referred to in the evidence and those referred to by the Claimant in her "List of Medical Evidence Supplied by the Claimant", which had been prepared following the Tribunal's explanation that only relevant documents would be read and that a reading list from each party would assist.

18. Further, the Respondent agreed the Claimant's version of transcripts of telephone messages received by her; there are seven in the bundle.

19. The Claimant became upset on various occasions in her evidence, at which points the Tribunal would either pause or take a break. We did not find that the quality of her oral evidence was adversely affected by these breaks. We noted that they permitted her the opportunity to recover sufficiently to continue.

20. The Tribunal found that the Claimant was a witness who gave an account of events that she honestly believed to be true. We allowed for the fact that she was giving evidence for the first time, which is usually a stressful experience for any witness or party. We concluded, however, that her evidence was unreliable in key places. The Claimant was over-sensitive to certain management actions towards her and put a negative, or the worst possible, interpretation on the actions of the School's

management and Human Resources support. We found that she had a reduced ability to recollect events precisely, and concisely. The Tribunal found that these tendencies arose through a combination of the symptoms of stress-related anxiety and depression, which had endured over a period of years. During her oral evidence, we witnessed how these symptoms continued to affect the Claimant.

21. The Tribunal found that it preferred the documentary evidence and the oral evidence of the Respondent's main witnesses (Ms. Stalham, Ms. Calahane, Ms. Wiggs and Ms. Grande-Imbernon) where there was any conflict of fact. In particular, Ms. Stalham was an impressive witness, who gave direct answers, fluently, and with practical explanations provided in answer to the several matters put to her. We recognised the scale of the task that had confronted her when she took over management of the School, where a number of staff were absent through sickness and which had had a very poor OFSTED report. We accepted all her evidence, including about the context to the matters complained of.

Findings of Facts

Findings of fact on the issue of disability

22. The Claimant confirmed her disability impact statement [77-79] to be true. It was not put to her that it was not, nor that she was exaggerating her symptoms when giving evidence. She was not cross-examined as to its accuracy; her evidence was not challenged at all on the disability issue. We accepted the Claimant's evidence as to her symptoms.

23. From before November 2014, the Claimant described that her sleep was interfered with at times of stress; it was the first thing to be affected by stress. She described that during times of stress she had difficulty processing lots of thoughts, being unable to switch off.

24. The Claimant's symptoms of anxiety increased gradually in the months leading up to November 2014. She described it as a downward spiral. We find that these symptoms had a substantial adverse effect on her ability to carry out normal day-to-day activities by the beginning of November 2014.

25. By November 2014, the Claimant's symptoms had a big impact on her ability to do day-to-day activities. The Claimant's sleep had reduced to an average of four hours per night. By this time, she was having vivid nightmares and regular panic attacks. She explained that when she stopped work, she had a breakdown, which lasted for weeks, and which she only began to address from January 2015. She had a referral to a dermatologist in November 2014, which was linked to her symptoms of stress and anxiety.

26. The Claimant's symptoms of her stress-related impairment by the beginning of November 2014 were broadly as follows:

26.1. She was restless and could only concentrate for a few minutes at a time on matters that seemed trivial, such as films or television.

26.2. She ruminated on things that had happened or could happen.

26.3. She had a reduced ability to absorb information when she read it.

26.4. She had a reduced ability to sleep, due to her mind racing. She averaged about 4 hours per night.

26.5. Her ability to communicate was reduced. She had difficulty organising thoughts, due to her mind racing, and could get side-tracked easily, causing her to struggle to remember the point she was making.

26.6. She worried excessively about the reduced ability to communicate, so preferred to do so in writing; but this caused anxiety and took her longer, because she spent substantial time planning and editing.

26.7. Her appetite was affected by her mood; the more anxious she became, she may forget to eat, but occasionally would over-eat.

26.8. She had panic attacks, which had physical symptoms including irregular heartbeat. She would also pinch her hands or squeeze her fingers when she started to feel jittery as a means to focus her attention and help prevent a panic attack.

26.9. She had reduced confidence and did not like meeting new people.

26.10. She had lost interest in socialising.

27. The Claimant explained that, with therapy from January 2015, she had learned to control some symptoms, not to remove them, but to reduce them.

28. The Claimant's symptoms continued to have a more than minor or trivial affect on her ability to carry out normal day-to-day activities until November 2015. In reaching this conclusion, we have taken account of the use of medication from about March 2015, and we have deduced the effect of the medication.

29. Following her return to work, from December 2015 until June 2016, the Claimant still experienced periods of symptoms affecting her day-to-day activities.

30. From all the evidence, we concluded that the Claimant's symptoms as described in her impact statement (at paragraph 3) arose again in June and July 2016. In particular, the Claimant's evidence led to the inference that this was one of three periods where the symptoms had a more serious impact on her ability to do day to day activities, because she suffered panic attacks (the other periods being from November 2014, and from November 2016 until her resignation) and suffered a massive drop in her ability to sleep.

31. The Claimant's stress-related symptoms of anxiety and depression arose again from about early November 2016. We note that the symptoms were having an effect on her ability to work; she was already substantially behind with her marking since the start of term in September. We concluded that the Claimant's symptoms as described

in her impact statement (at paragraph 3) arose again from or about early November 2016.

Medical evidence

32. The medical evidence is set out in a collection of documents, not in a single medical report.

33. There is a report from the Claimant's GP, dated 3 August 2017 (p1466). This provided limited relevant medical evidence because it gives evidence about the Claimant's treatment and symptoms as at the date of the letter. It gives evidence about her current symptoms of a "*mental impairment due to her anxiety and depressive symptoms and due stress-related problems*."

34. However, the report does indicate that:

34.1. The Claimant started Sertraline (anti-depressant, psychotropic medication) 50mg tablets in March 2017 and there is no intention to discontinue it.

34.2. The Claimant was at high risk of relapse and recurrence of depressive and anxiety symptoms in future.

35. The following is a summary of the relevant GP medical evidence documents [1623], having read the Claimant's reading list on this issue. Starting with the GP records:

35.1. On 12 November 2014, the Claimant first reports to the GP with "*stress at work – teacher – feels being harassed*". On examination, she is noted to be stressed and tearful. The diagnosis is "*Feeling stressed*" and a Fit Note for 3 weeks is given.

35.2. On 28 November 2014, the Claimant reports again to the GP. On examination, the GP notes she is tearful and distressed. The GP refers the Claimant for Cognitive Behavioural Therapy.

35.3. On 22 December, the Claimant reports that she is feeling slightly better, but does not feel able to go back to work, and needs to liaise with Occupational Health. It records she is going for a stress management course. She is noted to be less tearful. The diagnosis is "*stress-related problem*".

35.4. On 22 January 2015, the notes record: "*had gone through work stress – unable to face work at the moment…has contacted therapy for you*".

35.5. On 23 February 2015, the GP records that counselling has begun. "*Solicitor involved and is liaising with school, hopefully transfer will be sorted out soon. Diagnosis; feeling stressed*".

35.6. 20 March 2015, the GP records that she is having Cognitive Behavioural Therapy but is more anxious; and that she had counselling for two sessions but was tearful and could not go through second one. She is described as anxious, and on examination "*Feeling stressed*". A Patient Health Questionnaire is completed. The diagnosis is: "*Mixed anxiety and depressive disorder*". The GP prescribes Citalopram, a SSRI, and is advised to contact Accident and Emergency if she has active thoughts of self-harm.

35.7. 23 April 2015: on examination, the Claimant is weepy, and feels depressed all the time. The Claimant did not start the Citalopram. She is counselled at length. "*Nervous debility*" is recorded as the reason for being signed off work for a further month.

35.8. On 19 May 2015, a diagnosis of mixed anxiety and depressive disorder is given explained as "*Ongoing episode*". Citalopram is prescribed again.

35.9. On review on 16 June 2015, citalopram is recorded as appearing to be helpful; and counselling helpful; but that C is still low, anxious and feeling stressed. The same diagnosis of mixed anxiety and depressive disorder is repeated.

35.10. The GP notes show that she continues to be prescribed citalopram for stress anxiety and depression.

35.11. On 10 November 2015, the GP records that the Claimant prefers to go back on a phased RTW over next 4 weeks, and is "*lot more settled and happier*". There are no further relevant entries until November 2016.

36. The Occupational Health ("OH") advice and records can be summarised as follows:

36.1. The OH advice to Ms. Stalham, dated 10 August 2015, was in respect of adjustments for the Claimant to attend a formal meeting. The advice in respect of these is at 574A, including "*Allowing the person to be accompanied by a suitable person*" and "*Providing the individual with information that forms the context of the meeting beforehand to enable them to prepare themselves in advance*".

36.2. The OH advice of 15.9.15 [596-597] records:

36.2.1. "*In my opinion, the blockage to a successful return … is the negative perception she has formed regarding some workplace issues and employee relation issues. Clinical evidence suggests that until this perception has been resolved … she is likely to continue with her current symptoms*."

36.2.2. Counselling would help her re-build her personal resilience and confidence.

36.2.3. "*It is ultimately a legal matter as to whether an individual actually meets the criteria as having a disability under the Act. While it is unlikely that the Equality Act may apply in this case, it is purely and occupational health opinion and cannot be considered as legally binding*."

36.3. The OH advice of 13.9.16 [792-793] in respect of the Equality Act applying is the same as above. This advice notes the Claimant is fit for work and:

37.3.1 "*Based on the information provided by Ms Fox … it would appear she is still experiencing some anxiety issues, however she is no longer receiving treatment from her GP as she reports she is managing her symptoms well*."

37.3.2 The Claimant was "*grateful for the support received so far facilitating a successful return to work in the last academic year*."

37.3.3. Adjustments were proposed including a stress risk assessment.

36.4. The OH advice on 19.12.16 [898-899] stated that:

36.4.1. the Claimant was experiencing symptoms of "*high anxiety poor concentration and poor sleep,*"

36.4.2. that she was signed off due to work related stress and that the stressors were unresolved;

36.4.3. if work place issues could be resolved her symptoms would reduce, and she would be able to return to work;

36.4.4. "*It is entirely a legal matter as to whether a person has a disability under the Equality Act 2010… The Equality Act may not apply in this case because the employee does not have a long-term condition which impacts on normal day to day activities*."

36.5. The OH advice of 30.1.17 [992-992A] records:

36.5.1. A meeting with management in January 2017 had significantly increased her anxiety levels.

36.5.2. Adjustments proposed which were similar to those suggested in earlier advice.

36.6. The OH clinical notes for 28 March 2017 [1643] record as follows: "*Short term memory poor – has to write everything down. Stress related*". It refers to a physical problem and "Picking when related to high stress". Under psychological health, it records: "*Mood varies day to day. Average 4/10 but occasionally higher…Anxiety is worse than depression. Makes her put things off. Finds it hard to deal with things. Anxiety is higher…*

Some days does not get dressed. Spends hours looking at the documentation for work issues. Feels this is obsessively. Did not go to bed at all one night as reading through work documentation." It records that her sleep is "*Affected by overthinking things*".

36.7. The OH advice 28 March 2017 (1643A) is that:

36.7.1. the Claimant has been diagnosed with anxiety and depression.

36.7.2. the underlying stressors, such as the pay issue and the grievance have not been resolved; and until resolved are likely to be a barrier to her returning to work.

36.7.3. "*The Equality Act may apply in this case because the employee has a long-term condition which impacts on normal day-to-day activities*."

37. We find the instructions given by the Claimant to her doctors were a true account of how she felt at particular times. It is consistent with her oral evidence and documentary evidence.

38. A stress risk assessment was completed on 27 September 2016 [810-812]. This identifies further support at p812, but does not refer to symptoms.

Findings in respect of actual or constructive knowledge of disability

39. In terms of the Respondent's knowledge, we are required to consider when the employer had actual or constructive knowledge of the relevant facts, not whether, as a matter of law, the consequence of such facts is that the employee is a disabled person.

40. We concluded that Ms. Stalham, and the Respondent, had constructive knowledge that the Claimant was a disabled person from about 25 June 2015, evidenced by the letter to Ms. Stalham on that date, especially the content at p.539:

"*As my most senior manager at work, Mr Hayes' behaviour towards me was something I did not know how to resolve. I felt isolated and at a dead end in terms of trying to improve my situation. I decided to take some time off with stress as I knew I needed to take a break from the overwhelming pressures at school that I could no longer cope with. I was particularly concerned at the progression to my physical health. Once I took that decision and notified school of my absence I broke down completely and spent much of the next three weeks in tears. I was unable to talk about anything other than the problems at school and it very much had taken over my life.*"

41. From that information, it is apparent that the Claimant's impairment could well last 12 months and that it had had a substantial adverse effect on her ability to carry out day-to-day activities. From that information, the Claimant was, after seven months of absence, not well enough to return to work. Moreover, Ms. Stalham had in her possession evidence that the Claimant was likely to have a stress-related anxiety and/or depressive condition, evidenced by the Fit notes, the contents of which are summarised in her letter of 2 July 2015 [554].

42. If we are wrong about this, we conclude that Ms. Stalham had constructive knowledge of the requisite facts by 19 October 2015. This is because:

42.1. By 15 September 2015, the OH advice made clear that the Claimant was still unfit for work and that her current symptoms were likely to continue until workplace issues were resolved. The Claimant had already been absent sick for over 10 months at this point.

42.2. At the informal absence review meeting on 19 October 2015, attended by Ms. Stalham and a HR adviser, the Claimant's "anxiety barrier" is discussed. At this meeting, the Claimant confirmed that she was still on medication, that she had had counselling, and that she would like more counselling. [654] At this point, the Claimant had been absent sick for almost 12 months and was likely to remain on medication for some weeks.

43. We found that Ms. Calahane had constructive knowledge of the relevant facts from the point of her first involvement with the Claimant. We infer that she would have received from Ms. Stalham the summary of the reasons for the Claimant's absence between 10 November 2014 and 11 December 2015, as set out in the letter of 2 July 2015, and must have known that the Claimant had a stress-related anxiety and/or depressive condition.

44. Moreover, Ms. Calahane did not intend to cause the Claimant more stress, from the outset, leading to the inference that she knew or reasonably ought to have known that the symptoms of the stress-related condition were having a more than minor or trivial effect on the Claimant's ability to carry out normal daily activities.

45. Ms. Calahane and Ms. Imbernon-Grande were candid in their evidence that the Respondent had no method or process by which it assessed whether an employee was disabled, other than by a referral to Occupational Health. Ms. Calahane believed that she was not qualified to say whether an employee was disabled or not.

46. Given the number of Fit notes and the OH evidence generated by January 2017 and then by 31 March 2017, and the fact that the Claimant had had long periods of sickness absence due to stress-related anxiety and/or depression, we found that Ms. Imbernon Grande and Ms. Wiggs must have had constructive knowledge that the Claimant's impairment had a substantive adverse effect on her daily activities which had lasted twelve months already, had recurred or could well recur.

Findings of fact in respect of the incidents alleged

47. The Claimant was continuously employed by the Respondent's predecessor as a primary school teacher from September 2011. Originally, she carried out 1-to-1 tuition, and acted as a relief teacher to cover classes.

48. In June or July 2012, the Claimant was appointed to a full-time teaching position at the School, from September 2012. We find that this was for a temporary role, under a one year fixed-term contract, created by a resignation, pending the appointment of a

replacement. This temporary appointment was at Scale Point M6, a point accepted by Ms. Stalham who had researched the relevant paperwork and found the error. The letter dated 21 May 2013 [1355] is incorrect in specifying M5, which may be explained by the fact that the employer's records were imperfect; Ms. Stalham confirmed that the School's files for staff were in a poor state when she took over in January 2015. We accepted the Claimant did not receive this letter. She did receive a later letter dated 31 October 2014, stating she was on MS6 [297].

49. During the Summer term of 2013, the Claimant secured her teaching role on a permanent basis from September 2013.

50. The Claimant's employment continued when the School became part of the Respondent Academy Trust, until her resignation without notice on 15 May 2017.

Incidents issues 2a-2c

51. The alleged incidents at issues 2a to 2c of the list of issues all took place before the Respondent took over management of the school. They all occurred when Mr. Hayes was Head Teacher. He was appointed in June 2014.

52. There was due to be an OFSTED inspection in October 2014. This increased both the Claimant's levels of stress and anxiety, and stress levels across the staff.

53. Mr. Hayes gave the Claimant the PE Co-ordinator role, removing it from Diane Fogg, Higher Level Teaching Assistant. He agreed that she could remain involved. There was some dispute between Ms Fogg and the Claimant as to what the extent of her involvement should be, Ms. Fogg being reluctant to give up the role.

54. We find that over time, probably because of the stress that the Claimant felt as a result of their meeting in November 2014, the actions of Ms. Fogg have been magnified beyond what actually occurred. For example, the complaint that Ms. Fogg falsified documents was, on closer analysis, the interpretation of the Claimant of what had happened concerning Ms. Fogg, who had applied for funding for new equipment without reference to the Claimant.

55. We considered the events objectively, and found that they were relatively minor matters, probably common across schools where duties and responsibilities are taken from staff and re-distributed to other staff. In this case, Ms. Fogg had been responsible for PE at the School for many years, which the Claimant to her credit recognised. There is no documentary evidence that the Claimant complained about Ms. Fogg until November 2014.

56. In the early part of the week commencing 3 November 2014, Ms. Fogg had taken an item of post from the Claimant's pigeon hole, with photographs featuring the Canvey games, to put on the staff room table. The Claimant considered this an invasion of her privacy. She described the action of Ms. Fogg as "*rifling through my private post*" (paragraph 53 statement), but this is a quite serious accusation, which there was insufficient evidence to support.

