



VCD

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

AND

Birmingham City Council

Mrs G Paul-Eke

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham

ON 11,12,13,16 & 17 March &

25, 26 & 27 August &

16 & 17 September &

20, 21 & 22 October 2020

Reserved Judgement 26 November 2020

EMPLOYMENT JUDGE Dean

MEMBERS Dr G Hammersley

Mr R Virdee

Representation

For the Claimant: in person

For the Respondent: Ms E Hodgetts, of counsel

JUDGMENT

The judgment of the Tribunal is that

1. The claimant was not unfairly dismissed by the respondent. The complaint is dismissed.
2. The tribunal does not have jurisdiction to determine complaints that relate to claims that are of conduct occurring before 8 July 2018 presented out of time.
3. The claimants complaints of unlawful discrimination because of the protected characteristic of race and disability do not succeed and are dismissed in their entirety.
4. The respondent in breach of contract failed to pay the claimant in full in lieu of her contractual notice period. The respondent is ordered to pay to the claimant damages in the sum of £368.82.

REASONS

Background

1. The claimant in this case was employed by the respondent until termination of her employment with effect on the 10th October 2017. The claimant presented a claim form on the 26th February 2018 following a period of early conciliation. The claimant brings claims of Unfair Dismissal, Race Discrimination, Disability Discrimination, notice pay and for victimisation. In essence the claim is that the claimant says the way in which the respondent treated her after she suffered a workplace injury and was signed off work for substantial periods of time and ultimately her dismissal was unfair and discriminatory which the respondent says was on grounds of capability. The claimant asserts that she has been unfairly dismissed and that she has been discriminated against because of matters arising from her disability and the respondents have failed to make reasonable adjustments and has caused her to suffer harassment because of her disability. The claimant complains that she has been unlawfully discriminated against because of her race and has been directly discriminated by the respondent's treatment of her because of her race.
2. The claimant identifies her race being of Black Afro Caribbean descent and having Trinidadian nationality. The claimant's disability is described to be lumber bulging at the spine, nerve damage to right hand and injury to right knee with arthritis. The respondent concedes that the claimant was a disabled person at all relevant times by the conditions.

The Relevant Law

3. The relevant statutory provisions to which refer are:
 - (a) Jurisdiction and time limits- s 123 Equality Act 2010;
 - (b) Unfair dismissal – s98 Employment Rights Act 1996;
 - (c) Disability discrimination complaints ss 6,15, 20&21, 26, 27, 39 Equality Act 2010;
 - (d) Race discrimination complaints ss9, 15 of the Equality Act 2010;
 - (e) Burden of proof 136 Equality Act 2010;
 - (f) Breach of contract complaints Employment Tribunals (Extension of Jurisdiction) Order 1994;
 - (g) Equality and Human Rights Commission: Code of Practice on Employment (2011)

Jurisdiction – time limits and continuing acts

4. The law provides that in respect of discrimination claims and detriment claims, if there is a continuing course of conduct it is to be treated as an act extending over a period. Time runs from the end of that period. The focus of the Tribunal's enquiry must be on the substance of the complaint that the respondent was responsible for an ongoing state of affairs in which the claimant was less favourably treated. The burden of proof is on the claimant to prove, either by direct evidence or by inference from primary facts, that the alleged acts of discrimination were linked to one another and were evidence of a continuing discriminatory

state of affairs see Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA.

5. If any of the complaints were not in time, the Employment Tribunal must consider whether there is nevertheless jurisdiction to hear them. In discrimination cases the test is whether it is just and equitable to allow the claims to be brought.
6. The statutory wording of section 123 of the EA10 is slightly different than in the SDA and RRA and, arguably, may be wider. However, for these purposes, we have assumed that the test is the same and that the well established principles apply.
7. When deciding whether it is just and equitable for a claim to be brought, the Employment Tribunal's discretion is wide and any factor that appears to be relevant can be considered. However, time limits should be exercised strictly and the Tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to do so. The exercise of discretion is therefore the exception rather than the rule Robertson v Bexley Community Centre [2003] IRLR 434 .
8. Case law provides that consideration of the factors set out in section 33 of the Limitation Act 1980 is of assistance. The Employment Tribunal should have regard to all the circumstances of the case, and in particular to the following:
 - (a) the length and reasons for the delay;
 - (b) the extent to which the cogency of the evidence is likely to be affected by the delay;
 - (c) the extent to which the party sued cooperated with any requests for information;
 - (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and
 - (e) the steps taken by the claimant to obtain professional advice once he or she knew of the possibility of taking action.
9. In addition, when deciding whether to exercise its just and equitable discretion, the Employment Tribunal must consider the prejudice which each party would suffer as a result of the decision to be made (sometimes referred to as the balance of hardship test) British Coal Corporation v Keeble [1997] IRLR 336 EAT.

10. A number of authorities have suggested that reliance on incorrect advice should not defeat a claimant's contention that their claim should be heard, depending on the source of that advice. See for example Chohan v Derby Law Centre [2004] IRLR 685 EA.
11. Additionally, the authorities say that the pursuit of internal proceedings is one factor to be taken into account. However, the fact that a Claimant defers presenting a claim while awaiting the outcome of an internal appeal process does not normally constitute a sufficient ground for the delay see Apelogun-Gabriels v Lambeth London Borough [2002] ICR 713.

Equality Act 2010

12. It should be borne in mind that the legislative intention behind the EA10 was to harmonise the previous legislation and to modernise the language used. Therefore, in general terms, the intention was not to change how the law operated unless the harmonisation involved codifying case law or providing additional protection in respect of a particular protected characteristic, in line with that which had previously been afforded to persons with other protected characteristics.
13. Because of that, much of the case law applicable under the SDA or RRA is relevant to how the provisions of the EA10 are to be interpreted and applied.
14. Sections 39 and 40 of the EA10 prohibit unlawful discrimination against employees in the field of work.
15. Section 39(2) provides that:

“An employer (A) must not discriminate against an employee of A's (B)—

 - (a) as to B's terms of employment;
 - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
 - (c) by dismissing B;
 - (d) by subjecting B to any other detriment.”
16. Section 120 EA10 confers jurisdiction on an Employment Tribunal to determine complaints relating to the field of work.
17. Section 136 of the EA10 provides that:

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

This provision reverses the burden of proof if there is a prima facie case of discrimination, harassment, victimisation or failure to make reasonable adjustments. The courts have provided detailed guidance on the circumstances in which the burden reverses Barton v Investec [2003] IRLR 332 EAT as approved and modified by the Court of Appeal in Igen v Wong [2005] IRLR 258 CA but in most cases the issue is not so finely balanced as to turn on whether the burden of proof has reversed. Also, the case law makes it clear that it is not always necessary to adopt a two stage approach and it is permissible for Employment Tribunals to instead identify the reason why an act or omission occurred

Direct discrimination

18. Direct discrimination is defined in section 13(1) of the EA10 as “A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others”.
19. In the RRA and SDA the words “grounds of” were used instead of “because of”. However, the guidance issued by the Government in respect of the EA10 stated that this was not intended to change to legal test and commentators have subsequently agreed that it has not done so. This means that the legal principles in respect of direct discrimination remain the same.
20. The application of those principles was summarised by the Employment Appeal Tribunal in London Borough of Islington v Ladele (Liberty intervening) EAT/0453/08, which has since been upheld. The summary is set out below in 5.8.4 to 5.8.9
21. In every case the Employment Tribunal has to determine the reason why the claimant was treated as he was. By reference to Nagarajan v London Regional Transport [1999] IRLR 572 HL In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.
22. If the Employment Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial. By reference to Nagarajan and also Igen v Wong [2005] IRLR 258 CA
23. Direct evidence of discrimination is rare, and Employment Tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the Burden of Proof Directive (97/80/EEC). The first stage places a burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. If the claimant proves such facts, then the second

stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If they fail to establish that, the Tribunal must find that there is discrimination. the Igen test

24. The explanation for the less favourable treatment does not have to be a reasonable one. By reference to Zafar v Glasgow City Council [1998] IRLR 36 HL. In the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation. By reference to Bahl v Law Society [2004] IRLR 799 CA. If the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. The inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, the burden is discharged at the second stage, however unreasonable the treatment.
25. It is not necessary in every case for an Employment Tribunal to go through the two-stage process. In some cases it may be appropriate simply to focus on the reason given by the employer ("the reason why") and, if the Tribunal is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test. The employee is not prejudiced by that approach, but the employer may be, because the Employment Tribunal is acting on the assumption that the first hurdle has been crossed by the employee. By reference to Brown v London Borough of Croydon [2007] IRLR 259 CA
26. Madarassy v Nomura [2007] IRLR 247 predates the Equality Act 2010 but it is considered as the seminal case for the approach for employment tribunals on when the evidential burden will shift to an employer to prove that its acts were not discriminatory. Lord Justice Mummery stated as follows: "The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."
27. It is incumbent on a Employment Tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are. By reference to Anya v University of Oxford [2001] IRLR 377 CA

28. It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The determination of the comparator depends upon the reason for the difference in treatment. The question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. By reference to Shamoon. However, as the EAT noted (in Ladele) although comparators may be of evidential value in determining the reason why the claimant was treated as he or she was, frequently they cast no useful light on that question at all. In some instances comparators can be misleading because there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for it. If the Employment Tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then it is unnecessary to determine the characteristics of the statutory comparator. By reference to Watt (formerly Carter) v Ahsan [2008] ICR 82 EAT
29. If the Employment Tribunal does identify a comparator for the purpose of determining whether there has been less favourable treatment, comparisons between two people must be such that the relevant circumstances are the same or not materially different. The Tribunal must be astute in determining what factors are so relevant to the treatment of the claimant that they must also be present in the real or hypothetical comparator in order that the comparison which is to be made will be a fair and proper comparison. Often, but not always, these will be matters which will have been in the mind of the person doing the treatment when relevant decisions were made. The comparator will often be hypothetical, and that when dealing with a complaint of direct discrimination it can sometimes be more helpful to proceed to considering the reason for the treatment (the “reason why” question) See for example Shamoon and Nagarajan v London Regional Transport[199] IRLR 572 HL

Discrimination Arising from disability

30. The provisions of s15 of the Equality Act 2010 details that:
- S15 Discrimination arising from disability***
- (1) A person (A) discriminates against a disabled person (B) if—*
- (a) A treats B unfavourably because of something arising in consequence of B's disability, and*
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

31. We have had regard to the guidance laid down by Simler P in Pnaiser v NHS England [2016] IRLR 170 and more recently by HHJ Eady QC in A Ltd v Z [2020] ICR199
32. In this case the respondent accepts knowledge of the claimant's disability at all material times. The duty to make reasonable adjustments and the failure to comply with the duty is detailed in the provisions of s20 and 21 of the Equality Act 2010.

Reasonable Adjustments

33. Section 20 provides where the duty to make reasonable adjustments is imposed on a person comprises three requirements:

“(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.”

34. The respondent only has to make **reasonable** adjustments.
Sometimes there is nothing that an employer can reasonably be expected to do to help an employee.
35. The bar is set fairly high in terms of what adjustments should be made.
See comments of the House of Lords in Archibald v Fife Council:

‘The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination’

36. If necessary, the claimant should have been treated more favourably than other non-disabled employees.
37. Employers are under no duty to make reasonable adjustments if:

- (a) They did not know and could not reasonably be expected to have known that the claimant had a disability, or

- (b) They did not know and could not reasonably be expected to have known that the claimant was likely to be placed at a substantial disadvantage as a result.

38. In considering whether or not there is a PCP established we have had regard to the recent guidance provided in *Ishola v Transport for London* [2020] IRLR 368.

39. The Equality and Human Rights Commission Employment Code of Practice talks about the duty to make reasonable adjustments in chapter 6. Tribunals must take into account any part of the Code which appears relevant.

40. The Equality and Human Rights Commission: Code of Practice on Employment (2011) at paragraph 6.19 provides [Sch 8, para 20(1)(b)] if the employer does not know the worker is disabled that:

“For disabled workers already in employment, the employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they reasonably can be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.”

41. Paragraph 6.23 the Code identifies what is meant by ‘reasonable steps’:

“the duty to make reasonable adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.”

Harassment

42. There are three essential elements of a harassment claim under S.26(1):

- (a) unwanted conduct
- (b) that has the proscribed purpose or effect, and
- (c) which relates to a relevant protected characteristic.

In particular:

Section 26 Equality Act 2010 provides

- “(1) A person (A) harasses another (B) if-
 - (a) A engages in unwanted conduct related to the relevant protected characteristics 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*

(2) *A also harasses B if-*

- (a) *A engages in unwanted behaviour of a sexual nature, and*
- (b) *the conduct has the purpose or effect referred to in subsection (1)(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."*

43. The case of *Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT* expressed the view that it would be a 'healthy discipline' for a tribunal in any claim alleging unlawful harassment specifically to address in its reasons each of these three elements at para 10-16 summarises the approach.