57. On 6 November 2014, there was a meeting between the Claimant and Ms. Fogg (who had learned that she had upset the Claimant). Ms. Fogg approached the Claimant after school in her classroom, and asked nicely if she had done something wrong. The Claimant replied that there were lots of small things about the PE role that she was unhappy about, that she was stressed with work, and that she was unhappy about what she had done by taking the item from her pigeon-hole. Ms. Fogg over-reacted to that in a verbal way, becoming defensive, stating that the post was on the top, hanging out, and that she did not go through the pigeonhole; and that she was the one who had attended the Games, and the book was meant to be shared. Ms. Fogg was angry because she perceived that she had done nothing wrong. Heated words were exchanged.

58. Ms. Fogg should not have acted as she did, but we found it was the type of act which requires managing, such as a request not to repeat or an informal warning. We do not consider that it required a disciplinary sanction under the disciplinary policy, in the absence of any evidence of the act being repeated.

59. We found that the Claimant overreacted to the incident which occurred on 6 November 2014. At this time, as we have noted above and as explained in the Claimant's witness statement at paragraph 52, the Claimant felt a high degree of stress at this time and her abilities were impaired, including by lack of sleep and feelings of anxiety. We concluded that her symptoms made her recollection of this meeting unreliable. Had there been the angry verbal "*attack*" by Ms. Fogg, as alleged by the Claimant, it is likely that the Claimant's email sent shortly after the meeting at 18.12 would have complained about it directly [429].

60. Mr. Hayes did not refuse to deal with the Claimant's complaint about that meeting. Ms. Fogg complained to him about the meeting, because she was unhappy about what had happened. We note that in response to the Claimant's email sent at 1812 [429], Mr. Hayes proposed that there be a joint meeting with all three of them present on Monday 9 November, to discuss the issues and look to move things forward: see his email at 19.23.

61. The Claimant's interpretation of events demonstrated her over-sensitivity, as this extract of the evidence demonstrates:

> "*CH proposed meeting with all 3 of you – do you criticise this?*
>
> *Yes – He had already met with DF and did following morning; I had not had opp to raise myself with him; so no opp to raise without her present; made me anxious; not sure if I could put across what I wanted in meeting without seeing him.*
>
> *If he thought caused friction with move; but if already spoke to one; no opp to give that person chance; so if he understood that by speaking to me, he would understand that I not able to do – why it would be a problem for me.*
>
> *He should have had that consideration.*
>
> *Later he sees how upset I am at different point.*

You felt DF should be dismissed?

I felt something should be done to fix what gone wrong.

Even if she did lose temper, I forgive her; I understand personal circs and that she value role, had for long time. Believed managed very badly; it would not escalated but for that.

At time, I can look back and still upset. Understand DF upset too; I not want her dismissed now.

At time, tipped me over edge at time; if at time, face some form disc process at time."

62. The following day, 7 November, the Claimant went to school early to speak to Mr. Hayes; but she found Ms. Fogg was speaking to him. She admitted that he had not allocated Ms. Fogg time, but, nevertheless, this made her unhappy.

63. We found that the Claimant had placed the worst possible interpretation on events (blaming Mr. Hayes for not allocating her time to meet him alone), as a result of the stress and anxiety that she was feeling at that time. The Claimant describes her state of anxiety and her stress at paragraph 57 of her statement, which records that she was shaking, picking at her hands, and felt quite lost. We accepted that evidence, which was not challenged.

64. A meeting was to take place on that morning with the Claimant and her partner teacher, Ms. Eddington. The Claimant complained that, as they were leaving his office, Mr. Hayes asked if she was okay; the Claimant was on the verge of tears, and replied that she was not. Then Mr. Hayes patted her on the shoulder, told her to take care of herself and left. Viewed as a whole, we did not find that this was patronising conduct by Mr. Hayes; he appeared to be sympathetic to the Claimant. There was no evidence that he knew that the upset of the Claimant was connected to Ms. Fogg's behaviour; the previous email from the Claimant had stated that she was "*very unhappy*" but not more.

65. The Claimant did not want to meet Ms. Fogg and Mr. Hayes together, due to the increased stress that such a meeting would provoke, with her interpretation being that there would be a risk of "*verbal attack*" from Ms. Fogg and her knowledge that her mental state at that time would make it difficult for her to respond and explain her point of view. This increased the stress that she was feeling.

66. Over the weekend, the Claimant continued to feel stress. She had a persistent headache. She had feelings of dread and panic about returning to school, and felt sick at the thought of it. She could not face the thought of returning and explaining how she felt in the presence of Ms. Fogg.

67. As a result, although she did not have a copy of the Sickness Absence Management Policy ("SAMP"), the Claimant emailed Mr. Hayes to inform him that she would be absent because of stress: see her email [430]. She explained that she felt it amounted to a campaign of bullying by Ms. Fogg.

68. We accepted the Claimant's evidence at paragraph 59 of her statement that she broke down completely once she had decided not to attend the School.

Issue 2b

69. The list of issues is incorrect insofar as it refers to the 2013-14 academic year; this is a typographical error because the relevant year was 2014-15.

70. The Claimant's complaint is that Mr. Hayes tried to downgrade the Claimant's performance in her appraisals as alleged in paragraph 10 of her Claim. Her submissions refer to the grievance minutes [624].

71. The Performance Management procedure had not been completed for the year 2013-14. Mr. Hayes planned to do so in Autumn 2014.

72. After an observation on one of the Claimant's lessons, Mr. Hayes graded the lesson as "Requires Improvement". Ms. Eddington, the Claimant's year group partner, received the same grading; but she had disputed this, leading him to change it to "Good".

73. Mr. Hayes then added the Claimant's disputed lesson grading from the 2014-15 year onto the performance review data for 2013-14, which she believed detracted from her "Good" and "Outstanding" judgments for 2013-14. In addition, the Claimant complained that Mr. Hayes had changed other teachers' grades when they had complained. She interpreted these two things as showing that Mr. Hayes "*might be attempting to downgrade performance ahead of the reviews he would be conducting*".

74. We did not accept her interpretation was likely to be correct as a matter of fact. The Claimant did not know what evidence Mr. Hayes had about colleagues. It appeared that he believed that, as Head Teacher, what he did was right.

75. From the Claimant's evidence (paragraph 49 witness statement), Mr. Hayes chased the Claimant for her signed Performance Management paperwork. Given that he was behind (this should have been done in the previous Summer term), this could not have surprised the Claimant. We accept that on the last day of the half term, Friday 24 October, Mr. Hayes tried to stand over the Claimant to ensure that she completed her comments. This was not an act which was likely to affect the trust or confidence of the Claimant, nor was it reasonable for it to do so. On the same date, Mr. Hayes had shared with the Claimant targets that he had set for her for that academic year, suggesting a degree of collaboration, even if he was by this stage failing to complete management tasks.

76. Thereafter, Mr. Hayes concluded the Performance Management review. He decided that the Claimant would stay at MS6. In his decision letter dated 31 October 2014 [297], he stated:

> "*As a UPS teacher you should be a role model within the school for other teachers to look up to and aspire to be like. From the evidence that I have seen and we have discussed, you do need to improve your performance to fully meet the Teacher Standards in the areas identified below.*

You will need to demonstrate:

- *pupils in your class are making at least nationally expected progress with a significant percentage making more than expected progress*

- *gaps between the disadvantaged pupils and those identified as DSEN are closing with those recognised as not being disadvantaged or DSEN*

- *marking and formative feedback to pupils follows the school policy.*

As you are aware, I have arranged for support to be provided to you over the coming weeks to help you demonstrate the above in preparation for next year."

77. The Claimant had not felt confident to challenge with him the decision to keep her at MS6.

78. There was no evidence that Mr. Hayes' decision not to put the Claimant on UPS1 was made in bad faith; the Claimant stated that she did not know if it was a decision made in bad faith, but she felt it was unfair.

79. In November 2014, the Claimant appealed the decision of Mr. Hayes to the Chair of Governors. No appeal was arranged at that time. On balance, this was not because the School ignored the Claimant; Mr. Hayes had not ignored her previously (evidenced by his responses to her emails). The delay was probably because the school management was in a state of disarray after the OFSTED report and the dismissal of the governing body and the formation of the Interim Executive Board, discussed below.

80. We accepted Ms. Stalham's evidence that a teacher must apply for and prove that they meet the criteria for UPS1 before being placed on that grade. This was corroborated by other documentary and oral evidence.

Post-October 2014 & Move to Academy Status

81. The School went into Special Measures following an Ofsted inspection in October 2014, which rated it as "inadequate". An Interim Executive Board ("IEB") ran the school between January and July 2015. It became part of the Respondent Academy in July 2015, when the Claimant's employment transferred to it pursuant to a transfer. We found the transfer to be within the Transfer of Undertakings (Protection of Employment) Regulations 2006.

82. Ms. Stalham was appointed as Acting Head Teacher in March 2015. She was seconded from Westwood Academy, where she had been a Deputy Head. She was appointed Interim Head Teacher by the IEB in July 2015.

Issue 6b

83. Although the Claimant responded to a letter of introduction from Ms. Stalham in March 2015, she stated that she did not want to meet at that time. By her letter

17 March 2015 [444], the Claimant reminded Ms. Stalham that she had requested a copy of the Grievance Policy "*in order to raise the issues I have faced as a formal grievance*"; she alleged this request was ignored by Mr. Hayes. She also stated that she had been notified that Ms. Boothman, IEB Member, would be dealing with her earlier correspondence. The Claimant stated that she did not want to waste Ms. Stalham's time until the issues had been raised in a formal grievance, so that she understand the effect that they had had on her health.

84. On 25 March 2015 [446], Ms. Boothman provided a copy of the Grievance Policy and asked for details of the grievance.

85. On 14 April 2015, Ms. Boothman wrote to the Claimant again, stating that a grievance hearing was arranged for 20 May 2015. The letter begins: "*I am writing following receipt of your intention to progress your grievance …*" [447]. This is an accurate description of the Claimant's intention in the letter of 17 March 2015, although the Claimant had not in fact completed a formal grievance form (GR1). The letter explained to the Claimant she should submit any evidence at least three days before the hearing.

86. On 14 May 2015, Ms. Boothman wrote to the Claimant stating that she had not heard further from her, and asking whether she would be attending the meeting on 20 May 2015.

87. On 20 May 2015, Ms. Boothman decided that she had to cancel the grievance hearing because she had insufficient information to proceed, evidenced by the letter at [456] stating that she had had no response. This letter concluded:

> "*As previously indicated should you wish to complete a GR1 or send a letter outlining your grievance together with the remedies you are seeking I will reconvene a meeting*."

88. The Tribunal found that, on the face of the evidence, the arrangement of the grievance hearing on 20 May was not unwanted by the Claimant.

89. The response of 20 May 2015 may well have been unwanted by the Claimant. We note that, over May-June 2015, the Claimant underwent weeks of invasive medical treatment. We can understand how this affected her ability to attend the grievance and to engage in it, given her physical impairment and emotional anxiety at the time.

The Pay Appeal

90. The Claimant's Pay Appeal from the decision of Mr. Hayes not to grade the Claimant at UPS1 was heard on 9 June 2015. The minutes are at 512a-c, disclosed late on day six of the hearing. The Claimant did not object to these documents going into evidence, but sought to point to differences between what was recorded and the evidence of Mr. Harbrow.

91. The Claimant did not attend the Appeal. At the time, she was suffering from severe anxiety. As explained in her witness statement, paragraphs 93, 95, this had grown worse because she had felt ignored by the School – even though we find that this did not in fact happen.

92. The School was represented by Mr. Harbrow (Executive Head Teacher) and Ms. Boothman, Director of the IEB.

93. Mr. Harbrow's evidence before us, which was that he only had a couple of bits of paper before him at the appeal, was mistaken. His memory was unreliable, probably because of the time elapsed since the appeal. The bundle for the Pay Appeal is at p461-506. We found the documentary evidence to be more reliable than his oral evidence.

94. The minutes of the Pay Appeal meeting clearly show that Mr. Harbrow had a bundle of documents at that appeal. At 1.15 of the minutes, his evidence to the Panel is as follows:

> "*In response to a question from RB, SH confirmed that it is normal practice when a teacher applies to go through the threshold to supply evidence to support the application. This may include extracts from target tracker, performance management reports, self-check book review/book look. SH added that from the pack, he cannot see any evidence of SF's additional input into the school. SF is a PE Co-ordinator and, as a result, would expect to see evidence of her leading/supporting another teacher.*"

95. The Appeal Panel decision [513-514] was to uphold the appeal. In effect, it was that Mr. Hayes' decision was quashed, and the School was required to hold a review of the decision not to progress the Claimant to UPS1 from 14 September 2014. The decision concluded:

> "*The Committee heard evidence from Mrs Boothman and Mr Harbrow (Executive Headteacher) that:*
>
> - *The paperwork available in school was incomplete, including a lack of Committee minutes relevant to the pay decision;*
> - *There was some evidence of good and outstanding teaching;*
> - *It was important to hear your response/explanation for your progress against your objectives;*
> - *The Target Tracker data was potentially unreliable;*
> - *The performance objectives were reasonable;*
> - *Progress in reading was low in certain groups of pupils.*
>
> *The Committee felt this indicated there were inconsistencies in the evidence and judgments made and therefore decided to uphold your appeal. The Committee requires that the school should conduct a review of the decision not to progress you to Upper Pay Range point 1 with effect from 1 September 2014. The Committee believes this review should be conducted by the school's headteacher and that it should be carried out when you return to work as the*

Committee believes it is important that the review includes hearing from you in relation to your progress against the performance management objectives."

96. The Claimant believed that the Pay Appeal bundle (which she received before the appeal hearing) showed that the decision of Mr. Hayes was flawed.

97. From the evidence we heard, we were in no position to assess whether our decision might have been different to that of Mr. Hayes. We did not have the materials or the direct experience that Mr. Hayes had. For example, the Claimant relied upon the figures at p.382, and alleged that Mr. Hayes was wrong to find that the Claimant had not met the "*At least 70% of Pupils Achieve Age Related Exp R.W.M*" [376]. But Ms. Wiggs's evidence, which we accepted, was that the Teacher Assessment Results (school results in white, national results in green) were for both classes of that Year group at the School; and the Claimant only taught one of those classes. These statistics could not be interpreted by the Tribunal as supporting either Mr. Hayes's assessment or the Claimant's assessment.

98. The Tribunal did not consider that the documents that were before us suggested a malicious decision not to grade the Claimant at UPS1. Further, the objective evidence did not prove a decision made when Mr. Hayes knowingly lacked justification for it, nor any unjustified attempt to downgrade (or not to upgrade) the Claimant. In fact, his letter at p.297 is, on the whole, supportive, advising the Claimant how she might progress to UPS1.

99. In short, we did not find that Mr. Hayes had committed an act which was calculated or likely to damage the relationship of trust and confidence between the Claimant and Respondent, nor that he had acted unreasonably in this respect.

Issues 2d-f and 6a

100. Ms Stalham wrote to the Claimant on 2 June 2015 explaining that her grievance and Pay Appeal were being dealt with. The Claimant was invited to a meeting on 17 June 2015 to discuss the OH referral form, or that she would send the draft to the Claimant (as was her practice with other employees).

101. The Claimant did not attend the meeting, and did not let Ms. Stalham know this in advance. Ms. Stalham, not surprisingly in those circumstances, sent off the OH referral. Subsequently, at the Claimant's request, a couple of matters were changed on the form. We find that Ms. Stalham intended the referral to be supportive and constructive and that there was no part of it which could reasonably affect the Claimant's confidence in the Respondent. The referral letter was adapted from a standard letter.

102. We accepted Ms. Stalham's evidence at paragraph 9. It is the duty of the member of staff to provide a fresh certificate at or about the time of expiry of a previous one; if not provided, the School must inevitably contact the staff member to see if they are fit or not. She believed that the duty of care owed to staff justified such contact as requesting Fit certificates if the previous one ran out and no new one was received, and the staff member did not attend work.

103. Moreover, one feature of the failing performance by the school was a high level of long-term absence amongst staff, so these requests for certificates were very reasonable in that context.

104. The letter of 17 June 2015 states as follows:

> "*Whilst I am writing I would like to bring your attention to certain obligations on your part under the terms of the Sickness Absence Management Procedure (SAMP). We have had to chase on several occasions a fitness certificate to cover your absence. It is in fact your contractual duty to ensure that you are at all times covered by appropriate certification. It is also your responsibility to be keeping us informed and making contact with us to advise of nature and the ongoing likely duration of your absence. I refer you to sections 1.2, Communication and 3.3 of the procedure, responsibilities of all staff, regarding communication obligations. Hence our trying to arrange a meeting to discuss your absence with you as just receiving a certificate through the post does not provide sufficient information for us to assist in supporting you during your absence. In future, if we do not receive an appropriate certificate in a timely fashion I am afraid that we will need to advise our payroll provider that you are on an unauthorised absence and to withhold your sick pay until appropriate certification is received.*
>
> *As you will see, there is a procedural obligation for you to comply with the referral to Occupational Health. I refer you to Section 4.5.1 of the procedure. If you are unable to attend the appointment Occupational Health makes for you please ensure that you advise them you cannot attend in good time. They will then discuss with you trying to book an appointment which you can attend*."

105. The letter does not contain any real criticism of the Claimant; it points out what she has not done, and what the contract requires, but it does not blame her or threaten her with sanction for the past delays in providing medical certificates. It warns her that the consequences of future delays could be that her pay stops; and in that sense this letter actually assists the Claimant by alerting her to this risk.

106. In this case, the Claimant had had no direct contact with Ms. Stalham who was only trying to ensure that procedures were followed in requesting certificates. The list of reminders is in the letter of 2 July 2015 explaining this [554]. Ms. Stalham had had no direct contact with the Claimant since her response in March 2015 (declining to meet with Ms. Stalham).

107. The letter of 2 July 2015 does not contest the information provided by the Claimant in her letter 25 June 2015 [532-541]. This letter from Ms. Stalham is conciliatory and provides explanation from the school's perspective. It is constructive regarding the OH appointment.

108. Ms. Stalham did not know that the Claimant did not have a copy of the Sickness Absence Management Policy ("SAMP"). At that point of time, through no fault of anyone, she had never met or spoken to the Claimant.

109. We found that the Claimant knew that she must let the School's senior management know if she was to be absent, so that cover could be arranged: see, for example, the Claimant's email to Mr. Hayes of 9 November 2014 [430-431].

110. It may well be the case that one or more sick notes were requested, when the Claimant had already sent them or taken action to get them by attending the GP. But we accepted Ms. Stalham's evidence that she sent the requests in good faith, not knowing that, and that she was reliant on what she was told by the School Office. For example, the fit note at p.510 was sent in by the Claimant, before the letter requesting a new certificate was sent out; but this appears to have been due to a delay in the office, and the office then sent a compliments slip [511] asking the Claimant to ignore their earlier request letter.

111. We find that none of the matters at issues 2d-2f were calculated or likely to destroy the relationship of trust and confidence; but if they were likely to, because of the Claimant's stress related impairment, it was not reasonable that they did so. We find that the Claimant was over-sensitive to reasonable management instruction; this over-sensitivity may well have been a symptom of her impairment.

112. Moreover, we find as a fact that the requests for certificates were appropriate at the times that they were sent. It was not reasonable for them to have the effect on the Claimant that she alleged.

6c: Return to work support

113. The Claimant contended that following her return to work, the Respondent harassed her by not providing necessary support.

114. The Tribunal accepted the evidence of Ms. Stalham as to the steps taken to support the Claimant following her return to work. But it is artificial to focus only on the support provided after the Claimant commenced full-time work on 14 December 2015.

115. On 6 October 2015, the Claimant's grievance was heard. The Claimant found the grievance hearing helpful.

116. By letter dated 11 October [630-637], the Respondent did uphold parts of the Claimant's grievance. For example, her claim to have been paid on the incorrect pay scale (MS5) was upheld; Ms. Boothman arranged for the difference (£2628 gross) to be paid to the Claimant. Furthermore, a payment of £400 was agreed, as a goodwill gesture.

117. Moreover, the grievance outcome explained that the Acting Head would review the decision not to progress the Claimant to UPS1, on the Claimant's return to work, at an appropriate point. It was recorded that the Pay Appeal had been upheld.

118. The Claimant did not appeal the parts of the grievance decision which were not upheld.

119. Furthermore, the Claimant attended a Return to Work meeting on 19 October 2015, attended by Ms. Stalham and Mr. Balls (HR). The Claimant was accompanied

by her cousin, even though the invitation letter had limited accompaniment to work colleague or trade union representative. The minutes demonstrate that Ms. Stalham was supportive during that meeting. For example, Ms. Stalham had already spoken to Ms. Fogg; at the meeting, she stressed that "*if there is any issue with DF's professional conduct or an unwelcoming tone this will be dealt with immediately*." [653]

120. As well as checking on the Claimant's health, Ms. Stalham made a further appointment for the Claimant to come into School for a social visit. Further, Mr. Balls stated that the Claimant would be fully supported.

121. A return to work meeting was held at the School on 11 November. Ms. Stalham agreed with the Claimant about a phased return to work and other measures designed to support the Claimant to return to work full-time. These are set out in the letter at p.1226. The support includes day-to-day support. It was not intended that the Claimant would take whole responsibility for a class until she felt comfortable to do so.

122. The Claimant commenced the phased return on 17 November 2015. The Claimant returned to work full-time from 14 December 2015.

123. We accepted Ms. Stalham's evidence at paragraphs 18 to 23 of her witness statement. Further, on 24 March 2016, at the end of the Easter term, the Claimant sent a positive email thanking Ms. Stalham and Ms. Thurston, stating that she has "*loved being back*" [717]. We found that such an email was sent because Ms. Stalham and others at the School had supported the Claimant's return to work. This email is consistent with the content of the OH advice arising from the appointment on 13 September 2016, in which it is recorded that:

> "*She reports that she is enjoying her work with her Year 3 class. Ms. Fox states she is grateful for the support she has received so far facilitating a successful return to work in the last academic year.*" [792]

2g: pay review allegedly "brushed off" after return to work

124. The Claimant's submissions argue that the evidence demonstrates that the outcome of the Pay Appeal was not provided; but instead the goalposts were moved by a requirement to provide "evidence" without any direction. On this issue, however, we preferred the evidence of Ms. Stalham. The pay review was not ignored, after the Claimant's return to work.

125. The Claimant's initial Performance Management Review ("PMR") Meeting for the year 2015-16 took place on 26 February 2016. This took place within a reasonable time of her return to work and was the first opportunity to set her targets. Ms. Stalham was aware that she should review whether the Claimant should move to UPS1 when she returned to work or "*at an appropriate time*", which she believed had been reached.

126. At the PMR, Ms. Stalham gave the Claimant the criteria which one would have to meet to be eligible for the threshold, and explained that she would carry out a review, which would need to hear from the Claimant, and that she could talk it through with the Claimant. Ms. Stalham offered to help "brainstorm" what evidence she would need to give, but the Claimant stated that she had the paperwork in her house which

she thought would be useful in the review. To avoid causing stress, Ms. Stalham put no deadline on this.

127. The Claimant did not complain about this approach, and appeared to Ms. Stalham to be positive about finding the evidence. There would be no reason for Ms. Stalham to doubt her understanding that the Claimant was comfortable with her approach to the pay review given the email of 24 March 2016, thanking her for support and not complaining about her approach to the pay review [717].

128. The Tribunal accepted that Ms Stalham did have regular meetings with the Claimant after she returned to work. The evidence indicates that by 22 April 2016, the Claimant was experiencing some difficulties in carrying out her role. By 28 June 2016, the Claimant was clearly experiencing stress; she emailed Ms. Stalham explaining that she could not attend a staff meeting being held at another school because she was struggling to hold her emotions together and was "*stressed by a number of things*". Thereafter, the Claimant was absent from work until 4 July 2016, because she wanted to get away from the stressors.

129. On 4 July 2016, the Claimant's PMR was reviewed with Ms. Stalham in a 1-to-1 meeting, as is normal practice. The Claimant explained her stressors were about meeting deadlines and working with her line manager in her year group, who had a direct approach. The issue of whether the UPS1 threshold had been met was raised; but the Claimant did not provide Ms. Stalham with any evidence that she met the standards for the UPS1 threshold. The Claimant had not sought any help to produce the evidence required; but Ms. Stalham did not challenge the Claimant about this because she did not want to add to her stress. Ms. Stalham did offer to brainstorm with the Claimant about the evidence required, but, at this meeting, the Claimant did not seek any support with obtaining it; the Claimant maintained that she needed to look for the evidence at home. The Claimant signed the PMR paperwork after that meeting [708-712]. We do not consider that it would have been signed without complaint if the Claimant felt her pay review was not discussed at that review.

130. We accepted that Ms. Stalham could not decide that the Claimant had reached the threshold without evidence that she had done so. This is implicit in the Pay Appeal decision.

131. During the Stress Risk Assessment meeting, in September 2016, the Claimant confirmed that she was to find evidence at home to support her application [795].

132. During the October 2016 Performance Management meeting, Ms. Stalham again discussed with the Claimant her need to bring in the evidence that she had talked of, and they discussed an alternative further Performance Management objective to enable the Claimant to meet the criteria for UPS1 [824]. We accepted Ms. Stalham's evidence about that meeting. The Claimant signed the notes of that PMR, indicating that they were correct.

133. After the Pay Appeal, as the Claimant alleged, no pay review was completed. But this misses the point. At all material times, Ms. Stalham believed that she could not complete the pay review, because the Claimant had not given her evidence to show that she met the criteria to move to UPS1. There was not movement of the goal

posts; but Ms. Stalham did proceed on the basis that the proper procedure had to be followed.

134. We find as a fact that there was no PCP of only holding pay reviews where someone was fit for work. The framework Pay Policy document [1697ff] shows that the policy of the School was that a pay review could be held irrespective of whether a teacher was fit for work: see p.1705, which provides that "*Any qualified teacher on the Main Pay Range*" may apply.

135. However, there was a PCP that evidence was required to demonstrate that the threshold criteria for UPS1 had been met. This is evidenced in the Pay Policy document and by the oral evidence, particularly that the Claimant could not pass through the threshold without adducing evidence that her performance demonstrated this criteria was met.

136. This PCP of a requirement for evidence did not put the Claimant at a substantial or any disadvantage compared to another teacher with her experience and in her role.

Issues 2h – 2j and 6d: November 2016

137. On 17 November, Ms. Stalham held a further 1-to-1 review meeting with the Claimant. In that meeting, the Claimant stated that she was happy with everything; but she proposed a change to the usual planning procedure, whereby she would plan one subject (literacy), and her year group partner plan the other (maths). Ms. Stalham explained to her why this could not be accepted and that it was necessary for year group partners to plan together.

138. We accepted that the Claimant also raised in that meeting that she would like to be allowed to do some marking in her PPA time, instead of planning together. We find that Ms. Stalham explained that this was not possible because it was needed as planning time. The Claimant interpreted this as a refusal to allow additional PPA time.

139. At that meeting, the Claimant did not inform Ms. Stalham that she was behind with marking and did not ask for support with this. Had she done so, we are sure that this would have been recorded in the note of that meeting [830] or the note of the meeting on 18 November [839] given that marking was an issue raised with the Claimant at a meeting in February 2016. We did not accept that the note of that meeting [830] was a later invention; we found that it was a fair reflection of the meeting.

140. Later on, 17 November, probably prompted by her discussion with the Claimant about wanting to use PPA time for marking, Ms. Stalham took a tour of the classrooms, examining pupils' books in various classrooms. This was her normal practice, despite being prompted to do it on this occasion.

141. Ms. Stalham picked up some Learning Journey books in the Claimant's classroom, after school had ended. She found that some of these had not been marked at all since term commenced in September. The School policy was that work was marked daily. The Claimant was aware of this policy from a discussion with Ms. Stalham at a meeting in February 2016. Quite reasonably, given that she was the Head Teacher, Ms Stalham took the books to her office to discuss with the Claimant

the next day. The Claimant interpreted this as putting the books in her office "*ready to chastise me the next day*", which we find an example of her tendency to put the worst possible interpretation on events.

142. On 18 November before school started, Ms. Stalham went to the staff room and asked the Claimant if she could have a chat in her room when she was able to; she said was able to come then. Ms. Stalham led on; the corridor is narrow so it was inevitable that the Claimant followed her down it.

143. In her room, Ms. Stalham explained that she was concerned about the lack of marking of these books and the quality of the work in them. There is no evidence that she raised her voice or was in any way disrespectful. Ms. Stalham made an adjustment by allowing the Claimant about two weeks, until Friday 2 December, to ensure all books were up to date with marking. Support was offered, but the Claimant refused the offer. Ms. Stalham also informed the Claimant that she had confidence in her as being able to perform as required, evidenced by the notes [839].

144. There was nothing about the events on 18 November 2016 which could reasonably have affected an employee's trust and confidence in Ms. Stalham or the Respondent. Ms. Stalham dealt with what she found in a very fair and measured way, allowing the Claimant time to catch up.

145. On Sunday 20 November, the Claimant emailed Ms. Stalham explaining that she would be absent from work (840-841). She stated that issues with her pay were causing anxiety and this was the "*underlying problem*".

146. On 21 November, because the Claimant was absent from work and in view of her previous long-term sickness absence, Ms. Stalham emailed Ms. Calahane, the Trust's HR manager.

147. The Claimant complains that, on various dates after this, Ms. Calahane, Stacey Moore and Julie Chandler would call her about "*non-urgent matters*".

148. The Tribunal accepted the Respondent's evidence explaining why those calls were made. In short, the Claimant had taken some of the children's books home with her and these were needed for assessment or moderation, and for the children to continue their work.

149. The named employees did try to contact the Claimant. The transcripts were viewed during cross-examination. The contents of the calls were made in good faith, for good reason, and appropriate and reasonable on the face of the transcripts. The purpose of the calls – to ensure the return of the books – was a relatively urgent matter, because the education of the children was ongoing, and their books were tools for them, and for the school, by which their education might be measured or demonstrated.

150. In any event, at the time she went absent through ill-health, the Claimant had not requested that all communication with her had to be by email, not telephone; her email of 20 November 2016 does not ask for this, and, indeed, ends by saying that the pay issue is her priority and that she looks forward to hearing from Ms. Stalham as to

how to move this issue forward. On 24 November, the Claimant emailed Ms. Stalham, stating that email was preferable to telephone calls, but she did not state that calls could not be received; she had in fact tried to phone back Ms. Calahane.

151. We accepted Ms. Calahane's evidence that the requests were made for the best of motives. We found it unlikely that her calls would sound upsetting. Looking at the transcripts of the calls, the staff member making them generally apologised for ringing. For example, Stacey Moore offered for a time to be arranged for collection and stated that the Claimant could email her reply: see transcript, 25 November [864]. It is notable that when Ms. Moore rang again on 28 November [868], she stated that "*Sorry to bother you but …its quite urgent now that* …" This demonstrates that the School had had no response to its earlier inquiries and the matter was becoming quite urgent.

152. We found no evidence in respect of the calls made to the Claimant that were likely to damage the relationship of trust and confidence. But in any event, we found that it was not reasonable for any of the calls to have that effect. The Claimant's interpretation was that there had been "*constant badgering*" for the return of the books (evidenced by her email at 870); but we found that the requests were reasonable in the context of lack of response from the Claimant and the requirement for the return of the books.

153. The Claimant remained absent from work until her resignation.

154. The Claimant alleged that the Respondent had employed another teacher on a permanent basis from the beginning of January 2017 to take over her class. From the evidence that we heard, this allegation was based on supposition and misinterpretation by the Claimant, who appeared to base her allegation on the fact that she had seen the name of the new teacher and class name on the website. The Tribunal accepted the evidence of Ms. Stalham and Ms. Calahane. At first, the Claimant's class was covered by Ms Thurston, Deputy Head, and agency staff. When the School realised that this could be a longer-term absence, a teacher was engaged from January 2017. This was on a fixed term contract designed to cover the absence which the Respondent believed could last up to the end of Summer term 2017.

155. The Claimant's submissions relied on the fact that the initial of the class name changed from "3F" to "3M" in January 2017. We found this merely reflected the fact that another teacher was taking the class in the absence of the Claimant from January 2017. The teacher awarded the fixed-term contract was not offered a permanent contract until September 2017, long after the Claimant's resignation.

Arrangements for the Sickness Absence Review Meeting 12 January 2017: Issues 2k; 6f; 13(a)

156. The complaint represented by issue 2k and 6f is that the Respondent told the Claimant that she could only be represented by a work colleague or trade union representative to the informal sickness absence review meeting arranged for 12 January 2017, despite OH recommendations that she required an adjustment to the policy and practice: see paragraph 43 Particulars of Claim. The Claimant alleged this was by Ms. Stalham on 21 December 2016 and Ms. Calahane on 10 January 2017 (see further and better particulars at p.51).

157. On 21 December 2016, after the Claimant had been absent for 1 month, by letter, Ms. Stalham invited her to an informal sickness absence review meeting [900] and included a copy of the Sickness Absence Management Policy. This letter includes:

> "*You should make all reasonable efforts to attend this meeting. If you have any specific requirements relating to the meeting or your ability to attend please let me know as soon as possible.*
>
> *Whilst this meeting is informal in nature, you may, if you wish, be accompanied by a trade union representative or work colleague. It is your responsibility to arrange for your representative to attend the meeting. I will be accompanied by a member of the SEAT HR team and by an advisor from the Education HR team*."

158. This was a standard letter, written with the advice of Essex HR. We noted Ms. Calahane and Ms. Stalham were following the procedure for sickness absence management, in a School where policies had not been followed, leading in part to the failed OFSTED inspection.

159. In the absence of a response, Ms. Calahane sent the Claimant a further email on 9 January, asking whether she was going to attend the meeting on 12 January 2017, and whether she had chosen to be accompanied by a representative.

160. By email sent on 9 January 2017 [907], the Claimant did not in terms request to be accompanied or represented by a person other than a work colleague or trade union representative. It stated that she was not a member of a union and had no contact with colleagues, so had no option but to attend alone, stated that the OH advice had recommended that she be accompanied at meetings and that she felt intimidated.

161. Ms. Calahane responded on 10 January. This response includes:

"*please be assured we will make every accommodation to ensure you are comfortable and afforded breaks when needed. Let me know if there are specific arrangements you require.*"

162. This email stated that it was an informal meeting and explained who would be present. Despite this, the Claimant did not respond by asking to be accompanied by a family member or friend. She interpreted the meeting as largely formal given the attendees.

163. After this response, the Claimant did not reply that she wanted or required to be accompanied by a friend or family member.

164. At the start of the meeting on 12 January, the Claimant attended alone. She did not request to be accompanied by a friend or colleague. The Claimant was upset at the outset of the meeting. From the minutes of the meeting, which we found to be accurate if not verbatim [925ff], it is clear that Ms. Calahane asked at the outset if she was "*OK to go ahead with the meeting*" and the Claimant replied that she was.

165. As we have seen, in September 2015, without any prior arrangement, the Claimant had attended a grievance meeting with her cousin, Theresa Fox. We found that had she asked to be accompanied by a friend or family member at this meeting on 12 January 2017, this adjustment would have been made.