44. The test of whether the conduct has the "effect" expressly requires the tribunal to have regard to s.26(4):

- (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.*

45. A threshold must be met, otherwise the language of the legislation is trivialised. *Richmond Pharmacology*, at Para 22:

"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

46. Mindful of the threshold we have had regard to the perceived effect of the conduct on the putative victim *Pemberton v Inwood* [2018] EWCA Civ 564 and whether it was reasonable for the conduct in question to be regarded as having that effect and the context in which the conduct complained of occurred.

Unfair dismissal – capability

47. Section 98 Employment Rights Act 1996 provides:-

- (1) “In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
 - a) the reason (or if more than one, the principal reason) for the dismissal; and
 - b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it –
 - (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do”
- (4) “Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
 - a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
 - b) shall be determined in accordance with equity and the substantial merits of the case.”

48. It is for the employer to show the reason for dismissal and that it was a potentially fair one. The burden is on the employer to show that it had a genuine belief in the reason alleged. British Home Stores v Burchell 1978 IRLR 379. The tribunal must consider whether that belief is based on reasonable grounds after having carried out a reasonable investigation but in answering these two questions the burden of proof is neutral.

49. The tribunal is assisted by the guidance offered in Iceland Frozen Foods v Jones 1982 IRLR 439 namely:-

- a) The starting point should always be the words of section 98(4) themselves.
- b) In applying the section the tribunal must consider the reasonableness of the employers conduct, not simply whether they consider the dismissal to be fair.
- c) In judging the reasonableness of the dismissal the tribunal must not substitute its decision as to what is the right course to adopt for that of the employer.

- d) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, another quite reasonably take another.
- e) The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.
- f) The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances.

50. The tribunal has borne in mind that the decision to dismiss on capability grounds is a managerial and not a medical one while medical and other expert reports may assist an employer to make an informed decision on the issue of capability.

The Issues

51. As detailed by EJ Kelly at the hearing on 12 March 2019 [50 -59]

52. Time limits / limitation issues

- (i) Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA"). Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "just and equitable" basis; when the treatment complained about occurred; etc.

53. Unfair dismissal

- (i) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's capability.
 - (ii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?
 - (iii) The claimant relies on the following as making her dismissal unfair:
 - a) The decision that the claimant was incapable of doing her work was unjustified.
 - b.) On the morning of the meeting at which the decision to dismiss the claimant was taken, the claimant forwarded an occupational health letter asking for two years' unpaid leave,

and her doctor's letter saying that she was unfit to attend the meeting, to two members of the decision making panel (Jenny Clarke and Joanne Keatley) and they did not consider it or show it to the rest of the panel.

c.) Jenny Clarke was on the decision making panel to decide on the dismissal of the claimant and she was biased against the claimant.

54. Remedy for unfair dismissal

(iv) If the claimant was unfairly dismissed and the remedy is compensation:

a) if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed? See: *Polkey v AE Dayton Services Ltd* [1987] UKHL 8;

b). did the claimant mitigate her loss appropriately?

55. Disability

(v) Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the following condition(s): Lumbar bulging spine, nerve damage to right hand and injury to right knee arthritis.

56. EQA, section 15: discrimination arising from disability

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

i. The claimant was dismissed because of her sickness absences. The respondent accepts that the claimant was dismissed for incapability.

b. On the morning of the meeting at which the decision to dismiss the claimant was taken, the claimant forwarded an occupational health letter asking for two years unpaid leave, and her doctor's letter saying that she was unfit to attend the hearing to two members of the decision making panel (Jenny Clarke and Joan Keatley) and they did not consider it or show it to the rest of the panel.

c. The claimant was given a warning for asking people to help her pick up things she dropped, which she did because she could not carry books between rooms due to her disability. This was in May 2017. The respondent has no instructions on this.

d. The claimant's class at Sparkhill was closed and the students were transferred to other tutors. This happened in the first week of September 2017.

(viii) If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the following as its legitimate aim(s):

- a The running of the establishment with members of staff present and capable of doing the work.
- b. No instructions as yet
- c. No instructions as yet

(ix) Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability? The respondent does not currently concede this issue but will consider the point.

57. Reasonable adjustments: EQA, sections 20 & 21

(x) Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person? The respondent does not concede this at the current time but will consider the point.

(xi) A “PCP” is a provision, criterion or practice. Did the respondent have the following PCP(s):

- ii. Requiring the claimant to sit on its normal chair
- iii. Requiring the claimant to carry bags between classrooms
- iv. Requiring the claimant to work from a location further from her home than Sparkhill
- d. Not providing support and guidance for the claimant from her managers

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

- a. Requiring the claimant to sit on a normal chair caused her more pain, requiring her to take stronger pain killers and needing more physical therapy, and it caused the claimant stress.
- b. Requiring the claimant to carry bags between classrooms put strain on her hand muscles, prevented her hand injury from healing quickly, and meant she dropped things all the time and had to ask people for help, for which she received a warning letter.
- c. Requiring the claimant to work from a distance further than Sparkhill caused her physical pain to have to sit in the car for longer and the claimant’s mobility driver was not able to drive as far as Selly Oak to collect the claimant, so that the claimant had to pay for a taxi home.
- d. Not implementing a recommendation from occupation health to improve guidance and support to the claimant from her line manager, Mrs Shin, which failure caused the claimant stress and increased her pain.

(xiii) If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such

disadvantage? The respondent is not willing to concede this point at this stage but will consider the point.

(xiv) If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows, and all the matters refers to matters at Selly Oak to which the claimant was moved in October 2017:

- v. A special chair should have been provided
- vi. A trolley bag should have been provided
- vii. The claimant should have been allowed to continue working at Sparkhill because it was difficult to get to Selly Oak in the evening because of the distance

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

58. EQA, section 26: harassment related to disability

(xvi) Did the respondent engage in conduct as follows:

- viii. The claimant received calls in hospital from Mrs Shin's line manager asking her why she was not in work. This was in 2015
 - b. The claimant received calls and emails from Mrs Shin while she was on sick leave and at work and at home which were in an aggressive tone. The claimant raised a grievance about this which was considered in a hearing in 2016. Mrs Shin's line manager then proceeded to send the claimant aggressive emails until the end of the claimant's employment.
 - c. In Sep 2017, the claimant tried to access the room where Mr Mohammed was teaching to ask a question. Mrs Shin reprimanded her for doing so, saying that she has no right to go to another teacher's room while he was teaching, but he had no students that day.

(xvii) If so was that conduct unwanted?

(xviii) If so, did it relate to the protected characteristic of disability?

(xix) Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

59. EQA, section 13: direct discrimination because of race

(xx) The claimant relies on her race as of black Afro-Caribbean descent and the nationality of Trinidadian.

(xxi) Has the respondent subjected the claimant to the following treatment:

- ix. The claimant was not allowed two years leave of absence to recover from your medical condition (and being dismissed instead). The claimant compares herself to 'M', a Caucasian white Polish colleague, whom the claimant says was granted such leave to receive medical treatment. The respondent denies that 'M' was given a two year period of leave of absence.
- b. On the morning of the meeting at which the decision to dismiss the claimant was taken, the claimant forwarded an occupational health letter asking for two years unpaid leave, and her doctor's letter saying that she was unfit to attend the hearing to two members of the decision making panel (Jenny Clarke and Joan Keatley) and they did not consider it or show it to the rest of the panel.
- c. The claimant says that the assessment grades given to her were not high enough considering her pass marks, and that the reason she was downgraded was her race.
- d. The claimant says she was not given additional classes when she asked for them. The claimant compares herself with Mohammed Afzal and Aben and Barda Martini. The respondent says that the claimant was not given additional classes because of her grade 3 assessments and the comparators had better assessment grades and Mr and Mrs Martini were qualified to teach GCSE maths.
- e. In an assessment in 2016, an assessor, Pat Jennings, sent the claimant from the room and then encouraged her class to make negative comments about her, such as she was a bully.
- a. In 2016, Mrs Shin asked the claimant about her foreign certificate teaching qualification and asked to see her passport, when this was not her job as the claimant's line manager.
- b. During her sickness absence in 2016, the claimant's managers did not ever ask after her.

(xxii) Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

(xxiii) If so, was this because of the claimant's race?

60. Breach of contract

(xxiv) The claimant's case that she was not paid all the notice pay to which she was entitled whereas the respondent says that all sums due were paid.

(xxv) The claimant says she was not paid all sick pay to which she was entitled.

61. Remedy

(xxvi) If the claimant succeeds, in whole or part, the Tribunal will be

concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

Case management

62. Case management has featured heavily in this case. At the start of the hearing Mr Virdee a non-legal member of the panel informed the parties that he was a former employee of the respondent council. The parties made no objection to his participation.
63. The claimant is disabled and at the start of the hearing in March the claimant who was offered and accepted the provision of a high backed ergonomic chair and the tribunal agreed to include a 10 minute rest break every hour. In August the claimant preferred to make use of a fixed chair.
64. At the start of the hearing enquires were made of the parties to whether or not reasonable adjustments were required. A personal evacuation plan was prepared by the Tribunal Service to assist the claimant should an evacuation from the building be required. It was agreed that the hearing would be conducted with a 10 minute break every hour and should the claimant require more frequent breaks she should make the Tribunal aware.
65. Claimant was reminded that she should stand or sit as she preferred and she availed herself of the adjustments as she considered necessary.
66. The claimant has identified an individual in respect of whom she claims that she was treated less favorably in terms of being allowed unpaid leave. The comparator is a person who has had cancer and had to protect her privacy the parties agreed that the comparator be identified only as "M".
67. Before hearing evidence the claimant asked that Miss Clark one of the respondent's key witnesses should be excluded from the room as her presence caused the claimant distress. Miss Clark's presence being essential to be able to give instructions to Miss Hodgetts the tribunal directed it would not be appropriate to exclude Miss Clark from the tribunal and in any event we observe that the claimant did not display any signs of distress at Ms Clarke's presence during the course of the hearing.
68. On day two, 12 March, at start of the hearing the claimant asked if the hearing day could be adjusted so that she could leave by 3:30 to collect her daughter to take her to an out of school Duke of Edinburgh activity it was explained that her daughter is autistic we were told she needed the familiarity of mother to collect her for a journey by bus to Solihull, without hesitation the accommodation was made.
69. On 16 September 2020 the Tribunal agreed to not sit beyond 16:10 in answer to a request made by Ms Hodgetts, the respondent's counsel, on 16 September to enable her to catch a train at 16:25 to meet child care arrangements, we were surprised in the circumstances that claimant, in her email to the Employment Tribunal on 16 September sent at 23:35, suggested the accommodation made was biased in favour of Ms Hodgetts childcare:

b. *“ This morning session was very distressing to myself and my daughter as I was not able to fully attend to her needs and more emphasis and consideration was put on the barristers needing to collect her daughter at a certain time. My stress was compounded by the fact that my daughter’s needs were not also taken into consideration.”*

70. In addition to scheduled breaks, additional ad hoc breaks were arranged whenever the claimant requested them or when the claimant appeared to be confused and in need of a break to gather her thoughts.
71. The conduct of this case and hearing of evidence was punctuated by a number of administrative delays and no less than four postponement requests made by the claimant during the currency of the hearing.
72. At the hearing on 13 March at the end of the afternoon the claimant was told that as her evidence was coming to an end it was likely that on 16 March, after the weekend, she would have to begin asking questions of the respondent’s witnesses. Claimant was advised to consider the respondents witness statements and the documentary evidence and prepare questions that she wanted to ask the witnesses and to put her evidence to them and to look at the issues that we were considering [50-59].
73. On 16 March the claimant brought additional documents to the Tribunal [656 – 664] and explained that she had not been able to produce a letter from solicitors who advised her in her 2014 Personal injury claim which she said were to demonstrate that the medical report of Mr Shams Tabraiz [318-343] erroneously stated that she worked full time. The claimant suggested the report had been corrected however no such amended document that had been corrected was produced to the Tribunal .
74. Despite guidance of the Employment Tribunal given on 13 March at the hearing on 16 March, the claimant in her examination of Ms Clarke that began at 11:50, appeared confused following her notes and the documentary evidence. Shortly after the lunch adjournment the Tribunal had cause to enquire if the claimant was fit to continue as she appeared confused, the claimant explained that she had a headache and was somewhat dizzy and confused. The Tribunal adjourned early to allow claimant to compose herself and recover and prepare her examination of Ms Clarke. The claimant was reminded again to prepare her questions and organise her thoughts to continue cross examination on 17 March. On 17 March the claimant emailed the Tribunal to advise that she had been advised by the NHS 111 service to self-isolate because of corona virus. The hearing was postponed and as a result of the response to the Coronavirus pandemic was rescheduled to 25 August.
75. On return on 25 August, the hearing dealt first with the claimant’s applications made in her email of 18 August. The claimant sought to be allowed to give further direct evidence herself as she suggested she had been unable to conclude her evidence due to her ill health. The claimant was reminded that her evidence in chief and cross examination had been heard over 3.5 days in March and that she had had the opportunity

to clarify her evidence following cross examination and clarification questions from the Tribunal. The claimant had confirmed that all her evidence was concluded before the respondent's first witness, Ms Clarke, had begun her evidence which was part heard. It was not consistent with the overriding objective to allow the claimant to reopen her case.