166. It is a misinterpretation of the correspondence prior to, and the events at, that meeting as showing that the Respondent refused to permit the Claimant to be accompanied by family member or friend. The original invitation related to representation by trade union official or work colleague ("*If you decide to bring a representative you should notify the Head Teacher at least 3 working days in advance…*"). There was nothing to indicate that she could not be accompanied by someone else had she requested this.

167. We find as a fact that the Respondent did not operate a PCP which placed the Claimant at any disadvantage in terms of who could accompany her.

The sickness absence review meeting 12 January 2017: Issues 2l -n; 6g-h

168. On the whole, we preferred the recollection and interpretation of events at the meeting provided by Ms. Calahane and Ms. Grande-Imbernon, which was consistent with the minutes. We found, as all the evidence suggested, that the Claimant was very distressed at this meeting, which we are sure affected her interpretation and recollection of events.

169. By agreement, the meeting began by going through the latest OH advice (from 19 December) point by point, and the Claimant was given the opportunity to elaborate. This was upsetting for the Claimant.

170. The first point is that Ms. Calahane and Ms. Imbernon-Grande could not deal with the pay issue (the upgrading to UPS1) at this informal absence management meeting. This was a meeting designed to establish facts underpinning the Claimant's absence.

171. Ms. Calahane was aware that the Claimant intended to raise a grievance in relation to the investigation following the pay appeal; this is apparent from the minutes at p.927, where the Claimant confirmed "*yes*". It is in that context that, at the meeting, the Claimant was advised to raise a grievance by Ms. Calahane and Ms. Imbernon-Grande. The grievance procedure which was a separate process to the sickness management process; they could not deal with these together at the absence review meeting.

172. The minutes demonstrate that the issue of the Claimant's progression to UPS1 was not ignored. The Tribunal interpreted the evidence as proving that the Claimant was given practical advice, in good faith, as to how she could work to resolve this issue by way of a grievance.

173. The Claimant was also critical of the conduct of Ms. Grande-Imbernon, alleging that she was belittling her problems and bullying her to agree to go back to work.

174. We accepted the evidence of Ms. Calahane as to why she asked Ms. Grande-Imbernon to be present. Also, we accepted Ms. Stalham's evidence that the Claimant was upset when confronted by direct approaches from management conflicting with her interpretation of matters.

175. Ms. Grande-Imbernon, who had previously had no contact with the Claimant, was likely to have been more direct at the meeting than Ms. Calahane. This is no criticism and, having seen her in evidence, we found that her more direct language was probably due to English being her second language. We found that the minutes of the meeting [927, bottom three paragraphs] were an accurate example of what was said to the Claimant by Ms.Grande-Imbernon. These show that she did not pressure the Claimant to return to work but that she did warn the Claimant that her absence could not be sustained. We find that it was reasonable for Ms. Grande-Imbernon to give that guidance in that context. (The earlier reference to a phased return to work did not come from her, but from the OH advice in the context of advice about the future, when the Claimant was fit to return).

176. After this passage, the Claimant told Ms. Imbernon-Grande that she was missing the point and stated that she was not off due to being unhappy with her pay. Ms. Imbernon-Grande responded that the Claimant herself had said "*how can I return to work until the pay is resolved?*" This led to the Claimant becoming very distressed, and the minutes state:

> "*SF was very upset at this point (Sobbing and catching her breath).*
>
> *SF said 'You don't understand, it's not just about pay its everything' 'It's such a big deal to me, I feel hopeless everyday' 'Things are very bad' 'Sometimes I wake up in the morning thinking what's the point in getting up, it would be better if I wasn't here'*.

177. This led to Ms. Calahane and Ms. Imbernon-Grande becoming alarmed for the Claimant's health and safety. They discussed her home situation, whether she had counselling and the need for a further OH referral.

178. At this point of the meeting, the Claimant was distressed and crying. It is in that context that Ms. Calahane, made the comments recorded in the minutes as follows:

> "*GC advised it is evidence SF is very unhappy and clearly miserable at the moment. GC said that pay is not as important as health and that the requirements for UPS are gruelling, taking on that additional responsibility may not be good for SF right now.*
>
> *SF commented 'I was at the time'*."

179. The Claimant put a negative interpretation on those words, as being demeaning. We find that those words were used by Ms. Calahane in a genuine attempt to be supportive. We accepted what she said in cross-examination as true.

180. After this meeting, Ms. Calahane investigated whether the Respondent could arrange counselling and found that it could not through OH; but she referred the Claimant to OH again [referral at 963-965].

Claimant's Grievance: issues 2o, p, q, r, t, u, v and 6i-j

181. By email 16 January 2017, the Claimant filed a grievance [955-960]. This included four points (each marked by a bullet point):

181.1. lack of adequate support;

181.2. failure to support an application for progression through UPS1, alleging a failure to advise her what evidence she might produce herself;

181.3. failure to pay annual leave entitlement whilst on sick leave from November 2014-November 2015;

181.4. Point 4 was a complaint about Ms. Imbernon-Grande's behaviour at the meeting on 12 January 2017.

182. Ms. Calahane collected evidence in the form of statements from those directly relevant to the grievance, Ms. Stalham and Ms. Imbernon-Grande.

183. In respect of Point 3, Ms. Calahane made an enquiry of e-payroll. Subsequently, Ms. Calahane advised her that no pay was owed for accrued holiday entitlement for 2014-15, and that this had been verified by Essex HR. (These documents [1046-1047] were sent in the bundle of documents sent to the Claimant ahead of the grievance hearing due on 7 March. At no time did the Claimant provide evidence, or another form of calculation, to challenge these figures.)

184. Crystal Wiggs, director of the IEB and head of another school, was appointed to investigate the grievance. She collected the pack of documents on 2 February, from the School. Subsequently, she was sent the OH advice of 30 January, which stated the Claimant was fit to attend any meetings but recommended various adjustments. These included allowing her to be accompanied by a "suitable person" (a term which was not defined), provision of a neutral venue, and providing information that forms the context of the meeting beforehand.

185. By letter dated 8 February 2017, Ms. Wiggs invited the Claimant to a grievance hearing on 17 February 2017 (during half-term). This letter is a standard letter. It includes:

> "*You have the right to be accompanied at this hearing by a trade union representative or colleague. If you wish to submit any further written documentation please let me have this at least 3 working days before the hearing.*
>
> *I should be grateful if you would confirm by 14th February 2017 that you will attend this hearing, and, if you wish to be accompanied, the name and status of your representative*."

186. The letter of 8 February is not a refusal of any sort as to who could accompany the Claimant. It is merely a letter completed from a template.

187. By email dated 13 February 2017, the Claimant raised seven points. These included the following [1015]:

> "4) *Regarding the Invitation to Grievance Hearing, you state:*
>
> *a) you will consider evidence gathered by all parties but I am not aware of this evidence as nothing has been disclosed to me prior to the hearing.*
>
> *b) I will be afforded the opportunity to make verbal representations – this however will present some difficulty for me without full disclosure ahead of the hearing, particularly considering my current ill-health.*
>
> *c) if I wish to submit any further written documentation, to do so at least 3 working days before the hearing.*
>
> *However, as the investigation was not a collaborative exercise and no disclosure has yet been made of the evidence gathered by all the parties, it is impossible for me to know what else I could provide that would be useful to the hearing.*
>
> *Referring to most recent Occupational Health advice (at point 4 of 4) it is recommended that, "providing with information that forms the context of the meeting beforehand to enable (me) to prepare (myself) in advance".*
>
> *Particularly in light of the advice above, I would like to request full disclosure of the outcomes of the investigation stage of my grievance as per points 3), 4)a), 4)b) and 4)c).*
>
> *5) Additionally, I attended a SAMP review meeting on Thursday 12.01.17 at Winter Gardens Academy where minutes were taken and to date, a copy of these minutes has not been provided for me to check and keep for my records. Please provide a copy of these minutes.*
>
> *6) Further O.H. Advice has been given regarding meetings. They recommend allowing comfort breaks and using a neutral location (at points 2 of 4, and 3 of 4) both of which you appear to have considered for the Grievance Hearing scheduled for 17.02.17, thank you. Point 1 of 4, most recent O.H. Advice concerns allowing me to be accompanied by a suitable person. At 5.4.3 of the Grievance Procedure, I have the right to be accompanied at this meeting by a TU rep, an official employed by a TU or a work colleague. Your letter inviting me to the hearing uses this criteria to define who I may be accompanied by. As I have previously informed you … I am not in a TU and not in touch with any work colleagues whilst I have been signed off from work. Details of my health, which should be private and confidential are not something I wish to be shared with a work colleague who attends this hearing with me either, particularly when the majority of teachers I now work with are not well known to me given the recent history at the school. Therefore, the criteria have the effect of preventing me from being accompanied at any meetings. The Trust has, on prior occasion, used less restrictive criteria to allow me to bring someone to meetings for moral support, indeed a relative attended the Grievance Hearing*

with me chaired by Tosca Boothman and this was very helpful in enabling me to attend.

I am unclear of the reason for the change of the practice between that Grievance Hearing and more recent meetings (SAMP and this scheduled Grievance Heading) but applying criteria to the job of a person who accompanied me to meetings is preventing me from being supported and this is to the further detriment of my health. O.H. have given me advice in this regard and I feel I must put my health first and insist that either the criteria be applied less restrictively and I be allowed to bring a friend or relative for moral support or, should this be a problem … that the Hearing be conducted by documents only – a paper hearing. Please advise."

188. The Claimant required a response that day or on 14 February, before she could confirm the name and position of any person attending with her, or her own attendance.

189. By email of 14 February [1017-1019], Ms. Wiggs responded. This was very difficult for Ms. Wiggs, given her duties and her child care responsibilities, but she did so, sending the email in draft to HR for advice before sending it in final form to the Claimant.

190. In her response, on the question of accompaniment, Ms. Wiggs stated that the Grievance Policy, 5.4.3, stated that the employee has the right to be accompanied at the meeting by the category of persons specified. Ms. Wiggs informed the Claimant that she must choose from this criteria if she wanted to be represented. Ms Wiggs had considered the OH advice that the Claimant be permitted to be accompanied by a "*suitable person*", but honestly believed that this referred to the criteria of persons specified in the Grievance Policy, whom she believed would be supportive to the Claimant. We find, however, that Ms. Wiggs did refuse the Claimant the opportunity to be represented by a family member or friend in this letter of 14 February.

191. On the issue of providing information for the context to the meeting, Ms. Wiggs quoted the Grievance Policy that "*this may involve discussions with witnesses and, normally, the persons identified in the grievance*." She did not understand the OH advice to require her to disclose all the evidence in her pack. She explained in her email that this was not necessary, because the purpose of the formal stage was to allow the employee to set out their grievance and the remedy sought. This was, in effect, a refusal to provide the Claimant with the documentation that she had which was relevant to the grievance investigation.

192. The Claimant perceived Ms. Wiggs' email of 14 February to be hostile. We found that it was not reasonable for both the email and the refusals within it to have this effect. Ms. Wiggs had gone to some trouble to respond to all points raised at short notice, had explained that she was following the Grievance Policy, had explained what adjustment had been made, and there was nothing to indicate that, when she sent the response of 14 February, that she was ignoring adjustments nor deliberately avoiding the Claimant's concerns.

193. Ms. Wiggs' response was consistent with her not understanding the adjustments sought. We found that she was inexperienced as a grievance hearing officer (this was her first grievance) and that she acted in good faith, taking HR advice. At the time of her response, Ms. Calahane was on holiday.

194. On 16 February 2017, the Claimant sent a long email to Ms. Wiggs stating that she would not be attending and explaining why [1032-1036]. She complained that Ms. Wiggs did not consider adjustments because she did not understand how helpful they were or because she did not want to help. This put a negative interpretation on what had happened. The email contained a subject access request under the Data Protection Act 1998.

195. The grievance investigation meeting did not go ahead. Given that the meeting was re-arranged, with all the adjustments requested, the Claimant suffered no detriment.

196. In response, Ms. Wiggs immediately stated that it had never been her intention to cause distress, but only to carry out the investigation within the policy.

197. Ms. Wiggs referred the subject access request to Ms. Calahane, who went about collecting the relevant data.

198. As soon as she returned from leave, on 21 February, Ms. Calahane emailed the Claimant, apologising for the delay, and explaining that she had made recommendations for the Grievance Procedure to put into effect the OH advice including a companion of her choice and provision of an investigation pack 7 working days prior to the hearing [1048]. In other words, Ms. Calahane ensured that the adjustments sought by the Claimant were made as soon as she knew of the request for them in respect of the grievance hearing.

199. By letter 22 February [1059], Ms. Wiggs invited the Claimant to the re-arranged grievance investigation meeting on 7 March. This invitation offered adjustments including that the Claimant could attend with a companion of her choice. Moreover, it stated that any relevant documentation for the investigation would be provided to her at the earliest opportunity. An agenda was included with the letter. The letter also asked if there were any further adjustments sought by the Claimant for her to consider.

200. Ms. Wiggs understood that the subject access request had been complied with by Human Resources, and did not herself re-send the evidence.

201. On 1 March, the Claimant received the grievance investigation documentation in a bundle, less than seven working days before the hearing. This was due to an accident in the bundle going out later than Ms. Calahane had intended. Although, applying the procedure set out in the correspondence, the Claimant only had 24 hours to respond to indicate any documents she would rely upon, the Claimant could have asked for this to be adjusted, because the correspondence from both Ms. Calahane (such as p.1048) and from Ms. Wiggs all indicated that they wanted the grievance dealt with fairly.

202. In cross-examination, the Claimant agreed with the suggestion that she thought some of the documents or parts of them were made up of lies. There was no factual basis set out for that perception.

203. The documentation contained a statement from Ms. Stalham [989-989A], which the Claimant believed contained untrue statements. As we have indicated already, we found Ms. Stalham to be a reliable witness. Having studied the statement prepared by her for the grievance investigation, and having heard her oral evidence, we found that this statement was true, being consistent with the documents referred to in it and her oral testimony.

204. In addition, the Claimant did not agree with the content of the meeting note from November 2016 [1098, 830], made by Ms. Stalham, which was disclosed at the same time. We found that this note of meetings was accurate and not a fabrication.

205. The grievance documentation also contained an annual salary statement for the Claimant [1107], which stated, incorrectly, that the Claimant was at UPS1. On 14 March, Ms. Calahane left a voicemail for the Claimant, apologising for this error and followed this with an email apologising [1134].

206. In evidence, Ms. Calahane took responsibility for the error. The Claimant did not think it was a genuinely administrative error, but did not particularise why, save that there was something questionable about the date of it.

207. We found that this was a mistake made by a person unknown, which in the experience of the Tribunal can happen in organisations. Ms Calahane could not explain how it had happened; she was upset and embarrassed by it.

208. The Claimant alleged that this error was a breach of contract, or an act forming part of a series, amounting to a breach of the implied term of trust and confidence. We find that this error was incapable of amounting to such an act. Moreover, we found that, although the Claimant perceived this created a hostile environment, it was not reasonable for it to have this effect. It was a mistake, followed by a swift apology.

209. On 3 March, the Claimant informed Ms. Calahane that she was not well enough to attend any meetings. Ms. Calahane made a further referral to OH, to see what further steps could be taken to facilitate a grievance meeting, after which a third and final grievance meeting would be arranged.

210. By letter of 21 March 2017 [1146], the Claimant was invited to a further grievance meeting on 31 March, with an explanation of adjustments being put in place to facilitate the meeting. The Claimant had clear warning that the grievance would be heard if she did not attend. The letter included:

> "*It has been identified by Occupational Health that resolution to your pay related issue is fundamental to your recovery. In consideration of this advice I must inform you that should you be unable to attend this date we will proceed with the hearing in your absence. This will mean that, as Grievance Investigation Manager, I will review all evidence gathered to date in order to come to conclusions in the absence of any verbal presentation from you*."

211. Ms. Wiggs had a copy of a quite recent OH advice (from 30 January 2017). It was reasonable for her to decide not to delay the grievance hearing further by waiting for the further OH advice, because in the circumstances, this further advice would have no material effect on the grievance and the adjustments sought by the Claimant had already been made. We concluded that Ms. Wiggs acted from the best of intentions – which was to move the grievance forward so as to increase the prospect of the Claimant returning to work.

212. We concluded that, particularly at this stage, the Claimant was extremely sensitive to the actions of her employer, and overreacted to decisions that she could not accept.

213. The Claimant alleged that it was an act of harassment to arrange a meeting, and to state that it would go ahead whether or not the Claimant attended, before the OH advice was received. While we accept that, taking a broad causation test, these acts were related to the disability of the Claimant, we have found that it was not reasonable for this act to have the proscribed effect.

214. We find that it was a reasonable and sensible step to take to arrange the grievance hearing, to avoid time being wasted before the grievance hearing occurred. Moreover, the hearing of the grievance was designed to help the Claimant to return to work, because the medical advice from OH was that resolution of the pay issue was a hurdle to her return.

215. The Claimant responded at length to the further invitation, by email of 28 March [1175-1181]. The Claimant stated that she was prepared to attend the hearing. The email, however, requested a number of further documents as part of the Subject Access Request, which she wished to be part of the evidence bundle. This request covered three pages.

216. Ms. Wiggs had, as far as she was concerned, complied with the SAR. Moreover, she believed that her remit did not extend to considering the further documents that the Claimant now sought to add to the bundle. The Claimant herself had not provided any further evidence after submission of her grievance.

217. Ms. Wiggs took HR advice again. By her response of 29 March [1201], Ms. Wiggs stated that she would take into account the Claimant's evidence and other evidence referred to in her email, and that she was committed to hearing the grievance fairly and making adjustments to enable the Claimant to attend.

218. The Claimant responded by email of 30 March 2017 [1234] at 2.18pm. She explained that her anxiety made her question concerns to the point of panic; and that she requested documentation not to be difficult but because it was necessary to answer her questions and minimise her symptoms, so as to enable her to attend the meeting. The Claimant explained that the documents requested should have been "*readily available*" and they were necessary.

219. Whilst we find that this response did reflect the effect of the Claimant's mental impairment at the time, we preferred Ms. Wiggs' evidence that the documents were not

necessary for the purpose of the grievance meeting, and that they would not have been readily available.

220. Ms. Wiggs had no opportunity to reply further. The Claimant failed to attend on 31 March and did not request an adjournment.

221. The OH advice had been received on 29 March. This advised that the Equality Act 2010 may apply to the Claimant, because of the long-term nature of her condition. It stated that the Claimant was fit to attend the grievance hearing [1183] and recommended adjustments (which were those made).

222. Ms. Wiggs decided to proceed with hearing the grievance, in the absence of the Claimant, because she could not understand why she could not attend, nor what else she could do to facilitate her attendance. She took advice from HR and took into account that it was not easy to arrange a meeting given the need to secure her own availability, a location and a Clerk.

223. Ms. Wiggs dealt with the grievance on the basis of the evidence that she had before her, including that listed at paragraph 30 of her statement. As noted above, the Claimant provided no evidence or alternative calculation to that provided by Ms. Calahane in respect of Point 3.

224. We find that there was nothing unreasonable in the approach by Ms. Wiggs to proceed to hear the grievance on 31 March 2017. To the extent that it undermined the Claimant's trust and confidence in the Respondent, it was not reasonable for it to do so, particularly in circumstances where relevant disclosure had been provided, where the Claimant had been warned that the grievance hearing would proceed if she did not attend, and where the Claimant had not applied for an adjournment (and, at first, had indicated that she would attend).

Subject Access Request ("SAR"): Issue 2s

225. The Claimant complains that the Respondent failed to comply with a subject access request throughout her employment.

226. As noted above, the Claimant made a subject access request on 16 February 2017. This was not limited to evidence relevant to the grievance, but included a request for "*all personal data*" [bottom 1033].

227. Ms. Wiggs referred the SAR to Ms. Calahane. Both initially viewed the request as being for documents relevant to the grievance only.

228. Ms. Wiggs genuinely believed that she had complied with it by providing all the documents that she had in her possession to Ms. Calahane, including statements and investigation documents carried out to date.

229. Ms. Calahane genuinely believed that she had complied with the SAR by the provision of the grievance bundle of documents provided to the Claimant.

230. On receipt of the further request for documents on 30 March 2017, Ms. Wiggs requested Ms. Calahane to provide further disclosure be made available at the grievance hearing, so far as this was possible. It was not feasible for Ms. Calahane to comply within this timescale.

231. On the face of it, the Respondent failed to provide all the Claimant's personal data within 40 days of the request.

232. Ms. Calahane did, with the support of HR, locate the remainder of the documents sought. These did not arrive with the Claimant until 27 April 2017 (as stated by the Claimant during cross-examination). The allegation that the SAR was not complied with until the end of her employment is not correct.

233. In cross-examination, the Claimant stated as follows, when asked if it was her case that the provision of the remaining documents was deliberately delayed to April so that she would not have them for the grievance hearing:

> "*My issue is when I am saying its clear what I need for hearing, and OH saying I am fit to attend when feel fit, this is an adjustment to let me prepare and not to be given at last minute, when there is a deadline and given late; rather than go ahead without me, meeting should been moved.*
>
> *Paperwork should been provided before not after Grievance Meeting*".

234. The Claimant's case was not, therefore, that there was deliberate withholding of these further documents. In these circumstances, we did not find that the delay in provision of the Claimant's personal data, even if technically a breach of her legal right to her data, was likely to destroy the relationship of trust and confidence.

235. The failure to comply with the SAR within 40 days was not likely to destroy the relationship of trust and confidence. It occurred because the Respondent's witnesses did not at first understand the Claimant to be seeking all personal data held, including any documents she referred to in her email of 30 March which actually existed. To the extent that this failure did affect the Claimant's trust and confidence in her employer, it was not reasonable for it to do so, given that the Respondent had provided substantial disclosure before the date of the planned grievance hearing on 31 March 2017 and given that Ms. Wiggs did not refuse to provide the Claimant with the additional documents that were specified very shortly before the grievance hearing.

Grievance Outcome: Issue 2w

236. On 6 April, the Claimant was sent the outcome letter, explaining the grievance was not upheld [1246-1252]. This enclosed the minutes of the grievance hearing [1238].

237. The Claimant alleges at paragraphs 338-346 of her statement that the grievance outcome contains numerous flaws. We found that the alleged "flaws" were in reality decisions that the Claimant disagreed with, and that the Claimant's evidence demonstrated her overreaction to the decisions reached. For example, paragraph 346 of the Claimant's witness statement demonstrates the extent of her reaction:

> "*The Outcome letter is incorrect throughout and that is what I feared would happen from limiting the documentation I could have access to when somebody partial was controlling the documents included for the hearing*."

238. We found that there was nobody "partial controlling the documents". This belief was the product of the Claimant's tendency to perceive the cause of events in a negative way.

239. In cross-examination of Ms. Wiggs, the Claimant particularised what she disagreed with, including that adjustments did not fully take account of her needs: the adjustment after the first hearing (to receive documents within a certain time-scale, 7 working days before the next hearing) was not made; and documentation was not used in the outcome, because it was not provided by the Respondent.

240. We accepted the measured evidence of Ms. Wiggs that she had done what she could to adjust the grievance procedure to promote the Claimant's ability to attend.

241. We accepted that Ms. Wiggs had reached the conclusions that she had for the reasons set out in the decision letter. Ms. Wiggs addressed each the points of the grievance in turn, including point 3. There was no evidence that she had reached those conclusions to deliberately upset or demean the Claimant. We found that she conducted the grievance with diligence, which was corroborated by the chronology of events and the documents. The Tribunal noted that Ms. Wiggs was cross-examined at length on her conclusions, but we found her evidence credible and detailed when explaining away points put to her.

242. We did not find that the decision reached on each point was unreasonable or incorrect, on the evidence that Ms. Wiggs had before her. It is difficult to criticise Ms. Wiggs for not addressing in the outcome letter points put to her in cross-examination, which were not put to her by the Claimant at the time of the grievance hearing. There was a specific complaint that the Respondent was "*moving the goalposts*" by delaying the re-grading and pay issue, which the Pay Appeal in 2015 had re-directed back to the School for determination. We accepted the following answer from Ms. Wiggs on this point: she could only look objectively at the evidence as it stood before her; the Performance management and stress risk assessment paperwork was signed by the Claimant; and she did not just accept what she was told by one side.

243. Moreover, the grievance outcome did engage with the grading issue and, in the "Redress" section, made practical recommendations to promote the Claimant's ability to move through the threshold to UPS1, even though the grievance was not upheld [second bullet point, 1250].

244. In respect of Point 3 of the grievance (whether the Claimant had received any annual leave entitlement whilst on sick leave between November 2014-November 2015), Ms. Wiggs determined that this had been investigated and responded to by Ms. Calahane. In the absence of any evidence or argument from the Claimant, this was not a surprising conclusion. We did not consider this evidence that Ms. Wiggs acted unreasonably or in error in reaching this conclusion.

245. In the circumstances, given the adjustments made for the Claimant to enable her to attend, the OH advice (that she was fit to attend), and the disclosure already provided, it was not a breach of the implied term of trust and confidence for Ms. Wiggs to hold the grievance hearing and determine the grievance. The intention of Ms. Wiggs was to hold the grievance and facilitate the Claimant's return to work.

The Grievance Appeal: Issue 2y and 6k

246. By email of 13 April 2017 [1256], the Claimant appealed the grievance outcome. The grounds of appeal alleged that:

246.1. the grievance hearing was improperly and inadequately informed due to the documentation, which failed to consider relevant information (which was not specified);

246.2. the Respondent had breached its duty under the Data Protection Act by failing to comply with the SAR, preventing the Claimant from citing evidence;

246.3. the hearing occurred without necessary steps being taken to enable the Claimant to attend and present her grievance, in breach of Equality Act 2010;

246.4. Point 3 had not been determined at all;

246.5. the grievance was improperly handled, the investigating officer acted unfairly, and further acts of victimisation occurred.

247. By letter dated 2 May 2017, the Claimant was invited to a grievance appeal hearing on 9 May.

248. On 5 May, a "without prejudice" letter was received from solicitors instructed by the Claimant. Neither party made any attempt to refer to the contents of this correspondence.

249. The grievance appeal was temporarily postponed pending a decision on a response to this letter.

250. On 9 May, the Claimant's solicitor spoke to Ms. Calahane directly and was informed that the grievance appeal was temporarily postponed. There was a dispute over the calculation of sick pay, with Ms. Calahane explaining that Payroll calculated sickness absence over the qualifying year, not over the current period of absence.

251. The Respondent decided to continue to progress the grievance appeal once it believed that the "without prejudice" discussions were concluded. We heard and saw no evidence about the content of those discussions.

252. By letter dated 11 May, the Claimant was invited to a further grievance appeal hearing on 16 May 2017.

253. From the Tribunal's inquiry, the Claimant's complaint was that the grievance appeal had been re-arranged at short notice. It is apparent that less than five working days' notice were provided. From the Claimant's perspective, this was contrary to the time provided for in the grievance procedure. On the other hand, the Claimant had previously been told that the grievance appeal was postponed temporarily, not that it would be postponed to a particular date; and the Claimant did not ask for a further postponement.

254. We found that the relevant paragraphs of the Claimant's witness statement did not provide evidence to explain why the conduct of the Respondent over the grievance appeal was a breach of the implied term of trust and confidence, nor whether the proscribed environment within section 26 EA 2010 was created. For example, at paragraph 346, the Claimant states that she was wary of walking into "*another ambush*", but we found that this was a further illustration of her perception that what occurred was hostile to her, without the evidence to support such a belief.

255. In all the circumstances, although this was technically a breach of the grievance procedure, it was not a repudiatory breach or a breach of the implied term of trust and confidence. It was not calculated to destroy that relationship; and, if the Claimant believed that it did so, it was not reasonable for it to have that effect.

256. The Claimant identifies the act of temporarily postponing, then arranging a further grievance appeal at short notice, as an act which breached the implied term of trust and confidence, or which formed part of a series of acts which did so. We did not agree. Indeed, the Respondent's grievance procedure required that the grievance appeal to be heard. The Respondent was entitled to decide that the "without prejudice" discussion was at an end.

257. We find that the grievance appeal was not unwanted. The Claimant herself had appealed. In any event, the decision to re-arrange the appeal did not create the environment proscribed by section 26 EA 2010; but, if it did create such an effect on this Claimant, it was not reasonable for it to do so.

Informal sickness absence review meeting: Issues 2z and 6l-m

258. In her letter of 21 February 2017, Ms. Calahane had explained to the Claimant that she was managing the Sickness Absence Management procedure, but that she would not progress this until the grievance was resolved. The Tribunal found this to be fair and reasonable. It was a step designed to minimise stress to the Claimant.

259. Subsequently, the OH report dated 28 March 2017 was produced. It stated that once the Claimant was in a position to return to work, redeployment may be an adjustment to consider.

260. By letter of 9 May 2017, Ms. Calahane invited the Claimant to an informal absence review meeting on 12 May 2017, advising her that she could be accompanied by a companion; there was no restriction on the identity of the companion [1413].

261. It is inaccurate to allege that there were months of no action in respect of the Sickness Absence Management procedure, nor that the Claimant was prejudiced by

any such delay. The Respondent had worked since the Claimant made her grievance towards having the grievance determined before the sickness absence was addressed, with a view to assisting the Claimant to recover so she might return to work. The Claimant placed a negative interpretation on Ms. Calahane's attempt to progress the procedure, which was done with the intention of getting the Claimant back to work.

262. By the date of her letter of 28 April, Ms. Calahane had been informed that the Claimant could be transferred to another local primary school, if she was agreeable to this. Ms. Calahane hoped that this proposal could be made at the meeting, and that it might help the Claimant in her recovery.

263. On 11 May 2017, the Claimant emailed Ms. Calahane seeking a further referral to OH, querying how the report of 28 March would assist the meeting (arguing that it had been sought for the purpose of an inquiry about suitable adjustments ahead of the grievance hearing on 31 March 2017). [1418a]

264. Ms. Calahane responded later that day, explaining that the OH report had addressed ways in which the Claimant might return to work, and explaining that she did still wish to meet with the Claimant informally for an absence review. We note that this OH advice was only six weeks' old by the date of this correspondence.

265. The Claimant emailed again on the same date, stating that there was little time for a companion to be arranged [1418a].

266. In a subsequent email, on 11 May, Ms. Calahane asked whether the Claimant was going to attend the meeting; she informed the Claimant that the meeting would be postponed unless she heard from her that evening or before 08.00 in the morning [1418].

267. There is nothing in these emails from Ms. Calahane of 11 May which is unreasonable or likely to affect the relationship of trust and confidence. In the circumstances, they were reasonable emails to send.

268. On 12 May 2017, Ms. Calahane emailed [1421] to inform the Claimant of her disappointment at the lack of communication; and that she would not attend the meeting, unless the Claimant confirmed that she would attend. She also warned the Claimant that she was going to telephone her.

269. On the same date, to ensure that the Claimant did not attend and find Ms. Calahane absent, Ms. Calahane telephoned her. Ms. Calahane did not usually call the Claimant; she did so on this occasion because she believed that it would help, by avoiding any distress that might be caused if the Claimant attended and found Ms. Calahane absent and, also, to save herself time (Ms. Calahane lived 90 minutes' drive from the neutral venue selected for the meeting).

270. Moreover, Ms. Calahane warned the Claimant in advance [1421] that she was due to call. It was some months earlier that the Claimant had stated that she preferred email communication (not that she did not want to receive any telephone call for any reason); and there was no evidence that the Respondent had called her after that request on any other occasion.

271. There is no allegation that Ms. Calahane said anything offensive or upsetting in the call; she merely conveyed facts to the Claimant. The call was a necessary precaution to ensure that the Claimant did not attend when Ms. Calahane would not be there.

272. The Claimant thanked her for calling, but remained silent during the call.

273. Ms. Calahane did not, in her professional work, text employees. Drawing on its experience, the Tribunal found that it was reasonable not to text the Claimant in these circumstances.

274. The Tribunal found that these events on 11 and 12 May 2017 were not capable, as a matter of fact, of amounting to a "last straw". Objectively viewed, they were not capable of contributing to a breach of the implied term of trust and confidence, even though the Claimant perceived them in a negative way. We found that Ms. Calahane carried out these actions in good faith; they were not carried out because of any past event, and these acts were not designed or intended to upset the Claimant nor to affect her trust and confidence in her employer.

275. For example, in her email of 12 May at 08.22, Ms. Calahane stated that she would leave a message on the Claimant's mobile that morning, indicating that she did not anticipate speaking to the Claimant; and the email concluded with Ms. Calahane stating that she would be making another referral to Occupational Health, indicating that the Claimant would face no sanction by her non-attendance.

276. In these circumstances, the Tribunal found that this email and this telephone call to the Claimant on 12 May were reasonable steps to take. The Tribunal found that these steps were not done to damage the relationship of trust and confidence, nor were they likely to do so; and if they were interpreted to do so by the Claimant, it was not reasonable for them to have this effect in these circumstances.

277. Moreover, these acts on 12 May 2017 were not capable of amounting to a last straw, even if previous events were capable of forming part of a series of events amounting to a breach of the implied term of mutual trusts and confidence.

Resignation

278. On 15 May 2017, the Claimant resigned with immediate effect, by way of a resignation letter [1427-1429]. This summarized a list of complaints similar to or the same as those in these proceedings. It concluded by alleging a continuing state of affairs which had adversely affected her:

> "*I should point out the above is only a highlight of what has happened to me over the last few years.*
>
> *I do not believe anything but resigning will stop you from trying to manipulate the situation of being my employer and able to schedule meetings for me to attend in order to try and find ways to cover yourselves where you can see errors and failings but do not want to address these properly and fairly*."

Grievance Appeal

279. The grievance appeal went ahead in the Claimant's absence on 16 May 2017. We accepted the evidence of Mr. Carver, who was Chair of the appeal panel.

280. The Claimant was first invited to this appeal by letter dated 2 May, with a hearing date of 9 May 2017.

281. The hearing was postponed, and by letter of 11 May, a further date for the appeal hearing, 16 May, was fixed. The Respondent failed to give the Claimant 5 working days' notice of the appeal hearing on 16 May, but the Claimant had more than 5 working days' notice of the appeal hearing in total, due to the postponement of the hearing scheduled on 9 May 2017.

Pay: September 2016 to August 2017; Issues 20 – 21

282. It was agreed that the Claimant was paid wages up to her dismissal based on a salary of £32,834 for the academic year September 2016 to August 2017. Her case was that she was due a higher salary over that period, and that the Respondent had failed to take into account a 1% pay rise to which she was entitled. This part of the case is unusual insofar as the Respondent agreed that a 1% pay rise was due; it claimed that this sum was paid to her from April 2016 in error (and that it should only have been paid from September 2016). We heard no evidence about how such an error could have arisen.

283. The Claimant relied on the Department of Education's "School Teachers' pay and conditions document 2016" [1814ff]. This confirms that a 1% pay rise was due from 1 September 2016 – but the list of schools to which it applies does not contain Academies.