76. The claimant sought to introduce further medical evidence and covert audio recordings in relation to allegations related to events in 2015 that had not previously been disclosed as ordered. The claimant's application was refused on the basis that to introduce late evidence at that stage was prejudicial to the respondent's preparation of their case and not consistent with the overriding objective.
77. Although the claimant had asked that she be allowed to give evidence remotely, having witnessed the social distancing measures introduced by the Tribunal, the claimant confirmed that she was happy to attend the hearing in person.
78. The hearing day adjourned on 25 August owing to the Tribunal bundles having been mislocated during the intervening months since March and the hearing continued on 26 August and administrative steps were taken to list additional days for hearing of the delayed evidence on 16 and 17 September.
79. The claimant's cross examination of Ms Clarke was continued and it was necessary to remind the claimant that she was trying to develop her complaint by suggesting to Ms Clarke that she was colluding with Ms Shin and Veronica Thomas to avoid dealing with grievance which was not part of her complaints at issue before the Tribunal.
80. As had been scheduled it was necessary to interpose the evidence of Ms Keatley who was no longer in the respondent's employment. The claimant suggested that she was not ready to question Ms Keatley and she was reminded that she had been told in March of the need for her to prepare questions for all witnesses. After a short adjournment to gather her thoughts and papers Ms Keatley was interposed and concluded her evidence at 3:15pm. The claimant continued cross examination of Ms Clarke for the remainder of the afternoon.
81. On 27 August the claimant attended and at the outset of the hearing sought a postponement because of 'high' blood pressure and the fact that she felt unwell, she reported that as well as high blood pressure she had 'blurry' vision and felt disorientated. The claimant explained that she had attended the hearing that day to demonstrate her good intention whilst feeling unfit to continue. Despite the respondent's objections to the postponement application the Tribunal was able to see that the claimant was unwell and granted the application.
82. Having heard representations from the parties the tribunal agreed to the postponement of the day's hearing and directed the claimant to obtain medical evidence of her lack fitness to attend the tribunal in accordance with the directions made by the President of the Employment Tribunal to which the claimant was directed. Having announced to the parties the decision to grant the claimants' application for a postponement the claimant was again reminded of the need to properly prepare her examination of the respondent's witnesses, and of the fact that she had

a period of 23 weeks since the adjournment in March to prepare her questions and her case and that the nature of litigation was inevitably a stressful experience. Whilst completing housekeeping for the future conduct of the hearing the claimant indicated that she was experiencing chest pains and medical assistance was called for the claimant. The hearing was postponed until the 16th September

83. The hearing was adjourned to 16 September and on 14 September the claimant at 22:35 had emailed the Tribunal to ask for the hearing be by video – social media as her 9 year old daughter had been sent home from school as she had been in close contact with an infected individual in addition the claimant described herself as being “unable to walk”. On 16 September 2020 the hearing was conducted as a hybrid hearing the members both in Covid-19 isolation awaiting test results and Employment Judge Dean and the Respondent physically in the Tribunal the claimant attended from home by video. It was anticipated that the hearing held remotely would have been able to hear the conclusion of Ms Clarke’s evidence and from Ms Shin the remaining respondent’s witness.

84. During the course of the video hearing whilst undertaking case management it became evident that the claimant was in some discomfort. Ms Hodgetts for the respondent brought it to the Tribunal’s attention that the claimant had on 14 September consulted with her GP in which the claimant had indicated she would not be able to attend the Tribunal because of severe back pain, neck pain and arthritis. The claimant was reminded that if she sought a postponement at any time because of her health she would need to support an application with medical evidence as required by the Presidential Guidance and was reminded of reasonable adjustments that the Tribunal might make. Regrettably the bundles of documents sent from the Tribunal by courier had not been delivered to one of the members at home. The hearing was adjourned to 1:30 when it was apparent the bundles had not been delivered and the hearing was postponed to 17 September.

85. On 17 September at the hybrid hearing the claimant was not in attendance in person or by video from home. The claimant on 16 September at 23:35 sent an email to the Tribunal enclosing a letter from her GP Dr S Bhatti which advised in a letter 16 September:

“Grace is a registered patient at Yardley Green Medical Centre. She suffers from severe back, leg and neck pain. She also suffers from hypertension and chronic kidney disease and anxiety. She is on a lot of medication for this she is unable to keep her balance.

Presently her daughter is awaiting a covid 19 test which has put a mental strain on her.

She will not be able to represent herself in court due to her medical conditions. I will be grateful if you take the above under consideration. “

86. The claimant sought a postponement of the hearing because of an apparent acute episode of the back pain and leg pain – sciatic nerve following a September fall. Having noted the respondent's objections the Tribunal determined a postponement would be allowed and the hearing relisted to allow claimant recover in a period of 6 weeks after 3 Sept fall and listed to 20 – 22 October. The postponement decision and covering email sent to claimant on 17 September included the reminder :

c. *“Employment Judge Dean gave detailed reasons for making the order at the hearing. In summary the reason for the postponement being granted was that the claimant was confirmed by her GP to be unfit to attend the hearing and to participate in the conduct of it for the reasons described in his note. The claimant is reminded that this is the third occasion on which it was necessary for the hearing to be postponed for a variety of reasons relating to her health and a postponement in such circumstances is exceptional. The conduct of litigation of its very nature can be demanding and stressful for all participants and while reasonable adjustments have been made to accommodate the claimant's disabilities it is essential that ultimately there is finality in litigation. “*

87. On 19 October immediately before the hearing listed to commence on 20 October the Tribunal received an email from her niece who, on the claimant's behalf, sent a GP letter requesting a postponement which stated:

d. *“Grace is a registered patient at Yardley Green Medical Centre. She suffering from Sciatica, Bulging Disc, pains in right hand, neck and legs, Cervical Radiculopathy, Hypertension and Chronic Kidney Disease. She is on regular medication for this.*

e. *She is taking the following medication having the following side effects of :-*

1. *Diazepam – the side effects are, muscle weakness, drowsiness, headaches and dizziness.*
2. *Butec – the side effects include; Faintness, sickness and drowsiness.*
3. *Cardioplén – the side effects are; headaches, dizziness and swollen ankles.*
4. *Ramipril – the side effects are; Chest pains, faintness and tiredness.*
5. *Naproxen – the side effects are; drowsiness Ringing in ear.*

f. *I would be grateful if you could take the above into consideration.*

g. *She is not able to focus or concentrate and fatigue due to having difficulty sleeping. She is experiencing a lot of stress and anxiety. She is medically unfit to attend court. She has been advised not*

to attend court hearing at tribunal on 20th, 21st and 22nd of October 2020.

h. She has been advised to rest and recover. This would take a least two months after getting physiotherapy for Cervical Radiculopath, as recommended by the Specialist in the emergency Department.”

88. The application made by the claimant for a fourth postponement of the hearing was strongly resisted by Miss Hodgetts on behalf of the respondent, the claimant did not attend the hearing which was convened by cloud video platform. We heard the representations made resisting the claimant's application that the hearing should be postponed for a fourth time. The application to postpone was not successful and ex tempore reasons for the decision were given.
89. The application was not successful on the basis that having regard to the balance fairness or otherwise to either party it was considered that this case was a relatively unusual case in so far as the prejudice to the claimant is reasonably limited, the claimant's evidence has been concluded in March and the tribunal has heard evidence from Ms Clarke in substantial part and from Ms Keatley the dismissing manager and only 1 other witness Ms Sun Joeng Shin remained to be heard. Ms Clarke has been under considerable strain having given her evidence in answer to cross examination on 16 March, 26 August and had expected to conclude her evidence in September and again in October. Ms Clarke still has evidence to give and the strain on Ms Clarke and the team arising from the unpredictability of the ongoing litigation and Ms Clarke being unavailable to manage the team while being preparing to give evidence and being stood down is having an adverse impact on the resources of the respondent a public body. The Tribunal had regard to the serious allegations against the respondent and Ms Clarke and Ms Shin, many of which are historic and the impact of this case being adjourned for a fourth time to an uncertain date in 2022 and the regard to the wider public interest and the Employment Tribunal resources and the pressures placed upon it to hear cases in the pandemic.
90. In the circumstances there was no foreseeable prospects of the claimant being fit to attend, whether in person or remotely by video, and conclude the hearing of the case. In any event the claimant's case having being completed on the 16th March 2020 the claimant had indicated that there remained only limited further cross examination of Ms Clarke to be completed and for the tribunal had continued to hear evidence from the respondent's remaining witnesses Sun Jeong Shin. It was decided that there were not exceptional circumstances that applied in this case to lead the tribunal to consider that it would be appropriate to grant a fourth application made by the claimant.
91. In the claimant's absence the Tribunal asked their questions in clarification of the evidence presented by Ms Clarke and heard evidence from Ms Shin who answered the tribunal's clarification questions.

Evidence

92. We have been referred to an agreed bundle of documents that extends over in excess of 665 pages. Witness evidence has been given and we have heard from the claimant who has adopted her witness evidence in witness statements combined in a single bundle of documents extending over 85 pages and an undated witness statement extending over 17 pages and an amended statement dated 4 March 2020 [18-34] and no additional witnesses on her behalf. For the respondent we have heard from a number of witnesses, each of whom have adopted their witness statements as their evidence in chief, including Mrs Jenny Clarke, Curriculum Leader for Health and Social Care and Maths and Science who at the relevant time was standing in for the claimant's line manager Veronica Thomas. Mrs Sun Jeong Shin, the Teaching and Learning Manager for Maths & Science for Birmingham Adult Education Service (BAES) [53-67] and Ms Joanne Keatley who was at the time Principle of BAES with overall responsibility for Birmingham Adult Education Service [80-85] and at the time of the hearing, now Head of Service and Wolverhampton Adult Education Service.

Credibility

93. The claimant has proved to be a witness whose acquaintance with the truth is sometimes fleeting, she has been seen on occasion to be an untruthful and wholly unreliable witness, and wherever there is a dispute of fact, Ms Hodgetts invites the Tribunal to find that the Respondent's evidence should be preferred unless there is otherwise objective evidence to support the claimant's account. The following is a non-exhaustive list of examples demonstrating C's unreliability.
94. The claimant has admitted a conviction in 2013 for acts tending to pervert the course of justice, in respect of lying to the police in 2012 about driving whilst disqualified.
95. In her claim form ET1 p14 para 4 the claimant asserts that she was "*forced off work in 2012 by bullying by SS*"; in contrast the Claimant has admitted that Ms Shin was not her line manager in 2012; that the 6 months' absence from work fell between the charge for driving while disqualified and lying about it, and her conviction; and the respondent asserts that those matters might have contributed to her stress levels; we find the claimant disingenuous in the reasons she gives why she was absent from work and untruthful in claiming that Ms Shin was her line manager at the time.
96. The respondent has referred to the fact the claimant makes a 'curious' assertion at p322 that although she was a passenger in the road traffic accident in October 2018, when the accident happened she was sitting in the driver's seat with the seatbelt on - strongly suggesting that she was, once again, driving while disqualified and therefore lied about being a passenger. We note the observation Ms Hodgetts makes but make no findings on the truthfulness or other wise of the claimant in whether she was driving the car or not. However linked to the 2018 accident the claimant disclosed to the respondent a medical report from Mr Shams Tabraiz to which we have been referred.
97. The claimant gave confirmation early in cross-examination that she stopped working during the day through agencies in 2014. In contrast

the claimant reported to Mr Tabraiz p323 in respect of October 2018 RTA that she was “*working as a full-time teacher and took 2 months off work*” in an account given to an expert preparing a report for the court. When faced with the inconsistency the claimant has sought to assert that the report was corrected by her solicitors corresponding with the consultant; the claimant has continued to fail to produce any evidence that this was corrected, as she claimed. The claimant suggested on 11 March in answer to cross examination that the report was one that she amended and that Mr Tabraiz was not correct in the statement that he made, she asserted that her solicitor in relation to that litigation for personal injury had written to Mr Tabraiz to correct the untruth and that she would produce the correspondence to correct the reports misstatement. The claimant did not despite her protestations provide the report to the tribunal. We conclude that the report signed by Mr Tabraiz is an accurate reflection of the claimant’s statement to him and was a misleading and untruthful report by her.