284. The Claimant alleged that she was entitled to be paid the maximum salary within the main pay range, which is recorded as £33,160 in the table at 13.1 [1822]. Her unchallenged evidence was that she was at M6, which was at the top of the main pay scale. We noted that a 1% increase to £32,834 does amount to about £33,160.

285. The Claimant contended that the Respondent's Pay Policy for September 2016 – August 2017, at p.1729, was in error, because the "Performance Progression Stage 6" (or M6) figure had not been adjusted upwards by 1%. This Pay Policy shows the M6 salary as £32,834.

286. The Respondent's Pay Policy states, at point 16, that it "*will ensure appropriate salary protection/safeguarding for teachers in accordance with the School Teachers' Pay and Conditions Document*". The Department of Education's Pay and Conditions Document states the following at 12.2:

> "*Any pay increase or safeguarded sum (for the safeguarded period) awarded to a teacher on the main pay range, the upper pay range or the unqualified teacher pay range in accordance with Parts 3, 4 and 5 or any movement between those pay ranges must be permanent for as long as the teacher remains employed*

within the same school but is not otherwise to be deemed to be permanent by operation of the terms of this Document or any earlier Document."

287. Although the Pay and Conditions Document gives minimum and maximum salaries only, which entitled the School to pay within the range, the Claimant's point in this case is that she was being paid at the top of the range already, prior to the 1% pay rise. Further, she contended that the Transfer of Undertakings (Protection of Employment) Regulations 2006 applied.

288. We agreed that the TUPE Regulations applied when the School was taken over by the Respondent Academy. On the facts, we could not see how it could be otherwise. We heard no evidence and no reasoned argument to the contrary.

289. Given that the TUPE Regulations applied, the Claimant's terms and conditions remained unchanged after the transfer. The Claimant's permanent contract of employment (dated 21 May 2014) is at p.265. This includes the following term:

"*Your general conditions of employment …will include:*

…

(ii) The School Teachers' Pay and Conditions Act 1991, and the School Teachers' Pay and Conditions Document; …"

290. Therefore, we found as a fact that the School Teachers' Pay and Conditions Document at p.1814 was incorporated into the Claimant's contract of employment. Accordingly, her salary increased to £33,160 from 1st September 2016. As a result, deductions were made from her salary between September 2016 and her resignation on 15 May 2017.

291. The Claimant received her final salary payment on or about 26 May 2017. This would be the last in the series of deductions. The Claim was presented on 8 June 2017.

292. It is important to record that this pay issue (the omission to pay the 1% pay rise, due as a result of the TUPE Regulations 2006) played no part in the Claimant's decision to resign, evidenced by the fact that it is not referred to in the agreed list of issues.

The Law

Disability Discrimination: Definition of Disability

293. Section 6(1) EA (like s.1 Disability Discrimination Act 1995) provides that a person has a disability if:

(1) P has a physical or mental impairment;

(2) the impairment adversely affects P's ability to carry out normal day to day activities;

(3) the adverse effect is substantial; and

(4) the adverse effect is long-term.

294. The Respondent's case on these issues were as follows:

294.1. The Claimant had a mental or physical impairment;

294.2. Such impairment did not have an adverse effect on her ability to carry out normal day to day activities;

294.3. Even if there was such an effect, it was not long-term.

295. The Respondent did not contend that, if the evidence of the Claimant was accepted, the activities alleged to have been affected were not normal day-to-day activities.

296. The Respondent pleaded (Amended Response p.71) that, in the event that the Claimant was found to be disabled, it was denied that it knew or reasonably ought to have known that she was a disabled person especially because OH had informed the Respondent over a lengthy period of time that the Claimant was not disabled.

297. The authorities show that a purposive interpretation must be given to the statutory test when deciding whether a person has a disability. But the burden of proof lies on the Claimant to show that he meets this definition.

298. In reaching its decision on the issue of whether a person is disabled under the Equality Act 2010, the Tribunal must take into account the "Guidance on matters to be taken into account in determining questions relating to the definition of disability", issued under section 6(5) EA 2010 (the "Guidance"). We have considered relevant passages within the Guidance.

Mental or Physical Impairment

299. In considering what amounts to an 'impairment', its effect is what is of importance: see Guidance A8):

> "*it is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded. … what is important to consider is the effect of an impairment not its cause*."

300. In *J v DLA Piper* [2010] ICR 1052, when dealing with a stress at work case, the EAT provided the following guidance:

> "40 Accordingly in our view the correct approach is as follows:
>
> (1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term

effect arising under it) as recommended in *Goodwin v Patent Office* [1999] ICR 302.

(2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in para 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.

(3) These observations are not intended to, and we do not believe that they do, conflict with the terms of the Guidance or with the authorities referred to above. In particular, we do not regard the Ripon College and McNicol cases as having been undermined by the repeal of paragraph 1(1) of Schedule 1, and they remain authoritative save in so far as they specifically refer to the repealed provisions."

301. The Tribunal must not elevate the "impairment" issue into a separate hurdle for the claimant to jump, because requiring a mental impairment to be proved by expert medical evidence with a precise diagnosis may pose an impossible or very difficult test for a Claimant to meet. At Paragraph 38, the EAT found, with emphasis added:

> "38 We can go much of the way with Mr Laddie's submission. There are indeed sometimes cases where identifying the nature of the impairment from which a claimant may be suffering involves difficult medical questions; and we agree that in many or most such cases it will be easier – and is entirely legitimate – for the tribunal to park that issue and to ask first whether the claimant's ability to carry out normal day-to-day activities has been adversely affected – one might indeed say "impaired" – on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common sense inference that the claimant is suffering from a condition which has produced that adverse effect – in other words, an "impairment". If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve difficult medical issues of the kind to which we have referred. This approach is entirely consistent with the pragmatic approach to the impairment issue propounded by Lindsay J in the Ripon College case and endorsed by Mummery LJ in McNicol's case. It is also in our view consistent with the Guidance. Paragraphs A3-A4 of the Guidance read as follows …"

302. The EAT in *J v DLA* considered the Tribunal's distinction between clinical depression, a mental impairment, and a reaction to adverse circumstances at work, which is not a mental impairment. This is not a helpful distinction, because the borderline between the two is often blurred, and leads to a circularity of argument: what amounts to clinical depression may well be a severe adverse reaction. The EAT continued at paragraph 42, as follows:

> "Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40(2) above, a

> tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long-lived."

303. The above passage was followed by the EAT *in Herry v Dudley Metropolitan Council* [2017] ICR 610. The facts in that case were somewhat different. At paragraph 56, the EAT held:

> "56 Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An employment tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an employment tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an employment tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the employment tribunal to assess."

304. In *J v DLA Piper*, the EAT also considered *Morgan v Staffordshire University* [2002] ICR 475, which concerned a claim of mental impairment determined under the Disability Discrimination Act 1995, when the statutory definition included a requirement on the claimant to prove the impairment was clinically well-recognised. *Morgan* was considered as follows at paragraph 44:

> "It thus cannot now be relied on as a guide to the law as it now stands. As noted above, the tribunal in the present case referred to an observation by Lindsay J, at para 20(3) (p 484 e-f), that "such loose terms … as 'anxiety', 'stress' or 'depression'" would not "suffice". The tribunal's summary fails to reflect the context of that observation, which was specifically directed at the need to prove a clinically well-recognised illness; and the reference was to that extent inappropriate. However, it is fair to say that a similar, though more general, point seems to us to be valid in the context of the Act in its current form. As we have observed above, both laymen and some health professionals too often use loosely terms such as those referred to by Lindsay J, and the reminder remains appropriate that in considering both the adverse effect issue and the impairment issue tribunals may have to look behind the labels."

305. The relevant passages in *Herry* (paragraphs 54-56) do not depart from this guidance. We have, however, reminded ourselves of the point made by the EAT in *Herry* at paragraph 55, in response to paragraph 42 of *J v DLA Piper*:

> "We would add one comment to it, directed in particular to diagnoses of "stress". In adding this comment we do not underestimate the extent to which work related issues can result in real mental impairment for many individuals, especially those who are susceptible to anxiety and depression."

306. We reminded ourselves that the Tribunal must focus on the impairment on the ability of the person to do (or not do) acts: *Goodwin v The Patent Office* [1999] IRLR, para 34 – 36.

Medical evidence

307. Whether a person is disabled within section 6 EA 2010 is not a question of medical opinion, but a question for the Court: see *Abadeh v BT plc* [2001] IRLR 23 EAT. Whether an impairment has a substantial adverse effect is a question of fact for the Court, not a doctor: see *Abadeh* at para 9.

Substantial

308. A substantial effect is one which is more than minor or trivial: see Guidance, Para B1 and s.212 EA 2010.

309. The fact that a claimant can only carry out normal day-to-day activities with difficulty or with pain does not establish that disability is made out. The Act is concerned not with any adverse effect but rather with a more than minor or trivial adverse effect.

310. EA 2010 requires the Court to consider the "deduced effect" of the disability. Paragraph 5 of Schedule 1 EA 2010 provides that:

> "(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:
>
> (a) measures are being taken to treat or correct it, and
>
> (b) but for that, it would be likely to have that effect."

311. The Guidance states (at para C3) that *'likely should be interpreted as meaning that it could well happen, rather than it is more probable than not that it will happen'*.

Long Term

312. Schedule 1 para 2(1) of the EA 2010 provides a definition of "long term":

> "The effect of an impairment is a long-term effect if:

(a) it has lasted at least 12 months;

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

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

313. An impairment which has had a substantial adverse effect, but where the effect has ceased, the substantial effect is treated as continuing if it is likely to recur: Sch 1, Para 2(2), EA 2010 and *Swift v Chief Constable of Wiltshire* [2004] IRLR 540. "Likely" in this context means "*could well happen*".

314. Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of long-term: see Guidance C4.

315. In determining whether the adverse effect of a person's impairment was "*likely to recur*", a Tribunal should not have regard to subsequent events, but determine the question on the basis of the evidence available at the time of the act alleged to constitute discrimination: *McDougall v Richmond Adult Community College* [2008] ICR 431, paragraph 24 (a case relied upon by the Respondent).

Adverse effect on the ability to perform normal day-to-day activities

316. This aspect of the statutory test is comprehensively addressed at Section D of the Guidance. Paragraphs D2 – D6 are useful guidance in most cases. The Appendix to the Guidance contains a helpful illustrative but non-exhaustive list of factors which it would be reasonable to regard as having a substantial adverse effect on normal day to day activities.

Disability Discrimination

317. In this case, two types of disability discrimination were alleged: failure to make reasonable adjustments (section 20-21 EA) and harassment (section 26 EA). The Tribunal directed itself to the relevant law as follows.

Duty to make reasonable adjustments

318. In practice, when hearing complaints of disability discrimination, an Employment Tribunal should first deal with the complaint alleging the failure to make reasonable adjustments: see *Archibald v Fife Council* [2004] IRLR 651 at paragraph 32.

319. Given the carefully drawn statutory duty to make reasonable adjustments, it is helpful to set out the relevant statutory provisions at the outset:

"20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

21 Failure to comply with duty

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

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

320. A statutory Code of Practice on Employment has been published by the Equality and Human Rights Commission 2011 ("The Code"). Courts are obliged to take it into consideration whenever relevant. Chapter 6 is concerned with the duty to make reasonable adjustments, and emphasises that the duty is one requiring an employer to take positive steps to ensure disabled people can progress in employment. The Code includes:

320.1 The phrase "provision, criterion or practice" (which is not defined in the EA 2010) should be construed widely so as to include any formal or informal policies, rules, practices, arrangements including one-off decisions and actions.

320.2 Paragraphs 6.23 to 6.29 of the Code give guidance as to what is meant by "reasonable steps".

320.3 Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicability of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantive disadvantage.

321. In *Carrera v United First Partners Research*, the Employment Appeal Tribunal held that a PCP did not require an element of compulsion; an expectation or assumption placed upon an employee may suffice. HHJ Eady gave the following guidance at paragraph 31-37:

321.1. The identification of the PCP was an important aspect of the Tribunal's task; the starting point for its determination of a claim of disability discrimination by way of a failure to make reasonable adjustments.

321.2. It is important to be clear as to how the PCP is to be described in any particular case.

321.3. The protective nature of the legislation meant a liberal rather than an overly technical approach should be adopted to the meaning of "provision criterion or practice".

321.4. The Tribunal had taken an unduly narrow view of the Claimant's identification of the PCP, and that it should, instead, have adopted a real world view of what a requirement was in the context of the case.

322. The Employment Tribunal considering a claim that an employer has discriminated against an employee by failing to comply with the duty to make reasonable adjustments must identify:

322.1. the relevant provision, criterion or practice made by the employer; and/or

322.2. the relevant physical features of the premises occupied by the employer and/or the auxiliary aid required;

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

322.4. the nature and extent of the substantial disadvantage suffered by the Claimant.

323. The above steps follow the guidance provided in *Environment Agency v Rowan* [2008] IRLR 20 at paragraph 27.

324. Substantial disadvantage is such disadvantage as is more than minor or trivial.

325. In *Archibald v Fife*, the House of Lords held what steps are reasonable depends on the circumstances of the particular case, which the employment tribunal must establish (paragraph 43).

326. In applying *Archibald v Fife*, in *Chief Constable of South Yorkshire v Jelic* [2010] IRLR 744, the EAT held that the test of reasonableness was an objective one, for Employment Tribunals to decide. The EAT also emphasized that each case turned on its own facts.

327. This Tribunal reminded itself that even where the duty is engaged, not all adjustments will be reasonable even where they overcome the disadvantage.

328. The Tribunal considered *Griffiths v Secretary of State for Work and Pensions* [2016] IRLR 216. The following is a fair summary of it for our purposes in this case:

328.1. The nature of the comparison exercise under section 20 required the tribunal to ask: does the PCP put the disabled person at a substantial disadvantage compared with a non-disabled person? The fact that they were treated equally and might both be subject to the same disadvantage when absent for the same period of time did not eliminate the disadvantage if the PCP bit harder on the disabled, or a category of them, than it did on the able-bodied. The ET and the EAT had erred in holding that the s.20 duty had not been engaged because the policy applied equally to everyone (see paragraphs 46-48, 58, 63 of judgment).

328.2. There was no reason artificially to narrow the concept of what constituted a "step" within the meaning of s.20(3). The only question was whether it was reasonable for it to be taken. Although the proposed steps would have been, if taken, capable in principle of ameliorating the disadvantage resulting from the operation of the policy, the steps required to avoid or alleviate such disadvantages were not likely to be steps which a reasonable employer could be expected to take.

328.3. It may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed; the uncertainty is one of the factors to weigh up when assessing the question of reasonableness.

329. We note that Elias LJ drew attention to the judgment in *Archibald*:

"…the comparator was an able bodied person who was not at risk of dismissal because, unlike Mrs Archibald, he or she was able to carry out the duties of the job. As Lord Rodger pointed out (paragraphs 42-43), the substantial disadvantage was that Mrs Archibald was at risk of dismissal, and the purpose of the reasonable adjustment was to prevent the terms of Mrs Archibald's contract from placing her at that substantial disadvantage. Allowing her to take a post, even possibly at a higher grade, without a competitive interview was capable of achieving that objective. In Archibald the disadvantage, namely risk of loss of employment, was very significant. But lesser prejudice will suffice. In the context of section 20 the word "substantial" is simply defined as "more than minor or trivial": section 212(1)." (*Griffiths* at paragraph 21.)

330. The Tribunal also considered the following passage in *Griffiths* (at paragraph 80):

"The section 20 duty is normally relevant when looking into the future; it is designed to help prevent treatment which might give rise to a section 15 claim from arising. But that is not the purpose of the section 20 complaint here. It is really a staging post in challenging in order to invalidate the written warning – treatment which has already arisen. In my view there is a certain artificiality in arguing the case in that way. I respectfully agree with some observations of HH Judge Richardson in *General Dynamics Information Technology Ltd v Carranza*

[2015] ICR 169 para. 34 when he said that dismissal – and I would add any other disciplinary sanction – for poor attendance can be quite difficult to analyse in terms of the reasonable adjustments duty, and that:-

> "Parties and employment tribunals should consider carefully whether the duty to make reasonable adjustments is really in play or whether the case is best considered and analysed under the new, robust, section 15"."

Requirement of knowledge

331. The requirement of actual or constructive knowledge in section 20 EA (or, rather, in the equivalent DDA 1995 provisions) was addressed in *Gallop v Newport CC* [2014] IRLR 211. The Court held, per Rimer LJ:

> "36 I come to the central question, namely whether the ET misdirected itself in law in arriving at its conclusion that Newport had neither actual nor constructive knowledge of Mr Gallop's disability. As to that, Ms Monaghan and Ms Grennan were agreed as to the law, namely that (i) before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person; and (ii) that for that purpose the required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in section 1(1) of the DDA. Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1. Counsel were further agreed that, provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined in section 1(2). I agree with counsel that this is the correct legal position."

332. The legal principles emerging from *Gallop* and *Donelian v Liberata UK Ltd* [2018] IRLR 535 as to the application of the knowledge provisions within the EA 2010 are as follows:

332.1. Provided that the employer had actual or constructive knowledge of the facts constituting the employee's disability, it did not need to know that, as a matter of law, the consequences of such facts were that the employee was a "disabled person" as defined in the Act.

332.2. The tribunal must ascertain whether, at the material times, the local authority had actual or constructive knowledge of the s.6/Sch.1 facts constituting the claimant's disability.

332.3. The facts in *Gallop* illustrated the need for an employer, when seeking outside advice from clinicians, not simply to ask in general terms whether the employee was a disabled person within the meaning of the legislation but to pose specific practical questions directed to the particular circumstances of the putative disability.

332.4. Where the opinion given was that the employee was not disabled, the employer must not forget that it was he who had to make the factual judgement; it should not simply rubber stamp the opinion that they were not. An example of a case where the employer had not rubber stamped the OH opinion was Donelian.

332.5. The standard is one of reasonableness, not a counsel of perfection.

Harassment

333. Section 26 provides, where relevant:

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

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

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

(i) violating B's dignity, or

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

…

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

(a) the perception of B;

(b) the other circumstances of the case;

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

334. Paragraph 7.9 of the Code states that "related to" in section 26(1)(a) should be given "a broad meaning in that the conduct does not have to be because of the protected characteristic".

335. The Code continues that "related to" includes a situation where the conduct is related to the worker's own protected characteristic, or where there is any connection with a protected characteristic.

336. In respect of the proper application of section 26(1)(b) and (4), which deal with the proscribed consequences of the unwanted conduct, we considered *Dhaliwal v Richmond Pharmacology* [2009] IRLR 336. Although that was a case decided before the Equality Act 2010, the provisions in issue were at section 3A Race Relations Act 1976, and were similar to those in section 26. We find it helpful to set out the following extracts of the judgment of Underhill J(P):

"14 Secondly, it is important to note the formal breakdown of "element (2)" into two alternative bases of liability – "purpose" and "effect". That means that a respondent may be held liable on the basis that the effect of his conduct has been to produce the proscribed consequences even if that was not his purpose; and, conversely, that he may be liable if he acted for the purposes of producing the proscribed consequences but did not in fact do so (or in any event has not been shown to have done so). It might be thought that successful claims of the latter kind will be rare, since in a case where the respondent has intended to bring about the proscribed consequences, and his conduct has had a sufficient impact on the claimant for her to bring proceedings, it would be prima facie surprising if the tribunal were not to find that those consequences had occurred. For that reason we suspect that in most cases the primary focus will be on the effect of the unwanted conduct rather than on the respondent's purpose (though that does not necessarily exclude consideration of the respondent's mental processes because of "element (3)" as discussed below).

15 Thirdly, although the proviso in subsection (2) is rather clumsily expressed, its broad thrust seems to us to be clear. A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. … The proscribed consequences are, of their nature, concerned with the feelings of the putative victim: that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a "subjective" element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt. See also our observations at para 22 below.

…

22 On that basis we cannot accept Mr Majumdar's submission that Dr Lorch's remark could not reasonably have been perceived as a violation of the claimant's dignity. We accept that not every racially slanted adverse comment or conduct may constitute the violation of a

> person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase..."

337. Paragraph 15 above is authority for the proposition that the criterion in section 26(4) EA were overall objective criterion. The Tribunal found that, applying *Dhaliwal* and the reasoning of Underhill J, this was a correct interpretation of the law.

338. The Tribunal considered Paragraph 22 of *Dhaliwal*, and Paragraph 13 of *Grant v HM Land Registry* [2011] IRLR 751.

339. We directed ourselves that not every unwanted comment or act related to a protected characteristic may violate a person's dignity or create an offensive atmosphere. We considered that, at least as a matter of practice rather than law, more than in other areas of discrimination law, context is everything in cases where harassment is alleged. Put shortly, the context in which words are used or acts occur is relevant to their effect.

Burden of proof in discrimination cases

340. We reminded ourselves of the reversal of the burden of proof provisions within section 136(2) EA 2010, as explained in *Igen v Wong* [2005] EWCA Civ. 142 and *Madarassy v Nomura* [2007] ICR 867.

341. In respect of the application of these provisions in complaints of breach of the duty to make reasonable adjustments, we considered the guidance in *Project Management Institute v Latif* [2007] IRLR 579 (Elias P, as he then was, presiding) at paras 44, 53-54.

342. In short, if the burden shifts, the employer must show the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

Jurisdiction: Time Limits

343. Section 123 EA 2010 provides so far as relevant that:

> "(1) … proceedings on a complaint … may not be brought after the end of –
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> …

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –

(a) when a person does an act inconsistent with doing it, or

(b) if a person does no inconsistent act, on the expiry of the period in which the person might reasonably have been expected to do it."

344. A distinction is to be drawn between a single act (which may have continuing consequences) and a continuing act arising from a policy, rule, scheme or practice operated over time: *Barclays Bank v Kapur* [1991] ICR 208.

345. Tribunals should not take too literal an approach to the question of what amounts to a continuing act by focusing on whether the concepts of policy, rule, scheme or practice fit the facts of the particular case. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period". Instead, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs in which female officers were treated less favourably: *Hendricks v Commissioner of Police for Metropolis* (2003) ICR 530 at paragraph 54.

346. One of the complaints in this case is of the failure to comply with the duty to make reasonable adjustments imposed by section 20 EA 2010. To determine when the failure is to be treated as occurring, section 123(4) EA 2010 must be applied. The proper application of these provisions has been recently considered in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ. 640 at paragraphs 11-15:

346.1. Applying subsection 123(4)(b), the failure to comply with the duty is to be treated as occurring on the expiry of the period in which the employer might reasonably have been expected to make the adjustments.

346.2. Ascertaining when the respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty began.

346.3. The period in which the employer might reasonably have been expected to comply with its duty ought in principle be assessed from the claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the claimant at the relevant time.

347. The principles to be applied in the application of section 123 EA 2010 have recently been summarised in *Abertawe Bro Morgannwg University Local Health Board v Morgan*, to which we have directed ourselves. The ET's discretion to extend time under the "just and equitable" test is the widest possible discretion: *Morgan* at paragraph 17.

348. There is no justification for reading into the statutory language any requirement that the Tribunal must be satisfied that there was a good reason for the delay, nor that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal must have regard. If a claimant gives no direct evidence about why she did not bring her claims sooner a Tribunal is not obliged to infer that there was no acceptable reason for the delay, or even that if there was no acceptable reason that would inevitably mean that time should not be extended: *Abertawe Bro Morgannwg University Local Health Board v Morgan* at paragraph 25.

348.1. Factors which are almost always relevant to consider when exercising any discretion whether to extend time are:

(a) the length of, and reasons for, the delay and

(b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

See *Abertawe Bro Morgannwg University Local Health Board v Morgan* at paragraph 19.

Constructive Dismissal

349. Section 95(1)(c) ERA provides that there is a dismissal when the employee terminates the contract with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

350. The burden was on the employee to prove the following:

350.1 here was a fundamental breach of contract on the part of the employer;

350.2 That the employer's breach caused the employee to resign;

350.3 The employee did not affirm the contract and lose the right to resign and claim constructive dismissal.

351. The propositions of law which can be derived from the authorities concerning constructive unfair dismissal are as follows:

351.1 The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: see *Western Excavation Limited v Sharp*.

351.2 It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: see *Malik v Bank of Credit and Commerce International* [1998] AC20 34h-35d and 45c-46e.

351.3 Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, Browne-Wilkinson J in *Woods v Wm Car services (Peterborough) Limited* [1981] ICR 666 at 672a; *Morrow v Safeway Stores* [2002] IRLR 9. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.

351.4 The test of whether there has been a breach of the implied term of trust and confidence is objective as Lord Nicholls said in *Malik* at page 35c. The conduct relied as constituting the breach must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.

351.5 A breach occurs when the proscribed conduct takes place: see *Malik*.

351.6 Reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach; but it is not a legal requirement: see *Bournemouth University v Buckland* [2010] ICR 908 at para 28.

351.7 In terms of causation, the Claimant must show that she resigned in response to this breach, not for some other reason. But the breach need only be an effective cause, not the sole or primary cause, of the resignation.

352. In *Kaur v Leeds Teaching Hospital NHS Trust* [2018] IRLR, the Court of Appeal approved the guidance given in *Waltham Forest LBC v Omilaju* (at paragraph 15-16). Reading those authorities, the following comprehensive guidance is given on the "last straw" doctrine:

352.1 The repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence: *Lewis v Motorworld Garages Ltd* [1986] ICR 157, per Neill LJ (p 167C).

352.2 In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (Glidewell LJ at p 169F)

352.3 Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small

things (more elegantly expressed in the maxim ' de minimis non curat lex') is of general application.

352.4 The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

352.5 The final straw need not be characterised as 'unreasonable' or 'blameworthy' conduct, even if it usually will be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy.

352.6 The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality referred to.

352.7 If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.

352.8 If an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign, soldiers on and affirms the contract, he cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

352.9 The issue of affirmation may arise in the context of a cumulative breach because in many such cases the employer's conduct will have crossed the *Malik* threshold at some earlier point than that at which the employee finally resigns; and, on ordinary principles, if he or she does not resign promptly at that point but "soldiers on" they will be held to have affirmed the contract. However, if the conduct in question is continued by a further act or acts, in response to which the employee does resign, he or she can still rely on the totality of the conduct in order to establish a breach of the *Malik* term.

352.10 Even when correctly used in the context of a cumulative breach, there are two theoretically distinct legal effects to which the "last straw" label can be applied. The first is where the legal significance of the final act in the series is that the employer's conduct had not previously crossed the Malik threshold: in such a case the breaking of the camel's back

consists in the repudiation of the contract. In the second situation, the employer's conduct has already crossed that threshold at an earlier stage, but the employee has soldiered on until the later act which triggers his resignation: in this case, by contrast, the breaking of the camel's back consists in the employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so.

352.11 The affirmation point discussed in *Omilaju* will not arise in every cumulative breach case. "There will in such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. Indeed in some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant, even though the claimant seeks to rely on them just in case (or for their prejudicial effect)." (per Underhill LJ).

352.12 We note that a breach of trust and confidence has two limbs:

352.12.1 the employer must have conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee and

352.12.2 that there be no reasonable or proper cause for the conduct.

Submissions

353 The Respondent wished to make written submissions; the Claimant indicated that she would have written submissions as well.

354 The Tribunal received these on the morning of 28th September. The Claimant had not completed her reading of Mr. Heard's submissions. To ensure fairness, we put the matter back to 11.30am to give the Claimant an opportunity to read the Respondent's submissions, given that she is a lay person, with a mental impairment.

355 At the Claimant's request, the matter was put back again to 12.00 noon for her to complete her reading.

Conclusions

356 We have applied our findings of fact and the law set out above to the issues. The fact that we do not refer to each and every piece of evidence, or submission, is not evidence that they were not taken into account. We considered all that we read and heard. It is worth noting that in this case the bundle extended to over 1850 pages, there were over 200 pages of witness statements, and the parties' written submissions ran to over 50 pages.

Jurisdiction: Issues 17-18

357 The following complaints of harassment were, on their face, presented within three months of the act or omission complained of: 6j, k, l, m, and n.

358 The Claimant submitted that she had suffered one thing after another, and that these could not be simple mistakes, but were part of a continuing state of affairs. This is demonstrated in parts of her evidence, where she perceived that events had a motivation or an intention behind them which was hostile or against her interests. For example, in respect of the Subject Access Request, the Claimant refers to the Respondent "ignoring" her; and in respect of the grievance outcome, that the outcome letter was incorrect throughout and that someone partial was controlling the documents.

359 Furthermore, as a further example, the Claimant considered the meeting of 12 January 2017 to be deliberately weighted to be formal, and considered it an "*ambush*". The Claimant alleged that she had not been listened to, and had been treated in a demeaning way.

360 The Claimant's resignation letter states, after listing many of the matters forming part of her complaints in these proceedings, the words quoted in paragraph 278 above. This, again, is evidence that the Claimant is alleging a continuing state of affairs.

361 Applying *Hendricks*, the Tribunal decided that the Claimant's case was made on the basis that the different alleged acts of discrimination were linked to one another, and were evidence of an allegation of a continuing discriminatory state of affairs.

362 If the Tribunal are wrong about this, we considered that it would be just and equitable to extend time to include those matters which are otherwise out of time. This is because:

362.1 The Respondent did not identify any prejudice suffered by complaints being out of time and it had no difficulty adducing evidence to meet those complaints.

362.2 Moreover, many of these complaints formed part of the constructive dismissal complaint, which required the Respondent to address the same or related incidents in the context of defending the unfair dismissal complaint.

362.3 The Claimant's mental impairment had strong effect on her ability to process information, to weigh information, and to order her thoughts, which we witnessed during these proceedings.

Issues 9 -10: Definition of disability

363 From our findings of fact, we had no hesitation in concluding that the Claimant was a disabled person, within section 6 and Sch 1 EA 2010, at all material times. It is regrettable that the Respondent refused to concede this issue, particularly after her oral evidence on this issue went unchallenged. This wasted time and caused at least

some extra stress for the Claimant. Also, it added to the impression that the Respondent had little understanding of the definition of disabled person within the Equality Act 2010.

364 We reached the following conclusions on the material parts of the definition. We have used the approach proposed in *J v DLA Piper* in the absence of a medical report setting out when the impairment first arose.

Adverse effect

365 We accepted the Claimant's evidence that the adverse effect began at some point prior to November 2014. This is most notably demonstrated by her evidence that her sleep was interrupted and reduced by the effect of her impairment.

Substantial

366 We find that it was because the adverse effect of this impairment became substantial that the Claimant stopped work in November 2014 and thereafter consulted her GP. We accepted her unchallenged evidence about the progression of her symptoms.

367 Doing the best we can, we infer that the substantial effect began on or about 1 November 2014, which is close to the date of the incident involving Ms. Fogg, referred to at issue 2c. This is consistent with the oral evidence of the Claimant and the medical records, because it appears that the GP was first consulted on 14 November 2014.

Long-term

368 The substantial adverse effect of the impairment was long-term.

369 We find that it was likely to last 12 months as at the date of the first allegation of disability discrimination in May 2015, in the sense that it could well have lasted 12 months at that point, given that the symptoms had been present for more than 6 months, even if the substantial adverse effect only commenced at or about the beginning of November 2014.

370 If we are wrong about this, having made the above findings of fact, we are satisfied that the substantial adverse effect was likely to recur, in the sense that it could well recur, after it arose in November 2014. We reached this conclusion because:

370.1 The Claimant gave evidence that she suffered from stress-related symptoms prior to November 2014, notably affecting her sleep and her ability to process or control her thoughts.

370.2 By the date of the first alleged acts of discrimination (May 2015 – see issue 6b), the length of the episode of stress-related anxiety and depression pointed to this being more than a mere reaction to work events. It was likely (on a balance of probability) to have been some form of anxiety and/or depressive disorder from early November 2014.

370.3 The GP report, limited though it may be, identifies that stressful life events could affect the length of the substantial adverse effect.

371 If we are found to be wrong in law about this (despite the above conclusions being based on findings of fact), the Claimant's symptoms of anxiety and depression did, as a matter of fact, recur in June 2016. This, coupled with the above findings, demonstrate that, on any view of the law, at the very latest, the Claimant was a disabled person from June 2016 onwards.

Impairment

372 This is a case where there was no medical report addressing whether the Claimant had a mental impairment prior to 2017, nor when such an impairment started. We have applied the guidance in *J v DLA Piper* by identifying when the adverse effect began, when the adverse effect first became substantial, how long it lasted, whether it could well have recurred, and when in fact it did recur.

373 Moreover, it was not disputed that the Claimant had a mental impairment, and nor was her evidence of symptoms and their duration challenged.

374 We inferred from the above that the Claimant had a mental impairment at all material times in the form of an anxiety and/or depressive disorder from, at the latest, October 2014, when the OFSTED inspection was due.

Issue 12: Knowledge

375 This issue is relevant to the complaints that the Respondent failed to make reasonable adjustments. The approach of the Respondent and its submissions appeared to proceed on the basis that it was relevant to the complaints of disability related harassment, which is incorrect as a matter of law.

376 We reminded ourselves that the relevant statutory test includes both actual or constructive knowledge:

376.1 that the employee was a disabled person; and

376.2 for that purpose, the required knowledge is of the facts constituting the employee's disability as identified in section 6 EA 2010 (rather than knowledge of the relevant law).

377 In this case, the Respondent's Human Resource advisers merely accepted the advice provided by Occupational Health advisers, treating that as expert medical evidence on the issue - even though it was unclear what qualifications or medical expertise the OH advisers had.

378 Moreover, the Respondent treated the question of whether a person was a person with a disability as a question of medical opinion. As a matter of law, this approach was mistaken. This question is basically a factual question; sub-parts of this question may be answered with the assistance of medical opinion evidence. But medical evidence may not be necessary and it will never, in itself, be sufficient.

379 Moreover, as this case demonstrates, the accuracy of any report from a doctor or occupational health practitioner will depend on the instructions provided to that adviser. An employer, when seeking medical advice, must pose specific practical questions directed to the particular circumstances of the putative disability.

380 More significantly, the Respondent should have made the factual judgment itself, by properly directing itself to consider whether the Claimant was a disabled person. In this case, the limitations of the OH advice were obvious. The OH advisers made clear that they were providing an occupational health opinion, not a legal opinion. These warnings were made for a good reason.

381 None of the Respondent's Human Resources advisers ever considered whether the Claimant might be a disabled person prior to the OH advice of 28 March 2017; there is no evidence that anyone consulted the statutory definition nor the Guidance, nor that they sought advice about this. This is likely to be why the Respondent never asked factual, practical, questions of the Claimant to establish whether she was likely to be a disabled person protected by the EA 2010 and why it did not obtain the GP records of the Claimant.

382 We are critical of the Respondent's approach to this issue, rather than being critical of any individual. This was a systemic failing, which concerned the Tribunal, particularly because the Respondent is a body carrying out a public function and because the evidence of Ms. Calahane was that stress-related illness was "*prevalent in schools*". The Respondent never considered the statutory definition within section 6(1) EA 2010, nor the factual issues that this raised, nor did it follow the advice of the OH advisers, which was that whether the Claimant was a disabled person was a "*legal matter*" (even though this was wrong, it might well have prompted an employer to take legal advice).