98. The claimant’s makes repetition of her assertion that the April 2014 incident caused all the health conditions conceded to amount to disabilities (witness statement paras 7, 9, 92): We have compared the Case Summary pp 652-655 summarising the claimant’s own expert evidence on causation of injuries (3-6 months’ exacerbation), as well as those of the claimant’s own medical records that she has disclosed in these proceedings, demonstrating that 3 of the conditions already existed:

- a. back condition: p352: “over last 9m”; p402 “2 to 5 years”;
- b. knee condition: p346; p357 - referred to arthroscopy 2013; p373 “many years’ duration”; and by March 2015 the left knee was more painful than the right; p382: repeating the same views; p429 “pain which started 12 years ago with pain in her knees”;
- c. right limb condition: p363: referring to symptoms 3 years before; p437 - as of December 2017, the main problem in the right arm was right elbow pain; p322 “history of pain ... right elbow ... last few years”; pp455-457: alleging that pain in the right arm was because of the RTA in October 2018;

99. Similarly, the respondent refers us to the claimant’s failure to acknowledge the significance of other health conditions in contributing to her sickness absence:

- d. urinary problems: pp398 (July 16), 427, 403 (August 16), 406, 409, 410-412 (October 16), 416 (February 17)
- e. abdominal problems: p391 (Dec 15), 392, 315, 493 (Feb 16), 313, 123, 424, 426 (May 16), 399 (Aug 16 - referring to 3-4 year history), 407, 408 (oesophagitis), p422 (Feb 17)

f. and, it emerged in evidence, liver and kidney problems

100. The claimant asserts in her witness statement paras 7 & 9 that she sustained boney injuries which contrasts with her admission in cross-examination that she did not;
101. The claimant asserts that the respondent was unreasonable in saying that the claimant was unfit to return to work in 2017 whereas Ms Hodgetts refers to the fact that the claimant wanted 2 years leave to regain her fitness.
102. The claimant has made complaints about interactions with management as detailed in her witness statement at para 26 & 53. We have been referred to and have considered and compared the copious contemporaneous evidence of supportive management interactions: pp92 et seq; pp102-103, 106, 112-113, 115-116 (OH report), p118 (contact meeting), pp120-121 (contact meeting with David Room - note C's misrepresentation of this meeting at witness statement 2nd para 33), and the notes recording Ms Shin's attempts to get C to do complete a Stress Risk Assessment, pp155, 167 etc; Attendance Improvement Plan and the targets at pp162-163, etc; Sadly in her reflections the claimant we conclude has a distorted view of the truth of management discussions
103. Claimant accepts that she has a conviction for perverting course of justice and having heard her testimony and response to cross examination it has become clear that the claimant has frequently sought to avoid responsibility for her actions and only when confronted with contrary evidence and inconsistency is she persuaded from her mistaken account.
104. In giving her version of events in previous years for example in relation to the reason for her absence from work the claimant attributes actions to various family member and her medical conditions and gets muddled in her story. The claimant's recollection may well be what she believes to be true and we have seen the claimant in conduct of these proceedings suggested that Ms Hodgetts has been treated preferentially in the tribunal when agreeing to not sit beyond 4:10 on a particular hearing day. The claimant overlooked the occasions when the tribunal had made more generous adjustments to time to allow her to collect her daughter from a bus and to allow the claimant time to gather her thoughts and prepare cross examination by ending the hearing day early. Both accommodations we consider were reasonable however the claimant does not seem to acknowledge the reality of events.
105. Arising from Full case minutes 13 June 2016 the claimant says in the full case hearing [148] that the pain she experienced was pancreatic cancer but that she had not wanted the respondent to know real reason so GP put low mood and arthritis on sick note. Subsequently however it transpired that the claimant was subject to a test for pancreatic cancer and there was no diagnosis or cancer in her case.
106. While respecting the claimant right to privacy it is plain that the claimant does not shy from misrepresenting the full truth.

107. In relation to the emails the claimant alleged that she sent on 10 October 2017, the morning of the ultimate full case hearing the claimant presented to the tribunal additional pages handed up in March 2020 proceeding p653- 656A and claimant produced 656B -665 in the March 2020 hearing. We have considered the document at 662 and compare it to corresponding page 264 the claimant produced in March 2020 662 says sent 9 October 2017 at 12:26 and 264 the respondent's email chain is date 6 October. We note that there were no attachments to the emails on either version. However the only reference to an attachment to any email is on 8 October 2017 at 02:43 [262] and the file name suggest it was created on 16 October.
108. The claimant accepted in cross examination that it is possible to go to emails to amend the text of emails after the event.
109. Considering the batch of emails handed in March 2020 p664 and email 16 October 18:35 to Joanne Keatley when compared to the version in the early part of the bundle [262] version spells Ms Keatley email address but without the 'h' in Birmingham which would be bounced back. The Claimant says she was startled when the inconsistency was pointed out to her. In contrast the respondent's evidence has been consistently that they did not receive the emails from the claimant at the time which purported to have sent attachments in advance of the Full Case Hearing.
110. The respondent's evidence has been clear and consistent that they did not receive the claimant's emails at the time. The claimant has not challenged the respondent's witnesses on the point. The respondent's evidence has been preferred.

Findings of fact

111. The Respondent, Birmingham City Council ("BCC"), is a local authority and a statutory corporation. It carries out governmental and administrative functions and has powers of taxation. It is governed by a scheme of legislation including the Local Government Act 1972, which regulates its activities and finances.
112. The claimant worked for the respondent in the Birmingham Adult Education Service ("BAES") which is a provider of part-time courses and learning opportunities for adults and offers a flexible learning service with daytime, evening and weekend courses available throughout the year across three academic terms.
113. The Claimant was employed by the Respondent from 22 October 2004 as a Sessional Maths GCSE Tutor within the Birmingham Adult Education Service ("BAES") until her dismissal on 10 October 2017.
114. The Claimant's job role was that of a variable hours Maths Tutor, meaning she was not contracted to work a set number of teaching hours per week. Between 2004 and 2015 the Claimant taught two to three classes a week on average, which was reduced to one class a week from 2016. This equated to approximately three hours teaching per week.
115. The Respondent operates a Managing Absence Policy and Procedure [65-70] which all employees are informed of when they join

the Respondent's employment. The key features of the procedure relevant to this case are an Attendance Improvement Plan ("AIP") and full case hearing [68-69].

116. An AIP is triggered by *"either 4 or more absences totalling 11 or more days or 21 days or more absence within a 12 month rolling period"*. The triggers are pro rata for part time employees
117. A Full Case Hearing can be triggered where an employee has *"been on long term sickness and there is no likelihood of returning to work within a reasonable period"*, or an employee has *"a pattern of absence that continues to be unacceptable following the issue and review of targets set within an AIP"* or has *"Absence levels which are impacting on the service delivery"*.
118. Under the Respondent's Managing Absence Policy and Procedure p[67]provides:

"For all absences: The employee must call their manager if they will be absent from work because of illness;"
and

"There are key times the employee must contact their manager throughout their absence; the employee and manager should ensure contact is maintained;"

"The manager should arrange and carryout a contact visit for week 2 or 3 of a continuous absence, and every 4 weeks subsequently."

119. At the time of her dismissal, the Claimant had been absent from work for over 340 working days in the last three years. As a result three full case hearings were convened during this period, held on 13 June 2016, 30 June 2017 and 10 October 2017 and an AIP was initiated from 7 July 2016.
120. The Managing Absence Procedure forms part of the Claimant's Contract of Employment.

Accident at work 1 April 2014

121. The Respondent accepts that the Claimant suffered a fall at work on the 1 April 2014; however causation of any alleged injuries and the nature and extent of the alleged injuries is disputed. The Tribunal has been informed that the Claimant has recently served Court Proceedings against the Respondent for physical and psychological injuries resulting from the fall. The Tribunal does not make findings regarding fault or causation other than that the claimant apparently has an number of pre-existing conditions that were exacerbated by a fall while at work for the respondent.

Sickness absence 2014

122. The Claimant was absent from work from 2 April 2014 to 21 July 2014, a total of 110 working days, due to a lower back injury due to a fall at work. The Tribunal observes that although working days absent is referable to the fulltime equivalent working days the claimant was only ever while working for the respondent engages to work fractional time.

123. After the fall the respondent provided the claimant with a chair and a trolley bag to carry her books while at the work location in the Shard End Hart Education Centre.

Lesson Observations 4 February 2015 [82-90]

124. During the course of her employment the claimant like other teachers was subject to class observations from time to time and one such observation was undertaken on 4 February 2015. We are told that the claimant had been observed in 2010, when her teaching was graded as requiring improvement (grade3) however had not had any observations until February 2015 as she had been absent due to various sickness absences. The observation was undertaken by Pat Jennings and a full observation report was completed. The claimant accepts that the document was even handed. The claimant has suggested that while the claimant was out of the class room Ms Jennings encouraged learners to make negative comments about the claimant such as she was a bully; she makes the allegation she says based on what students told her after the class. The claimant has not called any former students to corroborate her allegation and we find it is inconsistent with the contemporary evidence. After the observation Ms Jennings sent an email to the claimant about completion of the Assessment and which confirmed:

“If you wish to challenge or query the findings or the action plan, guidance notes on the process are attached above. I meant it when I said I would rather you queried the findings if you are not in agreement with them.” [533]

125. We note that although the list of issues refers to an assessment made by Ms Jennings being made in 2016 the only assessment made by her was in 2015, a lesson observation in May 2016 having been undertaken by Ms Ennis about whom there are no complaints. The claimant has conceded that the dates in her claim form and witness statement are incorrect.

126. The observation makes an objective assessment using the standardised template and gave a summary of learner feedback [86]. Having considered the observations and the account of the claimant's then line manager Ms Sun Jeong Shin we find that the observation was even handed and in particular the “Summary of learner feedback” was positive identifying that *“All the learners felt safe and knew how to raise concerns”* and that *“Learners liked the fact that they ‘cover so much in 3 hours’. They like being in small groups where they feel comfortable with other and enjoy a good relationship with the tutor”*

127. We find that the claimants allegation of bullying are contradicted by the observations recorded. The observation and assessment was carried out in accordance with the Guide to the Observation of Teaching, Learning and Assessment at BAES [45-549]. There is no evidence for us to find that Ms Jennings sent the claimant from the room and then encouraged her class to make negative comments about her, whether because of the claimant's race or at all, indeed in answer to cross examination the claimant acknowledged that Ms Jennings assessment of the claimants teaching was balanced and praised her when it was due and offered constructive criticism where necessary.

128. The claimant has confirmed that despite her allegations in the complaint before us that at the time in 2015 she made no complaint about Ms Jennings to suggest that she was subject to discrimination related to her race.
129. It is clear that the respondent sought to ensure that equality and diversity was embedded within the organisation and in lessons, all staff were required to do mandatory training. On 1 February 2016 while the claimant was absent recuperating at home from a wrist operation the claimant was asked by Ms Shin if she wanted to do online Equality & Diversity training if she was bored at home [96].

Sickness absence 2015 – 2016

130. The Claimant was absent from work from 17 November 2015 to 3 April 2016, a total of 139 working days, due to knee, back and hand pain, arthralgia and a low mood. The claimant was not teaching to be assessed in accordance with the planned review in November 2015.
131. During the claimant absence Ms Shin remained in contact with the claimant and we have been referred to a log of Ms Shins contact with the claimant [92-101] for the period from the claimants first absence on 17 November 2015 to 6 May 2016 while she was the claimant's line manager. The log has gathered the then contemporaneous notes made of telephone conversations, emails and voice messages. We find that the tone of the communication from Ms Shin was throughout concerned for the claimant's health and welfare and when necessary showed appropriate communications to encourage the claimant to communicate with the respondent as necessary submitting fit notes in a timely fashion. Ms Shin was empathetic commenting for example:

" have a good rest now you are out of hospital" [7/12/15]

"so much to talk about. How are you first of all? Are you recovering well? Are you taking all the medications you need?"[10/12/15]

"It is important that you ask your husband to send me the doctor's note starting from 11 December. Also, your learners want to send you some flowers. Can I come and deliver the flowers on Tuesday evening after the lesson if it's not too inconvenient? I won't stay. If that's OK with you, can you let me have your address please?"[14/12/15]

"Have a lovely Christmas yourself and get well. Look forward to having you back in January" [15/12/15]

"Following our sickness policy, I will refer your case to Occupational Health. As it's there to support you, you will get some benefit from it." [05/01/16]

The claimant gave no indication that Ms Shins communication was unwelcome and responded:

“Thanks for your supportI was really nice seeing you and I am still looking for my cup ☺ God blessing be upon you and your family” [27/01/16]

132. Claimant complains about her supervising manager Ms Shin as detailed in her witness statement [paras 25- 30]. Ms Shin became the claimant’s manager in November 2014.
133. Ms Shin referred the claimant to occupational health in accordance with the respondent procedure [106]. The claimant had a contact meeting on 25 January 2016 [106] and claimant asserts that the respondent made unjustified criticisms of her. She refers to reports by Ms Jennings to encourage students to make criticisms of the claimant for making unjustified allegations of claimant aggression towards them. The claimant at the contact meeting suggested that managers constant visits to her classroom were stressful even though they were intended to be supportive to prepare for an upcoming OTLA and the service procedure was to mentor the claimant because she had achieved a grade 3 in her previous OTLA with Ms Jennings. The claimant did not at the time suggest that Ms Shin’s summary of the contact meeting was inaccurate.
134. The claimant was referred to Occupational Health [111-113] and a report followed [115-116] which confirmed that the claimant’s return to work was anticipated in the near future. A further contact meeting took place on 23 March 2016 at the claimant’s home where the claimant was accompanied by her Trade Union representative Mr David Room [120-122] .
135. Following a management referral, the claimant had attended an appointment with Occupational Health on 12 February 2016 [115]. Their report confirmed that the Claimant had *“some back and knee pain from an existing condition”*, but that these were *“not contributing towards her absence and do not impact on her ability to work”*. The report stated that the Claimant’s current period of absence resulted from an allergic reaction following a flu vaccine. In addition the Claimant had also undergone an operation on her left hand in January 2016 which required physiotherapy. Although this may delay the Claimant’s return to work, it was not anticipated that the Claimant would require any further time off work with this issue once a “few” sessions of physiotherapy had been undertaken. The Claimant had reported that it was recovery from this operation and “work related issues” that were leading to her continued absence.
136. On **23 March 2016** the Claimant attended a meeting with her Union Representative, David Room, her manager Sunjeong Shin and Jenny Clarke (Curriculum Lead) who acted as a note taker. In her witness statement para 30 the claimant says she complained about SunJoeng at the contact meeting 23 March 2016. The meeting was held at the NUT’s building in Kings Heath and was arranged to obtain an update on the Claimant’s current condition and likely return to work. Following this meeting, a summary of the discussion which took place was sent to the Claimant by a letter dated 23 March 2016. [120-122]
137. During this meeting the Claimant confirmed that she was feeling better and that she intended to return to work following the Easter

holidays. The Claimant advised that she had recently undergone an operation on her hand and while this was still sore, she was able to drive to the meeting that day and did not believe this would affect her ability to teach. The Claimant further advised that she had been suffering from depression which she believed stemmed from work based stress following historical classroom observations. The claimant had indicated that she would want more work from BAES but was aware that the policy was not to offer more work to tutors whose learners were not making the progress expected of them.

138. The Claimant's manager informed the Claimant that under the Respondent's Managing Absence Policy meetings were expected to take place between her and the Claimant every four weeks. She further explained that this had proved impossible as the Claimant had failed to respond to any of her emails or return any phone calls. The Claimant stated that she had felt unable to face her emails, which were causing her additional stress. The Claimant's manager was surprised by this as her emails to the Claimant had only been to enquire about her wellbeing. The Claimant further stated that she thought it was "unreasonable" to expect an employee to respond to a call or an email when on sick leave. The Claimant's manager explained that communication throughout her absence was important and expected under the Absence Policy. In view of the breakdown in communication the Claimant's Union Representative therefore agreed that going forward he would act as an intermediary for future communication.
139. At this meeting it was agreed that the Claimant would return to work on 12 April 2016 and would attend a return to work interview with her manager at 10:00am, where an attendance improvement plan ("AIP") would be discussed in line with the Absence Policy. It was also agreed that as a means of a gradual re-introduction, the Claimant would return as a classroom supporter for her first week before returning to her role.
140. Upon the Claimant's return to work, a return to work meeting took place on 12 April 2016. [123-124] following a period of absence over 20 weeks [139days]. A Class room Observation took place on 10 May 2016 completed by Helen Ennis [134-141]. The claimants confirmed in the hearing that she had no complaint in respect of the May 2016 observation which she had confused with the 2015 observation of Ms Jennings.
141. The claimant was sent an Invitation to a Full Case Hearing sent on 10 May [125-126] for the meeting on 24 May 2016. We have been referred to the Management case prepared for a full case hearing [127-133] that was arranged with the purpose of considering whether any further actions could be taken to assist the claimant, whether there was a need for further medical diagnosis or a period of rehabilitation or medical redeployment should be sought or ill health retirement or termination of employment in light of the available medical evidence and the consequences/impact/cost of sickness on the service delivery /group/workload etc. The reason for the hearing being convened was the long term absence and that attendance levels were impacting on the service delivery. The management case reported on the application of

the managing absence procedure in return to work interviews and contact meetings

Full case hearing 13 June 2016 – [143 - 150]

142. On 13 June 2016 a full case hearing was held to consider the Claimant's levels of absence in accordance with the Respondent's Managing Absence procedure. The purpose of the hearing was to consider the following points:

- ii. Whether further actions could be taken to assist the Claimant;
- iii. If there was any need for further medical diagnosis or a period of rehabilitation;
- iv. Whether medical redeployment had been sought with advice from Occupational Health;
- v. Whether ill health retirement had been considered by Occupational Health; and
- vi. Whether in light of medical evidence and the impact on service delivery the termination of the Claimant's employment should be considered.

143. The hearing was chaired by Ann Devany (Head of Curriculum) and was supported by Loretta Crow (HR Technical Advisor) and Sun Jeong Shin (the Claimant's manager) who presented the management case. The Claimant attended the hearing with her Union Representative, David Room.

144. The Claimant's manager expressed her concerns around the Claimant's extended periods of sickness and the impact this had on the service delivery. In the current academic year the Claimant had been absent for almost half of her scheduled classes. The Claimant's manager expressed further concerns about the Claimant's lack of communication whilst on sickness leave and the effect this was having on her ability to make alternative arrangements.

145. The Claimant's case was in part presented by her Union Representative, who raised concerns about the volume and content of emails which the Claimant's manager had sent to the Claimant whilst she was on sick leave. The Chair of the hearing, confirmed that BAES is bound by the Managing Absence Policy, which required regular contact during periods of regular or extended absence. The Chair further confirmed that having read the emails from the Claimant's manager Sun Joeong Shin these were generally brief and supportive in tone and content. Our own observations confirm that assessment to be fair.

146. The Claimant's Union Representative further raised the need to ensure all reasonable adjustments were put in place. It was confirmed that previous recommendations by Occupational Health had been implemented, including providing the Claimant with a trolley to carry teaching materials and a specialist chair in her classroom. The Union Representative said a further referral to Occupational Health would be

welcome to establish whether there were any further adjustments that could be made to assist the Claimant.

147. The Claimant herself is observed to have stated that she was feeling able to cope with the demands of her teaching role. The Claimant confirmed that she remained committed to her role and would seek to minimise her absences.

148. We find that the Chair carefully considered all the evidence and the submissions from both sides. After consideration of the recommendations of the Occupational Health assessment from February 2016, which had reported that the Claimant was able to resume her normal role, the Chair requested that the following actions should take place:

- vii. A stress risk assessment be undertaken and completed by the Claimant with her manager;
- viii. A referral be made to Occupational Health to determine whether there were any further reasonable adjustments which could be made to support the Claimant in work;
- ix. There be open and clear communication between the Claimant and her manager;
- x. An Attendance Improvement Plan be initiated and monitored by the Claimant's manager every three months during progress review meetings. Numerical targets would not be set for disability related absences;
- xi. Mentor support be continued but the Claimant's manager would ensure an appropriate mentor is provided not the line manager;
- xii. Avoid scheduling teaching observations in November due to high levels of personal stressors at this time of year; and
- xiii. The Claimant would participate in all relevant training to help equip her for the next academic year.

149. The outcome of the full case hearing was confirmed by a letter to the Claimant dated 13 June 2016. [151-154] and the action points were timetabled by Ms Shin [155-156].

150. On 24 June 2016 the claimant met with Ms Shin to discuss the Attendance Improvement Plan and Risk Assessment and the request that had been made by HR that the claimant provide copies of her certificates. Following this meeting the claimant put in a complaint about Ms Shin. Ms Shin writes a contemporaneous account of the meeting with claimant on 24 June [158 – 159] stating that claimant was rude and aggressive to her line manager, the contemporaneous note is a clear and compelling record of the incident. After the incident the claimant spoke to her manager, Veronica Thomas who sent an email to Jenny Clarke who was the curriculum lead for Health and Social care and from 2012 to 2018 was also curriculum lead for maths and science[157]. Ms Thomas' email is a contemporaneous record of the incident as reported by Ms Shin to Ms Thomas and also captures the report made to her by Ms Jennings to whom the claimant had spoken in the aftermath of the meeting.

151. In response to the email, Ms Clarke met the claimant in week commencing 4 July and sent an email to the claimant on 15 July [161] confirming their discussion which was to discuss the Stress Risk assessment and attendance Improvement Plan. In addition Ms Clarke had re-iterated the need for her to provide copies of her levels of qualifications in respect of teaching and her specialism for the respondent's records ahead of an Ofsted inspection.
152. Subsequently Mark Haywood from HR emailed claimant to explain the need for certificates to be provided of her teaching qualification [160].

Attendance Improvement Plan (“AIP”) [162- 164]

153. Following the full case hearing an Attendance Improvement Plan was made on 7 July 2016 [162] and it was signed by the claimant on 15 July which confirmed amongst other things the previous adjustments that had been made including a chair having been provided to the claimant to aid with back pain when sitting and a trolley provided to aid with carrying resources/equipment.
154. An AIP review meeting was scheduled for 7 October 2016; however the Claimant was unable to make this date or the alternative date offered of 8 October 2016 due to two medical emergencies. Jenny Clarke attempted to contact the Claimant the following week to re-arrange the review meeting by email and text messages as the Claimant's phone would not accept calls from Ms Clarke. A proposed date of 19 October 2016 for the review meeting was declined by the Claimant due to “*personal difficulties*”.
155. By a letter dated 17 October 2016 [174 -175] , Jenny Clarke wrote to the Claimant to express concerns about the Claimant's lack of communication and the outstanding actions from the full case hearing. The Claimant was assured that she was a valued member of staff and that it was important to address the communication issues as this was having a detrimental impact on the delivery of the service, particularly from the learners' point of view.
156. It was confirmed that the AIP review meeting would now take place on 2 November 2016. The Claimant however went on sick leave on 26 October 2016 and did not return to work. The Respondent state that three meetings were planned to undertake a stress risk assessment and conduct attendance review meetings but for the Claimant's lack of cooperation these could not take place.
157. In tandem with the attendance improvement plan following the lesson observation in May 2016 the claimant remained well and completed her teaching obligations for the remainder of that academic year. In advance of the start of the Autumn term and start of the academic year tutor meetings were scheduled for 31 August and 1 September 2016. The claimant did not attend the tutor meetings as scheduled and as result a meeting was held on 12 September with Ms Shin and Jenny Clarke [166- 167] to cover the matters missed in the Tutor briefings held on 31 August and 1 September. At the meeting there was an initial discussion to understand why the claimant had gone into the classroom of another teacher whilst teaching was taking place

however the claimant declined to answer. The range of the discussion was recorded.

158. Late in September 2016 it became apparent that due to insufficient enrolments at the Sparkhill Centre at which the claimant taught her evening classes that the class would need to be closed. Ms Clarke and Ms Shin endeavoured to find an alternative GCSE Maths class for the claimant to teach and initially considered a class being available in Erdington [171] and ultimately it was decided that there would be an opportunity to offer teaching a class in Selly Oak and the claimant's first class taught in Selly Oak was on 5 October 2016 followed by a second class on 12 October.
159. The respondent denies the claimant's claim that she expressed concern about the move to Selly Oak as it was further away for her to travel and that she would have to take taxis to travel there. We have found that when tested the claimant variously claimed that the person who gave her a lift to class would not be able to drive the greater distance and that there was not disabled parking available. We accept the respondent's account that there was disabled accessible parking at the Selly Oak site.
160. The respondent has confirmed that in the hasty arrangement to locate a class that would be available to the claimant they had not transported the chair that the claimant used at Sparkhill to Selly Oak before her first class however we accept that had the claimant made the request to relocate the chair arrangements would have been made to do so. In the event the claimant did not return to teaching before the termination of her employment on 10 October 2017.
161. The evidence before us is that at Selly Oak there was a trolley to transport her papers. Although the chair was not available at Selly Oak initially we accept the account Ms Shin has given that when the claimant's classes had relocated from Shard End to Sparkhill Ms Shin had personally relocated the chair the claimant used and there is nothing to suggest that the chair would not have been relocated when it's absence was noted by the respondent. In any event the claimant has not suggested that she raised a concern at the lack of the chair at Selly Oak and it is her evidence to us that she spends little time sitting down in lessons in any event.