383 We concluded that Ms. Stalham, and the Respondent, had at least constructive knowledge of the facts that meant that the Claimant was a disabled person from about 25 June 2015, evidenced by the letter to Ms. Stalham on that date, especially the content at p.539.

384 If we are wrong about this, we conclude that Ms. Stalham had constructive knowledge of the requisite facts by about 19 October 2015. This is because:

384.1 By 15 September 2015, the OH advice made clear that the Claimant was still unfit for work and that her current symptoms were likely to continue until workplace issues were resolved. The Claimant had already been absent sick for over 10 months at this point.

384.2 At the informal absence review meeting on 19 October 2015, attended by Ms. Stalham and a HR adviser, the Claimant's "*anxiety barrier*" is discussed. At this meeting, the Claimant confirmed that she was still on medication, that she had had counselling, and that she would like more counselling. [654] At this point, the Claimant had been absent sick for almost 12 months and clearly would remain on medication for some weeks.

385 We have explained above that the other witnesses named in the list of issues had actual or constructive knowledge at the material times.

Issues 13 – 16: Breach of the duty to make reasonable adjustments

386 To assist the parties, we have analysed these complaints by considering in turn each PCP referred to in issue 13 and the disadvantage alleged to be caused, as set out in the Further Particulars at p.52.

13a: Only allowing a trade union representative or work colleague to attend meetings

387 The Respondent did not apply a PCP of "*only allowing a trade union representative or work colleague to attend meetings*".

388 The Tribunal found that employees had a right in respect of formal grievance hearings, which is that a trade union representative or official, or a work colleague, could accompany the employee to a formal grievance meeting: see 5.4.3 of the Grievance Procedure [p.172i].

389 The Tribunal found that employees had a right to be accompanied by a trade union representative or a work colleague to a formal absence review hearing: see 5.2.1 of the Sickness Absence Management Procedure [184].

390 The PCPs represented by these rights did not put the Claimant at a more than minor disadvantage compared to another teacher in her position. These were statements of the minimum legal rights of the Claimant; they were not limitations on who else might accompany her.

391 In any event, we concluded that the Respondent did not breach the duty on any of the dates alleged at p.52 for the following reasons.

Absence review meeting 12 January 2017

392 As for the absence review meeting on 12 January 2017, we find that this was an informal meeting.

393 There could be no breach of the duty to make reasonable adjustments in the circumstances. The Respondent offered to make adjustments in the invitation letter of 16 December 2016 [900] and in Ms. Calahane's email on 10 January, including the following offer [908]:

"*Let me know if there are specific arrangements that you require*."

394 The Claimant did not request that she be accompanied by a friend or family member.

395 The Claimant attended on 12 January. At the meeting, she made no request to be accompanied by a friend or family member.

396 In those circumstances, where the Respondent has offered to make arrangements to assist the Claimant to attend, and the Claimant has not requested any specific adjustment, there could be no breach of the duty even if the alleged PCP did exist.

397 As explained above, the Claimant had attended an earlier meeting with a family member, despite the invitation letter using similar wording as used in the invitation letters ahead of the sickness absence review meeting in January 2017: see the meeting on 28 September 2015 [600]. The terms of the invitation letters were no barrier to the Claimant being accompanied by a family member or friend.

Invitations to grievance hearing, 8 and 14 February, and scheduled grievance hearing 17 February 2017

398 The letter of 8 February [1003] is not evidence of the PCP alleged. It is not a refusal of any sort as to who could accompany the Claimant.

399 In the email of 14 February [1017-1019], Ms. Wiggs stated that the Grievance Policy, 5.4.3, stated that the employee has the right to be accompanied at the meeting by the category of persons specified. Ms. Wiggs informed the Claimant that she must choose from this criteria if she wanted to be represented.

400 We find that, despite what is stated by Ms. Wiggs, this was not the meaning of the Grievance Policy (which is setting out minimum rights). This is supported by the fact that the Claimant attended the grievance hearing in September 2015 with her cousin, without complaint.

401 Moreover, this was not in fact a PCP applied in these circumstances. This is because the scheduled grievance hearing did not go ahead and because Ms. Wiggs, having received advice from Ms. Calahane, changed her decision on the question of who could accompany the Claimant.

402 In any event, the invitation letter and email placed the Claimant at no disadvantage compared to another teacher in her position. These were only items of correspondence.

403 The meeting scheduled for 17 February 2017 did not go ahead. Therefore, even if such a PCP did exist, the Claimant was not in fact placed at any substantial disadvantage.

404 In any event, if we are wrong about the above, the Respondent made a reasonable adjustment to the PCP alleged before the grievance hearing took place by allowing the Claimant to be accompanied by a friend or family member (see email from Ms. Calahane 21 February p.1048), as explained in our the findings of fact.

<u>13b: Not providing grievance documentation prior to a meeting</u>

405 We find that the Respondent applied a PCP of not providing the grievance evidence documentation to an employee prior to a grievance hearing.

406 However, there was no breach of the duty to make reasonable adjustments on the dates alleged. In respect of the specific dates pleaded at the Further Particulars, p.52:

406.1 Despite the refusal to provide such documentation by Ms. Wiggs on 14 February 2017, the Claimant was not placed at a disadvantage compared to a comparator, because the scheduled meeting on 17 February did not proceed.

406.2 On 1 March 2017, the Claimant was provided with a bundle of documents relevant to the grievance issues which had been generated by Ms. Wiggs' investigation. This demonstrates that a reasonable adjustment to the PCP was made. It was reasonable for the Respondent to provide documents which Ms. Wiggs believed were directly relevant to the grievance. A reasonable adjustment did not require the Respondent to provide every document to which she was entitled under her SAR; Ms. Wiggs had never seen those documents forming part of the Claimant's email request for specific documents made on 28 March 2017.

406.3 The grievance meeting scheduled for 7 March 2017 did not go ahead. The Claimant was not placed at any disadvantage by the PCP, which had, in any event, already been adjusted in a reasonable way.

406.4 The email from Ms. Wiggs of 29 March 2017 [1201] is not evidence of a breach of the duty to make reasonable adjustments. On the contrary, it explains that Ms. Wiggs is committed to making reasonable adjustments. Also, it makes the distinction between the evidence within the scope of the grievance investigation and the evidence requested by the SAR.

406.5 The Claimant alleges that her emails of 30 and 31 March were ignored. This is not an allegation of breach of the duty to make reasonable adjustments. In any event, we found as a fact that her emails were not ignored by Ms. Wiggs. We accepted Ms. Wiggs' evidence that the additional documents requested were not necessary for the purpose of the grievance meeting, and that they would not have been readily available. In other words, the further adjustment sought by the Claimant (of further disclosure), was not a reasonable one.

406.6 The fact that the grievance hearing took place on 31 March 2017 is not evidence of a breach of the duty to make reasonable adjustments. The Respondent had complied with this duty already, by the disclosure provided on 1 March 2017.

<u>Issue 13c: To provide a minimum of 5 working days' notice of formal meetings; or 3 workings days for sickness review meetings</u>

407 We find that there was a PCP requiring a minimum of 5 working days notice of formal sickness absence review meetings: see paragraph 5.2.1 of the Procedure [184]. This is not relevant to the alleged breaches in this case, however, which are alleged to take place on 9 and 11 May 2017, ahead of an informal sickness absence review meeting scheduled for 12 May 2017.

408 We find that there was no PCP that employees were given 3 working days' notice of an informal sickness absence review meeting. The "informal procedure" part of the Sickness Absence Management Procedure does not refer to a requirement to give 3 days' notice [183].

409 If we are wrong about this, we accepted that there was no real evidence that the Claimant suffered more than minor disadvantage because of her mental impairment as a result of the PCP alleged under issue 13c.

410 In any event, the dates relied upon are 9 May and 11 May 2017: see Further Particulars, p.53. The PCPs relied upon could not, as a matter of fact, have put the Claimant at any disadvantage because the meeting on 12 May 2017 did not go ahead.

411 If these alleged PCPs within the Sickness Absence Management Procedure placed the Claimant at any disadvantage on either 9, 11 or 12 May, such disadvantage was minor. The Claimant would not be disadvantaged by holding the meeting on 12 May expeditiously, because it was an informal meeting and Ms. Stalham wished to offer the Claimant a transfer to another school (which was something that the Claimant had previously requested).

412 If this allegation concerns the invitation dated 11 May 2017 to the second grievance appeal hearing on 16 May 2017, we note that, within the Grievance Procedure, there is a PCP that 5 working days' notice of a grievance appeal hearing should be provided: see p.172j. We do not consider that this PCP placed the Claimant at any disadvantage in this case, because the Claimant had already been given notice of an appeal hearing on 9 May 2017, by letter of 2 May 2017; but the hearing was postponed.

413 In any event, the Claimant made no request for more time to prepare for the appeal hearing on 16 May 2017. The Claimant made no contact at all with the appeal panel in response to its invitation of 11 May. In those circumstances, there could be no breach of the duty to make reasonable adjustments.

<u>13d: Only holding pay reviews when someone is fit for work</u>

414 The Tribunal did not find that there was the alleged PCP in existence: see paragraphs 133-136 above.

415 The context of this complaint is that the Claimant's position from the meeting of 12 January 2017, after she had commenced a period of sickness absence in November 2016, was that she could not return to work until her re-grading pay issue was resolved. The Claimant had, however, already been informed by Ms. Stalham what evidence she needed to produce in order to go through the threshold to UPS1. Throughout the period following her return to work in December 2015, the Claimant had failed to produce this evidence.

416 The Tribunal considered this complaint appeared to be, in reality, a complaint under section 15 EA 2010, which was not pleaded nor argued.

Issue 13(e): To provide not less than 10% weekly teaching timetable as non-contact hours for teachers

417 We concluded that there was no breach of the duty to make reasonable adjustments in this regard whether in July or November 2016.

418 The Tribunal found that the PCP referred to by the Claimant was that each teacher had Planning and Preparation time amounting to 10% of their weekly timetable, during which they were not timetabled to teach.

419 The Tribunal accepted that, as a result of the Claimant's stress-related impairment, she was struggling to keep on top of her marking, by June 2016.

420 The Tribunal concluded, however, that there was no evidence that the application of the PPA time PCP placed the Claimant at any disadvantage compared to a comparator teacher. If anything, this PCP was likely to assist the Claimant to manage her stress-related symptoms.

421 Moreover, as the Claimant admitted, the Respondent made adjustments to allow her more PPA time than the 10% standard. The evidence of the Claimant (from paragraph 191 of her witness statement) and Ms. Stalham was that the Claimant was given more PPA time than other teachers. This included over June 2016. Despite this, the Claimant describes this as the most stressful month since she returned to the School (paragraph 192 witness statement).

422 We concluded that any further adjustment to the PPA would not have been reasonable. PPA time was for planning and preparation, not for marking. In any event, any such adjustment would have had no effect on the Claimant's anxiety levels, given her evidence.

423 The PCP which placed the Claimant at a substantial disadvantage was the requirement for marking of all work to be done daily. We can understand that this was more difficult for her to comply with because her symptoms made it more difficult for her to process information than another teacher in her position.

424 Neither at the 17 November 2016 review meeting with Ms. Stalham, nor at any time prior to that, did the Claimant ask for any adjustment to the marking policy. She did not ask for extra PPA time for marking prior to 17 November 2016.

425 At the 17 November 2016 meeting with Ms. Stalham, the Claimant requested the use of some PPA time for marking. We concluded that this would not be a reasonable adjustment. PPA time was needed as planning and preparation time. Planning was completed by year group teachers together, to make it as high quality as it could be, and for good practice to be shared (as explained by Ms. Stalham).

426 Further, from the evidence that we heard, there was no adjustment to the marking policy which could have been made in November 2016 which could have overcome the disadvantage suffered by the Claimant, because of the scale of the symptoms of her anxiety and her depressive condition.

427 Moreover, the marking policy was there so that marking had an impact on the children's learning. Any adjustment which was more than allowing a few more days to mark work could impact on the education of children.

428 In any event, Ms. Stalham gave the Claimant two weeks to bring her books up to date and offered support to the Claimant, which we find to be reasonable adjustments in the circumstances. Given the nature of school work, the reasonable policy that marking should have an impact on the education of the children, the size and teaching resources of this primary school, and the recent history of OFSTED intervention, we are satisfied that all reasonable adjustments were made in this respect.

Issue 6: Harassment

429 We have set out in our findings of fact our conclusions on the complaints within issue 6a-6n. We have found that the Claimant was mistaken or incorrect in her factual interpretation of certain events. For example, in respect of issue 6d, a permanent replacement for the Claimant was not recruited until after her resignation.

430 In respect of other events, such as the complaint at issue 6b, we have found that the conduct was not unwanted.

431 Irrespective of whether the conduct set out at issue 6a-n occurred as alleged and whether or not it was unwanted, we have concluded that it did not have as its purpose the violation of the Claimant's dignity nor the creation of an environment that was hostile, offensive or humiliating.

432 Further, our findings of fact demonstrate that where conduct alleged was found to have in fact occurred, and where it had the effect of violating her dignity and creating a hostile and offensive environment, it was not reasonable for the conduct to have this effect in the circumstances. There are many examples of this set out in our findings of fact.

433 As we have explained, the Claimant was over-sensitive to perceived or actual criticism from managers, or management direction which she did not agree with. The Claimant overreacted to certain events. This was probably a result of her stress-related symptoms, such as her impaired ability to process information and her tendency to ruminate over and over on events.

434 For the avoidance of doubt, we found that none of the allegations of harassment were made out.

435 We have made positive findings of fact upholding the Respondent's case on each complaint within issue 6. Accordingly, the burden of proof provisions within section 136 EA 2010 have not been engaged.

Issues 1-5: Constructive Dismissal

436 We concluded that the Claimant did resign in response to the events on 11 and 12 May 2017. This is evidenced by her resignation letter, in which she refers to being

unable to cope with "*another ambush like the meeting in January*". (We make clear that we did not find that the Claimant was "ambushed" at the informal meeting in January 2017, nor that Ms. Calahane intended any sort of "ambush" on 12 May 2017.)

437 We found that the series of acts or omissions relied upon at issues 2a to 2bb did not, whether taken cumulatively or examined individually, amount to a breach of the implied term of trust and confidence.

438 On the findings of fact set out above, the Respondent and its predecessor did not conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence, even though the Claimant believed this to have occurred.

439 We understand that assessing the reasonableness of the actions of the employer is a tool which may help a Tribunal determine whether there has been a breach of the implied term relied upon, but not a legal test in itself. Using this tool, we found that in most of the instances alleged, the Respondent's senior management and HR advisers had acted reasonably and with proper cause, on the evidence before them.

440 On the very limited occasions where, objectively viewed, the Respondent may have acted unreasonably, we found that this was done by mistake or oversight; it was not done deliberately. For example, in respect of issue 2t, Ms. Wiggs had not realised that the OH advice was to the effect that the Claimant could be accompanied by a friend or family member. This incident is a good example of why there was no breach of the implied term of trust and confidence; because as soon as the relevant HR adviser, Ms. Calahane, returned from holiday, she informed Ms. Wiggs that adjustment should be made to the usual procedure; and the adjustments proposed were made by Ms. Wiggs.

441 As we have explained above, the Claimant became over-sensitive to the actions of managers and HR advisers, so that she perceived acts to be deliberate, and motives to be negative, where there was no real basis for this perception.

Issue 3

442 We reminded ourselves that a relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the "last straw" in a series of incidents. However, the particular incidents on 12 May 2017, which caused the Claimant to resign, were insufficient to justify her taking that action, even if there had been a series of other incidents which were capable of forming part of a repudiatory breach (which there had not been in this case).

443 In respect of the acts on 12 May 2017 (set out at issues 2bb and 3), Ms. Calahane did not act unreasonably, nor unfairly, nor with any malice. It is apparent that she intended to leave a voice message when she rang; and that she only decided to call in the absence of confirmation from the Claimant as to whether or not she would attend the meeting arranged for that day. We concluded that Ms. Calahane had acted in a considerate and appropriate way on 12 May 2017. Her acts were done innocently, and were so trivial that they could not amount to a "last straw".

444 Given the above conclusions, the issue of affirmation does not require determination, because we have found that there was no breach of contract.

Issues 20 and 21: Unlawful deduction of 1% pay rise

445 The complaint of unlawful deduction of wages at issue 20 was brought in time. The Claim was presented within three months of the last in the series of deductions, because the 1% shortfall featured in all payments of wages up to the date of the resignation.

446 As explained in our findings of fact at paragraphs 282-292, there was a series of unlawful deductions from the Claimant's wages, paid between 1 September 2016 and 15 May 2017. These occurred because the Respondent failed to appreciate the effect of the TUPE Regulations 2006. As the submissions demonstrated, the Respondent appeared not to understand the scope and effect of these Regulations.

447 The amount of each deduction was the difference between the salary that she was paid and the salary that she should have been paid, had the Respondent used the annual salary of £33,160 as its starting point.

448 The parties have not agreed a figure for this sum to date, but we expect that they will now be able to do so. The sum involved is relatively small (the Schedule of Loss estimates it to be less than £300).

Summary

449 The complaint of an unlawful deduction from wages set out in issues 20 - 21 is upheld.

450 The complaints of unfair dismissal, disability discrimination in the form of failure to make reasonable adjustments, and disability related harassment, are dismissed.

451 The Tribunal will list the matter for a Remedy hearing after 1 December 2018, to determine the compensation due under issues 20-21, unless it receives confirmation from the parties that agreement on this sum has been reached.

Employment Judge Ross

13 November 2018