Sickness absence 2016 – 2017

162. From 26 October 2016 to 10 October 2017, a total of 227 working days, the Claimant was absent from work due to back and knee pain, tennis elbow, post carpal tunnel decompression and a low mood. During this period the Claimant did not fully maintain contact with her line manager as required under the Respondent's Absence Policy.
163. The claimant has asserted [w/s para 44] that she did not cease communicating with Ms Clarke. We have considered the claimant's inconsistent explanations for failing to attend the meeting on 7 October 2016 [w/s para 39] that a family member was at the point of dying and at para 47 that she was forced to go off sick in October 2016 because her work place experiences became more difficult compared to the real reason as evidenced at p406 that she had a follow up gynecological

consultation. While the latter explanation was clearly true the claimant has proved herself not a reliable reporter of events.

164. In her witness statement [para 48] the claimant stated that was admitted into hospital; and the emergence of the fact that the procedure was cancelled; and her assertion at witness statement para 49 that she was “still” in hospital on 19 October 2016; when she plainly was not, because the procedure had been cancelled, and she taught a lesson on 12 October [173].
165. On 17 October Ms Clarke wrote to the claimant [174] expressing concern about the claimant’s lack of communication with her and the Science and Maths team and that she should remain in regular contact accessing her emails using Zimbra in the interests of security, the claimant had declined to arrange a meeting with Ms Clarke on 19 October and she as asked to update Ms Clarke on her circumstances. The claimant was encouraged to make contact with her mentor to arrange a session observation with Anoop Mankoo . In response the claimant sent an email to Veronica Thomas her manger at the Selly Oak site on 19 October [175] to advise she had been called to the bedside of a relative in intensive care whose condition was deteriorating. In cross examination the claimant confirmed that the person was not a family member.
166. Similarly, we have been referred to emails forwarded apparently on the claimants behalf on 8 and 9 November 2016 [183-184] *“in hospital ... severe anaesthetic”* - despite the fact that C was attending separate medical appointments on 7 November [p414] and 12 November [p416]. The email sent on 7 November was apparently from Abeni Watson, whom Claimant at the hearing has asserted was deteriorating in ICU on 7 October 2016; and p185, which the claimant described the communication in cross-examination to be : *“It’s the first time I’m reading it ... I wrote this using Abeni’s email ... She wrote this. I told her to put my name on it .. She sent it to me. I forwarded it. I believe more or less I forwarded it”*. The claimants account in this exchange as in very many others was at best confused and the respondent says misleading.
167. By a letter dated 9 January 2017 [186], Jenny Clarke (Curriculum Lead) wrote to the Claimant to inform her that Veronica Thomas (her new manager) was unwell and she would be picking up Veronica’s workload in her absence. The letter asked for an update on the Claimant’s condition and likely return to work. In accordance with the Respondent’s policy, Jenny requested that she conduct a contact visit with the Claimant and asked her to confirm where she would like this to take place. This contact meeting never took place, due to the Claimant’s failure to co-operate. The letter further confirmed that the Respondent would require an updated residency and work permit as these were both due to expire on 10 January 2017.
168. Due to the Claimant’s continued absence and as previously recommended, a further referral was made to Occupational Health.
169. On 9 May 2017 the Claimant attended a second Occupational Health appointment. The Respondent was notified by email on 23 May 2017 that the Claimant did not agree with the contents of this report and

had withdrawn her consent. Occupational Health were therefore unable to share the report or offer any advice or recommendations to the Respondent.

170. In accordance with the Respondent's Managing Absence Procedure, the Claimant was invited to a full case hearing by a letter dated 26 May 2017 [200]. The Claimant was offered two dates for her hearing; either 21 or 30 June 2017 and was asked to confirm her preferred date by 14 June 2017. The letter confirmed that if the Respondent had not heard from the Claimant by this date then the hearing would proceed on 21 June 2017. No response was received from the Claimant and consequently the hearing was convened for 21 June 2017.
171. Late on 20 June 2017, Jenny Clarke received a telephone call from the Claimant's Union Representative informing her that the Claimant was in hospital and would not be able to attend the full case hearing the following day. Jenny Clarke subsequently notified the attendees and the full case hearing was rescheduled to take place on 30 June 2017 [209].

Full case hearing 30 June 2017

172. On 30 June 2017 a second full case hearing was held to consider the Claimant's continued levels of absence in accordance with the Respondent's Managing Absence procedure.
173. The hearing was chaired by Joanne Keatley (BAES Principal). She was supported by Ann Bateman (HR Technical Advisor) and Veronica Thomas, [Teaching and Learning Manager], presented the management case [220-226] the case reported inter alia the impact on service delivery and adverse impact on the students [225]. Neither the Claimant nor her representative attended the hearing and no written submissions were made.
174. The meeting continued in absence of the claimant and her representative [226- 228]
175. By a letter dated 30 June 2017 [229] the Chair notified the Claimant of the outcome of the full case hearing, in that after reading all the paperwork and having listened to and considered all the evidence presented, she had decided not to make a decision at this hearing, but proposed two possible further options, either:
- a. The Claimant would, by 5 July 2017, give her consent for a further Occupational Health assessment to explore her suitability for medical redeployment; or
 - b. The Claimant may wish to consider ill health retirement.
176. The Chair also made it clear that if the Claimant did not provide her consent for a further Occupational Health assessment and/or consider ill health retirement, then a further full case hearing would be convened and a decision would be made without the benefit of an up to date medical report.

177. The arrangements to fix a full case hearing were delayed and on 14 July David Room the claimant TU rep wrote to Veronica Thomas [235] :
- (b) *“ Grace has suggested, and I agree, that it would be in the interests of all parties if Grace could be given and period of unpaid leave of absence in order to allow her health to improvement which would subsequently allow her to return to her normal duties at the workplace. I understand other employees have been granted 2 years leave of absence on the same basis and Grace would be agreeable to a similar arrangement.”*
178. By a letter dated 20 July 2017, [244-245] Joanne Keatley wrote to provide the Claimant with an update following the postponement of her full case hearing. The letter confirmed that the Claimant’s line manager had not received an email from her by 5 July 2017 agreeing to a further Occupational Health assessment, however the Claimant had produced a copy of an email, purportedly sent to her line manager on 5 July 2017 which appeared to confirm her consent to the assessment to explore her suitability for medical redeployment. The letter confirmed that the Respondent would await the outcome of this referral before convening a further full case hearing. The letter also acknowledged that the Claimant’s Union Representative had raised the possibility of the Claimant considering a two year unpaid break from work to improve her health and that this would be explored at the next full case hearing.
179. On 26 July 2017 the Claimant attended a third Occupational Health assessment. The report [252- 253] stated that the Claimant was suffering from a spinal condition, reduced function of her right arm, arthritis of her right knee and an internal hernia. The report stated that the outcome of treatment for the first two conditions was unknown and there was no indication of a return to work in the near future. It was suggested that a further Occupational Health review should take place to assess the result of the treatment the Claimant was hoping to undergo in August 2017. The report determined that Ill health retirement was not appropriate nor was medical redeployment. The report stated that it was”
- (c) *“At this stage difficult to know if her unfitness for her job was permanent or not – I understand that he job makes no physical demands upon Grace. Medically it is sensible to reassess the position after arranged specialist opinions in August”*
180. Jenny Clarke sent an email to the Claimant on 30 August 2017 [256] to advise that Veronica Thomas was absent from work and that the Claimant’s line management had transferred to herself. Ms Clarke requested an update on the Claimant’s various medical appointments [256] on 6 September in order to plan whether a full case hearing should be convened at that particular point. The Claimant did not respond directly to the email but sent brief details of two medical appointments through the post; one referring to an MRI scan and one to a GP appointment.
181. On 6 September 2017 Jenny Clarke sent a second email [255] to the Claimant seeking clarification as to what the appointments were for and if there were any medical updates. The Claimant responded on 8

September 2017 [254] requesting that Jenny Clarke cease communicating with her following advice from her *“doctor and pain psychiatrist to cease all communication with you as communicating with you in the past has had a negative impact on my health”* and alleged she had previously in (October 2016) been *“admitted to the intensive care unit due to the contents of your [Jenny Clarke’s] emails”*. The Claimant requested that Jenny contacted her cousin, Ronique Thompson, and asked for all future communication to be directed to her; the claimant suggested that she was scheduled to undergo an operation on her spine which her cousin Ronique Thompson subsequently confirmed had not taken place [254] . No further information regarding the Occupational Health review or medical appointments were provided prior to her ultimate dismissal.

182. The Respondent avers that throughout the period of the Claimant’s absence, Jenny Clarke sought to maintain regular contact with the Claimant by telephone and email but the Claimant did not engage as expected under the terms of the Absence policy.

183. By a letter dated 18 September 2017 [257] from Miguel Silva, Interim Head of Curriculum and Quality, the Respondent invited the Claimant to a rescheduled full case hearing, to be heard on either 10 or 19 October 2017. The Claimant was asked to respond with her preferred date by 29 September 2017. The letter also stated that if the Claimant failed to respond by this date the hearing would proceed on 10 October 2017 and that a possible outcome of the hearing may include the termination of her employment. As far as the Respondent is concerned no response was received from the Claimant.

184. On 20 September 2017, unbeknown to the Respondent, the Claimant attended an Occupational Health review. The Claimant did not advise the Respondent of this appointment and the Respondent did not receive the report until after the full case hearing and the Claimant’s dismissal.

Full case hearing 10 October 2017

185. On 10 October 2017 the reconvened full case hearing was held to consider the Claimant’s continued levels of absence in accordance with the Respondent’s Managing Absence procedure. The purpose of the hearing was to consider the following points:

- a. Whether further actions could be taken to assist the Claimant;
- b. If there was any need for further medical information;
- c. Whether the Claimant’s request for a two year unpaid career break should be granted;
- d. Whether the Claimant’s employment should be terminated on the grounds of medical capability.

186. The hearing [277- 280] was chaired by Joanne Keatley (BAES Principal) and supported by Ann Bateman (HR Technical Advisor) and Jenny Clarke (Curriculum Lead) who presented the management case [267-276]. The management report identified in particular the implications of the claimants absence on the delivery of the service to students The Claimant did not attend the hearing, nor was she

represented by a Union Representative or work colleague. No documents or written representations were submitted for consideration at the full case hearing in her absence.

187. The Chair considered all the evidence presented by management, including the advice and recommendations from Occupational Health (from 26 July 2017) and the management support which had been offered to the Claimant. The Chair further heard representations from the management as to the impact the Claimant's continued absence was having on the service and its delivery.
188. At this meeting it was noted that the Claimant had been absent for 15 weeks in the academic year 2015-16 and for the periods 19 October 2016 to 26 October then again from 27 October 2016 and did not return until 18 September 2017 and in the academic year September 2017 until the termination of her employment the claimant undertook 1 training session. The respondent considered with no return to work in sight that the attendance levels in the past three years, which was unsustainable. At the time of the hearing as far as the Respondent was concerned the Claimant had made no effort to attend a further Occupational Health appointment and the Claimant's previous absences were for a variety of differing medical conditions and treatment was still ongoing. Despite the support management offered and attempted to put in place during the Claimant's return to work between June and October 2016, this had not achieved a consistent and required attendance at work.
189. As there was no evidence available of a possible return to work and based upon the sickness absence record there was no evidence to suggest that attendance would improve in the foreseeable future.
190. Further, no submissions were received from the Claimant or her Union Representative as to the possibility of a two year unpaid break by any members at the hearing. This would normally be "employee led". In the absence of any evidence to the contrary the Chair therefore considered that this was not something that the Claimant wished to pursue further. The claimant had been asked to provide further information and none was forthcoming.
191. Mrs Keatley who conducted the Full Case Hearing [277 – 280] referred to the fact that the claimant had not provided any proposals regarding a two year career break and the onus was on the claimant to make the case however no suggestions were forthcoming. Most importantly Ms Keatley was not aware that the claimant had attended an Occupational Health appointment in September and that there had been produced a report. Ms Keatley who is no longer employed by the respondent has been a compelling witness. She was clear that neither HR nor the claimant's line manager Ms Clarke had received the Occupational Health report as neither had received one that updated the report from 26 July 2017 [252].
192. The final Case hearing had started in June and postponed to July and then to October.
193. Having carefully and fully considered all of the evidence presented, the Chair felt she had no alternative but to terminate the Claimant's employment with the Respondent with 12 weeks' pay in lieu

- of notice. The Claimant was notified of the outcome of the hearing and her right of appeal by a letter dated 10 October 2017.
194. We find that the claimant and her representative had previously engaged proactively in the managing absence policy and the Final Case Hearing under the policy, the possible consequences were clearly known to the claimant and her representative
195. The Employment Tribunal concludes that the respondent were reasonable in their belief that dismissal was fair. Mrs Keatley confirmed that even if she had been aware of the Occupational Health information that the decision would have been the same, to dismiss the claimant .
196. The Respondent vehemently denies receiving any emails, or medical evidence relating to the claimants inability to attend the full case hearing nor had the claimant or her union representative on her behalf made any written representations on the suggestion of two years unpaid leave of absence either from the Claimant or her Union Representative before the scheduled hearing on 10 October 2017 as they had been invited to do.
197. It is noted that the Claimant appears to have sent an email to her union representative on 6 October 2017 at 12:26pm following receipt of documentation from the Respondent before the full case hearing, confirming that she would like the hearing to go ahead in her absence and requesting the two years unpaid leave. Although this email refers to a letter from Occupational Health and her GP it does not appear that these were attached to said email or whether the email was ever sent/received by David Room.
198. The Respondent asserts that the first time they received an email from the Claimant during this time was on 16 October 2017, sent to Joanne Keatley at 18:35 hours, which makes reference to attached information which the claimant claims to have sent to her [Joanne Keatley] but no information regarding the latest Occupational Health report and doctor's letter were attached. This was some six days after the full case hearing and following receipt of the hearing outcome letter. For the avoidance of any doubt the respondent asserts that the Claimant's alleged emails of 6 October [12:26] and 9 October sent to Veronica Thomas and Linda Watts and emails allegedly forwarded to Joanne Keatley on the 10 October 2017 [7:30am] were not received before the full case hearing.
199. The Respondent confirmed that Jenny Clarke received an email from the Claimant on the 18 October 2017 at 2:43pm; the attachments were two photographs of the full case hearing outcome letters [in jpg format]. It is from here onwards the Claimant has alleged that the documents and information were not presented to the Chair of the full case hearing which is totally untrue and without any basis.
200. Having had cause to doubt the credibility of the claimant's evidence on many occasions we have given careful scrutiny to the emails that the claimant asserts were sent to the respondent prior to the full case hearing. We conclude as did the respondent that the information was not received by the respondent in advance of the hearing and that Ms Keatley reached a decision on the information that was before her that was reasonable in all of the circumstances.

201. The key aspect of the appeal was [287] regarding the request for 2 years leave. The claimant has suggested in her appeal letter that the failure to consider a request for two years unpaid leave of absence and the subsequent dismissal was a double standard and unequal treatment and victimisation and unfair dismissal. The claimant suggested that Ms Clarke was more disposed to dismiss the claimant on the purported ground of long absences than to accede to the claimants request for two years unpaid leave. We find that basis upon which Ms Keatley had agreed to consider a period of two years unpaid leave of absence was if the claimant put the business case for doing so however the claimant did not do so nor did TU on her behalf.
202. In referring to double standards the claimant has suggested in her evidence that a co-worker Ms M who had had cancer diagnosed had been allowed to take a period of two years unpaid leave to travel to her home country of Poland to have treatment. We have not been presented with the dates of the absence other than that it was a number of years prior to the claimant's absences and in different circumstances. The claimant refers to covering for a colleague when he was absent from classes in the academic year 2103-14 due to a heart condition however we have not been presented with he details of the absence though are mindful it relateds to events many years ago. We find that the claimant and her representative had been told of the need to present the case for requesting a period of unpaid leave of absence for two years and the information had not been forthcoming for the respondent to consider.
203. Respondent prepared the management [295- 300] and Jenny Clarke response to claimants appeal [301- 305]

Appeal

204. The Claimant appealed the outcome of the full case hearing by a letter dated 7 November 2017 [283 -288]. The Claimant's appeal before the elected members was scheduled to be heard on 16 April 2018 however due to the Claimant's unavailability this was rescheduled and finally was heard at an appeals committee meeting held on 25 October 2018.
205. No evidence was heard by us in relation to the appeal process The appeal hearing took place on 25 October 2018 before a personnel appeals (dismissal) sub-committee [306 – 307]. The claimant was represented by Mr David Room and claimant was also in attendance. The appeal panel considered the case papers including the claimants statement [283 -288] and the management statement [295-305]. The outcome of the appeal was not successful [307- 309] and the decision of the committee was communicated to the claimants at the end of the meeting following the committee's deliberations. The committee considered and expressly discounted the claimant's request that she ought to have been given the opportunity to take a two year period of unpaid leave as the Council were not in a position to guarantee a post being held back for her given the financial pressures that the council were under in the foreseeable four years.
206. The written outcome of the Appeal was sent to the claimant on 8 November 2018 [310 – 311]. We have found nothing in the appeal

process which renders the original dismissal unfair. The appeal was a review of the decision to terminate the claimant's employment and expressly considered the fact that the respondent had taken the dismissal decision without having sight of the claimant's later occupational health report. It was the view of the appeal panel that the report had it been seen would not have undermined the fairness of the final decision to terminate the claimant's employment.

207. We too have had the benefit of sight of the Occupational Health report [259] which was created on 20 September 2017. The report identified that the claimant was "*clearly unfit for work*" and that:

"Grace is unfit for work but in my opinion is not permanently unfit for her post. However I anticipate that she will not regain fitness in the short to medium terms (at least many months) while she is under treatment and recovers from this."

208. Dr Cathcart the author of the report commented on the claimant's indication that she was discussing a period of unpaid leave from work while she had her treatment however acknowledged that that was not a decision for him but for the respondent "*taking into account operational factors*".

209. We have had the opportunity to ask Ms Keatley to clarify why she went ahead with the full case hearing in October without waiting for a further occupational health report. We have accepted the account given that having initially convened the full case hearing in June and rescheduled it for July no report was forthcoming by October and many months had continued to lapse and that the respondent needed to take a decision on the resourcing of teaching in light of the claimant's continued absence. We are satisfied that having received no further representations on the claimant's behalf that she wished to put forward a case to support a request for a period of two years unpaid leave that the onus was on the claimant to put her case and none had been forthcoming.

210. We conclude that when taking her decision Ms Keatley had a well founded belief that the claimant was unfit for work and there was no foreseeable date in the future when she would be fit to return to work. Ms Keatley confirmed that if there was in any event not likely return to work within 3-6 months that she would have decided in any event to terminate the claimant's employment as the claimant was not able to return to work in the short to medium term.

211. We find in light of her answers to our questions of clarification that had Ms Keatley had the benefit of sight of the Cathcart report which confirms that there was not likely to be a return to work in the short to medium terms that Ms Keatley's decision to terminate the claimant's employment because of ill health capability would have been taken. What if any effect it might have had on her decision had she had sight of the Cathcart Occupational Health report.

Argument and conclusions

Unfair dismissal

The issues that the tribunal are to consider are:

(i) *What was the principal reason for dismissal and was it a potentially*

fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's capability.

(ii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

(iii) The claimant relies on the following as making her dismissal unfair:

a. The decision that the claimant was incapable of doing her work was unjustified.

b. On the morning of the meeting at which the decision to dismiss the claimant was taken, the claimant forwarded an occupational health letter asking for two years' unpaid leave, and her doctor's letter saying that she was unfit to attend the meeting, to two members of the decision making panel (Jenny Clarke and Joanne Keatley) and they did not consider it or show it to the rest of the panel.

c. Jenny Clarke was on the decision making panel to decide on the dismissal of the claimant and she was biased against the claimant.

212. The respondent admits that the claimant was dismissed from their employment for help health capability. The key fact to be considered is whether the employer took a decision in those circumstances to dismiss bad words a reasonable one in all of the circumstances at. The range of reasonable response test applies in cases of capability dismissals. The decision is a managerial one and not a medical one. The findings of fact we have made confirm that the decision to dismiss the claimant was made in light of the medical advice contained in the occupational health report of 26 July 2017. The report confirmed that the claimant was unfit for work and there was no expected date of return to work. Although the respondents are criticised by the claimant for having not had regard to the occupational health report of Dr. Cathcart we have found but that information was not before respondent when taking the decision and in any event the information contained within it would not have that changed the decision taken by the respondents to terminate employment on the 10th of October .

213. In her submissions Ms Hodgetts has referred us to the fact that the claimant was requesting a period of unpaid leave, as opposed to a career break for which the respondent has a career break policy. Under the respondents career break policy a resignation is required and that circumstance was not one contemplated by the claimant. The claimant had not provided the additional information and business case for allowing the claimant to take a period of extended unpaid leave to include the anticipated impact the request would have on the respondents business. None of the proposed particulars of an arrangement fro an extended period of unpaid leave were proposed, to include the proposed communications with the respondent during a period of such leave having regard to the pattern of the claimants communication with the respondent and the likely impact of the proposal on the business planning.

214. We find that the decision taken by the respondent to terminate the claimants employment was both procedurally and substantively fair in

all of the circumstances of the case. The reason for the dismissal was the claimant's lack of capability to attend work for a substantial period of time and that there was no foreseeable return to work in the short or medium terms. Having regard to the needs of the respondent's business the decision to terminate the claimant's employment was within the range of reasonable responses and the dismissal was not unfair.

Disability

The respondent accepts that at all relevant times the claimant was disabled because of the following condition(s): Lumbar bulging spine, nerve damage to right hand and injury to right knee arthritis.

EQA, section 15: discrimination arising from disability

215. The claimant was dismissed because of her sickness absences. The respondent accepts that the claimant was dismissed for incapability and that the effective cause of her absences in the academic year 2016-17 and continuing in 2017-18 were her disabilities.
216. The respondent does not accept that on the morning of the meeting at which the decision to dismiss the claimant was taken 10 October 2018 that the claimant forwarded an occupational health letter asking for two years unpaid leave, and her doctor's letter saying that she was unfit to attend the hearing to two members of the decision making panel (Jenny Clarke and Joan Keatley) and they did not consider it or show it to the rest of the panel. The tribunal has found that the claimant's account of forwarding information to the respondent in advance of the meeting is not credible.
217. The respondent does not accept that the claimant was given a warning for asking people to help her pick up things she dropped, which she did because she could not carry books between rooms due to her disability. This was in May 2017. The claimant has led no credible evidence of the allegation and the respondent had since 2014 provided the claimant with a trolley to assist her in carrying books to classes.
218. The claimant's class at Sparkhill was closed and the students were transferred to other tutors in the first week in September and the claimant was offered and agreed to transfer to teach a class at Selly Oak in the first week of September 2017. The claimant has failed to establish that any of the respondents alleged unfavourable treatment of her was for something arising from her disability other than in respect of the termination of her employment. The claimant has established the first limb in respect of the less favourable treatment in respect only of the termination of her employment.
219. We turn to consider whether or not the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim and that their treatment of the claimant was objectively justified. The respondent relies on the need to run their operation with members of staff present and capable of doing the work.
220. In making the findings of fact that we have it is apparent that at the effective date of termination of her employment the claimant had been signed off work since 26th October 2016 the last day when she

had been at work had been the 12th of October as she had been granted compassionate leave on the 19th of October 2016. The respondent had sought to conduct a full case hearing in June 2017 which was postponed because the claimants representative could not accompany her at to that meeting, the meeting had been re arranged for a date in July that it had to be postponed and reconvened again to the date in October. The claimant had been provided with all documents that the respondent intended to consider at the full case hearing and neither she nor her trade union representative attended or made representations.

221. The respondents management case for terminating the claimants employment because of her attendance record was a compelling one and identified the significant strain on the service and impact of the claimant's absence on learners. The claimant had not presented a case for the respondent to consider fully an application for a period of two years unpaid leave of absence which was outside the respondent's policy for career breaks.
222. Having had full regard to the facts of the case we conclude that the less favourable treatment arising from the claimant's disability was in the circumstances a proportionate means of achieving a legitimate aim and was objectively justified.

Reasonable adjustments: EQA, sections 20 & 21

223. In this case the respondent was clearly aware of the claimants disability. We have considered each of the circumstances which the claimant asserts were a provision, criterion or practice ("PCP") which we determine in turn together with the alleged substantial disadvantage.
224. The claimant maintains that there was a PCP of requiring the claimant to sit on a normal chair caused her more pain, requiring her to take stronger pain killers and needing more physical therapy, and it caused the claimant stress. We have found that the respondent did not require the claimant to sit on a 'normal chair' on the contrary an ergonomic chair was provided to the claimant which she used at Shard End and had been relocated to Sparkhill and would have been transferred to Selly Oak when she relocated there but for the fact that it was an arrangement than in the speed of the relocation was overlooked. We have found that the claimant made no complaint in either 5 or 12 October 2016 when she taught at Selly Oak and on her own evidence did not normal sit down when she was teaching. The claimant has asserted that she was caused to take stronger pain killers and needed more physiotherapy and it caused her more stress. After the claimant started at Selly Oak her initial absence was for compassionate leave on 19 October and thereafter for sickness absence related to a vaginal wall prolapse, wrist injury, abdominal pains and knee pain [408,411,414,416,417,420,421,422] and not until August 2017 did the claimants sick notes refer to back pain. We have been referred to no evidence to support the claim that requiring the claimant to sit on a 'normal' chair placed the claimant at significant disadvantage. We recall too that the claimant confirmed that when providing private tuition, which was a substantial source of the claimant's income she used a 'normal' chair and not an ergonomic one.

225. The claim that there was a PCP requiring the claimant to carry bags between classrooms put strain on her hand muscles, prevented her hand injury from healing quickly, and meant she dropped things all the time and had to ask people for help, for which she received a warning letter is not accepted by the respondent. The claimant has confirmed that she was provided with a trolley bag by the respondent and as a result the claimant suffered no additional pain.
226. The PCP requirement that the claimant to work from a distance further than Sparkhill and travelling to Selly Oak is accepted to be a PCP. The respondent does not accept that journey caused the claimant physical pain to have to sit in the car for longer nor do the claimant's sick notes evidence such a pain to record a relevant physical disadvantage. To the extent that the claimant's mobility driver was not able to drive as far as Selly Oak to collect the claimant, so that the claimant had to pay for a taxi home is a disadvantage it is one that is an economic not physical disadvantage lined to the claimants home location and not her disability.
227. The claimant asserts that there was a PCP of not implementing a recommendation from occupation health [115] to improve guidance and support to the claimant from her line manager, Mrs Shin, which failure caused the claimant stress and increased her pain. We have made a clear finding of fact that the recommendations were implemented in the outcome of the contact meeting on 23 March 2016 [120-122]. While the claimant may have continued to suffer stress from the necessary management interactions that does not we find amount to a relevant comparative disadvantage arising from her disabilities.
228. While the respondent acknowledges they had knowledge of the possible disadvantage in respect of the provision of an ergonomic chair and a trolley there is no substantial disadvantage that has been suffered in this case. In relation to the disadvantage associated with the move to Selly Oak and the Occupational Health recommendations the respondent maintains that they had no knowledge of the disadvantage. We have in the circumstances considered whether the respondent's took reasonable steps to avoid the disadvantage. In terms of the delay in relocating the ergonomic chair to Selly Oak the claimant had not been put on notice of the delay in transferring the chair and the respondent's could not reasonably have been expected to have taken steps within the limited time period. The claimant confirmed that he trolley was in fact provided and there was no disadvantage. In respect of the move to Selly Oak the claimant had agreed to the move and it was not reasonable to expect the respondent to continue to engage the claimant at Sparkhill where there were insufficient learners to sustain a class.
229. The claimant's claims of a failure to make reasonable adjustments in the circumstances do not succeed.

EQA, section 26: harassment related to disability

230. The claimant raises allegations related to harassment related to her disability in relation to conduct that occurred more than a year before the termination of her employment.

231. The claimant claims that in 2015 she received calls in hospital from Mrs Shin, her line manager asking her why she was not in work. The claimant is not specific as to the date of the calls and has not put the allegation to Ms Shin we made findings of fact in relation to the contemporary notes Ms Shin made of her encounters with the claimant from her first absence under her management in November 2015 [92-101] we consider on balance of probability the record of Ms Shin is a reliable one and does not suggests calls were made while the claimant was an inpatient in hospital.
232. We have made clear findings that the communications between the claimant and Ms Shin while she was on sick leave and at home and in work were never anything other than respectful and reasonable management communications and enquiries. The communications to which we have been referred could not reasonably have been perceived to be unreasonable or aggressive in tone nor related to disability nor could they reasonably be regarded as having that effect.
233. Similarly having had sight of the contact between the claimant and Ms Shins manager Ms Clarke we have seen no evidence to suggest that the communications were anything other than reasonable management contact seeking to resolve differences that the claimant felt she had with her line manager Ms Shin.
234. We have had no clear evidence of the allegation of harassment in reference to what is understood to be a claim that the claimant tried to access the room where Mr Mohammed was teaching to ask a question in September 2016 and that Mrs Shin reprimanded her for doing so, saying that she has no right to go to another teacher's room while he was teaching, but he had no students that day. Ms Shin in her evidence denies ever having reprimanded the claimant and not at all in September 2016. There is a contemporary record of a meeting held with the claimant on 16 September 2016 [166-167] We are aware that the claimant was asked why she had gone to the room of another teacher whilst teaching was taking place and the claimant had declined to provide an explanation the meeting discussion had avoided conflict and moved on to discuss the other more pressing issues that had been covered in the Tutor briefing sessions that the claimant had not attended.
235. In light of the findings of fact we have made the behaviour about which the claimant complains is conduct which did not relate to the claimants disability and the conduct was such that it could not reasonably be perceived to have the purpose or effect of creating an intimidating hostile, degrading or humiliating or offensive environment for the claimant.

EQA, section 13: direct discrimination because of race

236. The claimant relies on her race as of black Afro-Caribbean descent and the nationality of Trinidadian and asserts that the respondent subjected the claimant to the range of treatment detailed in her list of issues which we have considered in turn based upon the findings of fact that we have made.

237. The claimant alleges that she was not allowed two years leave of absence to recover from her medical condition and being dismissed instead. The claimant compares herself to M, a Caucasian white Polish colleague, whom the claimant says was granted such leave to receive medical treatment. The respondent denies that M was given a two year period of leave of absence rather she was on sickness absence during which Ms Shin followed the same sickness absence policy was followed. There is nothing that leads us to conclude that the claimant was treated less favourably than any other employee making a request for unpaid leave. The request was an unusual one and neither the claimant nor her union representative provide the information the respondent requested to make an informed decision on the unparticularised request.
238. The claimant refers to her claim that on the morning of the meeting at which the decision to dismiss the claimant was taken, the claimant forwarded an occupational health letter asking for two years unpaid leave, and her doctor's letter saying that she was unfit to attend the hearing to two members of the decision making panel (Jenny Clarke and Joan Keatley) and they did not consider it or show it to the rest of the panel. We have made extensive findings of fact in relation to the allegation and had found that the information was not received as was alleged to have been sent and the decision to dismiss was based upon the information before the decision maker. There was on the facts as we found them to be not a failure to put all available evidence before the decision maker.
239. The claimant says that the assessment grades given to her were not high enough considering her pass marks, and that the reason she was downgraded was her race. Based on the findings of fact we have made both in respect of the lesson observations by Ms Jennings on 4 February 2015 [82-90] and by Ms Ennis on 10 May 2016[134-141] the grade assessments were based on lesson observations. The claimant acknowledged in examination that additional classes were not allocated to tutors whose grade was at 3. We find that the claimant has not established that the respondent treated her less favourably than a comparator whose teaching observations were graded as they were. The observations were objective and independently assessed. The claimants allegation of less favourable treatment because of her race does not succeed.
240. The claimant says she was not given additional classes when she asked for them. The claimant compares herself with Mohammed Afzal and Aben and Barda Martini. The respondent says that the claimant was not given additional classes because of her grade 3 assessments and the comparators had better assessment grades and Mr and Mrs Martini were qualified to teach GCSE maths, that account was not denied by the claimant. We conclude for the reasons referred to above we conclude that the reason why claimant was not provided with additional classes was because of her grade 3 assessment and she was not treated less favourably because of her race.
241. Linked to the former allegations in relation to her grading and allocation of additional classes the claimant has alleged that in an assessment in 2016, an assessor, Pat Jennings, sent the claimant from

the room and then encouraged her class to make negative comments about her, such as she was a bully. We have made extensive findings of fact and the allegation made by the claimant in this regard is not upheld.

242. The claimant asserts that when in 2016, Mrs Shin asked the claimant about her foreign certificate teaching qualification and asked to see her passport, this was not her job as the claimant's line manager and is evidence of race discrimination. The claimant has accepted that the request was a reasonable one for the respondent to make and when taken to an email sent from Ms Shin to her on 6 May 2016 [101] the claimant accepted that Ms Shin had been directed by the Finance team to gather the documentation. The claimant in answer to questions on clarification withdrew the allegation. We conclude that the claimant was treated no differently or less favourably because of her race in the request for documentation being made. The claimant's allegation in this regard does not succeed

243. The claimant alleges that during her sickness absence in 2016, the claimant's managers did not ever ask after her. It is evident from the evidence and findings of fact we have made that the claimant's managers Ms Shin and Ms Clarke were solicitous of the claimant health. The tone of the respondent's communication with the claimant was only ever measured notwithstanding the claimant's reluctance to communicate with them as frequently and in the manner that was directed.

244. In respect of all of the allegations of less favourable treatment because of her race we find that the claimant was not treated less favourably than either named comparators or hypothetical comparators in circumstances not materially different to her.

245. In every circumstance we find that the respondent's treatment of the claimant has been objectively justified for reasons unconnected with the claimant's race. The claimant's complaints of direct discrimination because of her race do not succeed.

Time and jurisdiction

246. Having made detailed findings of fact and analysed the claimant's complaints as they are before us, we have reached conclusions in every case. We would add that notwithstanding the conclusions that we have reached, that in a many circumstances the discrimination complaints are presented out of time.

247. It is accepted by the respondent that the complaints related to the dismissal and the alleged failure to forward the Occupational Health Report to the respondent are not out of time.

248. Claims are to be presented to a tribunal within 3 months of the date of the alleged act of discrimination or the last act in respect of a continuing course of conduct. The claimant has at all material items been represented by her trade union and has been in the benefit of legal advice from her former partner, her daughter's father, who is a barrister. In answer to questions to clarify her evidence the claimant confirmed that she had felt in 2016 Mr Room her union representative was not really helping her and that she had got legal advice and had spoke to

ACAS who had told her she could go to an Employment Tribunal. The claimant added that at the time she had had other things going on and had not presented her claim of discrimination at that time.

249. It is clear that after the claimant relocated to Selly Oak in October 2016 the claimant had no further contact with Ms Shin and on even the most generous view if all of her complaints about Ms Shin's treatment of her continued up to her relocation a complaint if presented in time ought to have been presented to the Employment Tribunal on or before 7 January 2017. The tribunals discretion to extend time is not to be exercised lightly and the claimant has not put forward any persuasive argument as to why time in these circumstances ought to be extended.

250. The claimant has the right to pursue complaints that are in time to be considered against a landscape of earlier treatment evidence of which has been considered by us and informed our findings of fact in relation to timely complaints. We are mindful of the fact that a number of the claimant's complaints presented out of time are of matters of which the claimant's evidence and recall is often contradicted by contemporary objective documentation. Having had full regard to the balance of prejudice which weighs heavily against the respondent we find that the circumstances of this case are not such to persuade this tribunal that we should properly exercise our discretion and extend time on the basis that it is just and equitable to do so.

Victimisation

251. Although not a complaint that we are asked to address in the list of issues the claim form [page 15 para 20] asserts that the claimant was being victimised:

"because of her previous grievance against her line manager and her pending personal injury claim against the respondent."

252. The claimant has claimed that she was victimised and in answer to cross examination states for the first time that the 'protected act' was the assertion made by Mr Room on her behalf that *"it would be unfair for her to be fired under the Disability Act"*. Nothing in the grievances against Ms Shin suggest that there was a complaint raised that was asserting a right under the Equality Act 2010. In light of the findings we have made in respect of the claimants credibility we do not find the claimant's account to be in the least bit credible.

253. We conclude that the claimant had not done a protected act as defined by the Equality Act 2010. There was no grievance raised against Ms Shin and to the extent that she was concerned about the classroom observations and the contact meeting with Ms Shin following it there is not suggested complaint by reference to the Equality Act 2010. We conclude there was no protected act in response to which a claim of victimisation could be founded.

Breach of contract

254. The claimant's case that she was not paid all the notice pay to which she was entitled whereas the respondent says that all sums due were paid. The claimant seeks payment in lieu of notice calculated by reference to her pre 2014 income from tutoring for the respondent. The

claimant seeks to rely on the fact that she claims that the April 2014 accident resulted in a reduction in her earning. The claim is misconceived as such a claim could only recovered in a personal injury claim and we are led to understand that the personal injury claim between the claimant and respondent has been settled.

255. The respondent has confirmed that they have identified an error in the calculation of her payment in lieu of notice and written to the claimants on 6 March 2020 [650] to confirm that a shortfall on the calculation of her notice pay was made and a further payment of £368.82 is due to her.

256. The claimant says she was not paid all sick pay to which she was entitled. The claimant has a fundamental error in her understanding of the sick pay entitlement to suggest that there is an entitlement to a renewed entitlement to sick pay in each academic year. The terms of the respondent's sick pay scheme are detailed in their policy for an entitlement within a rolling period of twelve months. The claimant has not proved an indebtedness to contractual sick pay and that claim does not succeed.

Signed by _____
Employment Judge Dean
Date 02.08.2021