



# EMPLOYMENT TRIBUNALS

## Claimant

## Respondent

Miss T Kapasi

v

Royal Borough of Kensington  
and Chelsea

Heard at: London Central

On: 19, 20, 23, 24, 26, 27, 30 November  
and 1 and 2 December 2020

Before: Employment Judge E Burns  
Ms J Cameron  
Ms J Grant

## Representation

For the Claimant: Mr B Uduje (Counsel)

For the Respondent: Ms C Casserley (Counsel)

## JUDGMENT

The unanimous judgment of the Employment Tribunal is that all of the claimant's claims fail and are dismissed.

## REASONS

### CLAIMS

1. These are claims arising from the claimant's employment with the respondent from 1 January 2014 to the date of her dismissal on 3 October 2019. The claimant presented her first claim on 30 April 2019. She presented her second claim on 5 November 2019.

### THE ISSUES

2. Although a draft list of issues had been discussed and agreed at a case management hearing held on 20 February 2020, the claimant sought to add three additional issues at the start of the hearing, before we commenced hearing evidence. One of the issues required a minor amendment to the claimant's pleaded case. The tribunal allowed this. We gave oral reasons for our decision.

3. The issues to be determined were as follows:

**Was C disabled within the meaning of section 6 of the Equality Act 2010?**

- (1) The respondent admits that the claimant was a disabled person at the relevant times by chronic pain syndrome but does not admit the additional disabilities upon which the claimant seeks to rely – Chronic Fatigue Syndrome (CFS) and stress, anxiety and depression.

**Knowledge of C's Disability**

- (2) The respondent admits that it was aware of the claimant's disability (chronic pain syndrome) from the point at which occupational health advised that it would meet the definition of disability in the Equality Act 2010, namely 28.07.16

**Reasonable adjustments (ss. 20 and 21 Equality Act 2010)**

- (3) Did the respondent apply to the claimant:
- (a) a requirement in line management meetings [on employees] to attend to their own contemporaneous notes;
  - (b) the Improving Work Performance Policy; and/or
  - (c) the Sickness Absence Management Policy?
- (4) If so, did all or any of those requirements/practices constitute provisions, criteria or practices within s. 20(3) Equality Act?
- (5) If so, did the PCPs or any of them place the claimant at a substantial disadvantage in comparison to persons who are not disabled, in that:
- (a) in relation to (3)(a), her pain/restricted movement in her arms and hand (and other associated difficulties) impaired her ability to take notes;
  - (b) in relation to (3)(b), the claimant was more likely because of her disability to be absent than non disabled employees and her disability restricted the speed at which she could complete work;
  - (c) in relation to (3)(c), the claimant's disabilities caused her to be absent from work more often than people who do not have her disability?
- (6) If so, did the respondent know (or could it reasonably have been expected to know) that the PCPs it applied were likely to place the claimant at those disadvantages?

(7) If so, did the respondent fail to take such steps as were reasonable to avoid the above disadvantages? The claimant suggests the following steps:

- (a) In relation to (5)(a) the provision of a scribe or a recording facility;
- (b) In relation to 5(b), delaying implementation of performance management and/or adjusting the work targets;
- (c) In relation to 5(b), adjusting the trigger points for disability related absence, discounting disability related sickness absence caused by pursuit of the IWPP, altering working hours or content of EP role, allowing period of disability leave for recovering

(8) If not, was the claimant subjected to a detriment by any failures to take reasonable adjustments, contrary to s.39(2)(d)?

**Discrimination Arising from Disability (Section 15 of the Equality Act 2010)**

(9) Were the following unfavourable treatment:

- (a) Limiting the scope of the claimant's duties to EHC Assessment Reports in 17.12.17, formalised on 03.09.18;
- (b) Requiring her to meet work and attendance targets set the Operational Work Plan presented to her on 22.08.18;
- (c) Invoking informal performance monitoring on 3 December 2018;
- (d) Sickness absence caution on 6 December 2018;
- (e) Effective suspension of her role on 20 December 2018;
- (f) Formal performance warning on 04.02.19
- (g) dismissal on 03.10.19?

(10) If so, did the following form any part of the reasons for that unfavourable treatment:

- (a) the claimant's sickness absence from September 2016 to September 2017;
- (b) the claimant's inability to deliver work to the timescale in the work plan;
- (c) in addition, in relation to her dismissal, her sickness absence in 2018 and 2019?

- (11) If so, did those reasons arise in consequence of the claimant's disability?
- (12) If so, was that treatment a proportionate means of achieving a legitimate aim – the respondent states that it has a legitimate aim of ensuring an acceptable level of attendance /improvement for the delivery of its statutory obligations/ services provided by the Educational Psychologists [see GOR]
- (13) If not, was the claimant subject to a detriment as a result, contrary to s.39 (2)(d) or dismissal contrary to s.39(2)(c)

**Harassment – section 26 of the Equality Act 2010**

- (14) Did the respondent subject the claimant to the following unwanted conduct?
- (a) in the meeting on 22 August 2018:
- i. did the Claimant's line manager shout at her, *I think, if you don't like what you hear, you choose to hear what you want*;
  - ii. was the Claimant reprimanded for loss of a school account;
  - iii. was the Claimant reprimanded for joint working with colleagues;
  - iv. was the Claimant's contribution to the meeting (by way of work suggestions and attempted input into her work plan) dismissed; and
  - v. did the Claimant's line manager say, *I didn't want to tell you, but your schools don't want you back*;
- (b) being made subject to performance monitoring thereafter (including the first formal warning);
- (c) being required to prove her capability to do her job (limited role) on threat of potential dismissal and was this without justification, apart from the fact that she had been sick, and adjustments had been put in place;
- (d) issuing a first sickness absence caution and the SAP pursued thereafter:
- (e) requiring the Claimant to be unfit for work for no more than 5-days in the following 3-months thereafter on threat of potential dismissal;
- (f) effectively suspending the Claimant's role on 20 December 2018 leaving her deprived of meaningful Educational Psychologist work (and opportunity to practice her profession);
- (g) subjecting the claimant to the respondent's frustrations (Monsen's response) when she questioned why the respondent had allowed the support worker assistance to lapse;

- (h) hostile and intimidating conduct by Julie Ely at the sickness absence hearing in the way the Claimant was questioned
  - (i) recommendation that the Claimant be dismissed (Julie Ely).
- (15) Are any or all the alleged conducts related to the Claimant's disability?
- (16) Did each or all of the act have the effect of creating an intimidating and / or hostile environment for the Claimant?
- (17) If so, taking into account the perception of the Claimant and the circumstances of the case it is reasonable for the conduct to have such and effect

### **Unfair dismissal**

- (18) Was the Claimant dismissed for a potentially fair reason in accordance with s. 98(2) ERA 1996?
- (a) What was the reason for dismissal?
  - (b) Did the Respondent follow a fair procedure in reaching the decision to dismiss?
  - (c) Did the Respondent act reasonably or unreasonably in treating the reasons as sufficient reason to dismiss?

### **Jurisdiction**

- (19) Are the complaints, or any of them, out of time and if so, should time be extended?

### **THE HEARING**

4. The hearing, which dealt with liability only, was conducted in person. Both parties were represented by counsel.
5. There was an agreed trial bundle of 1164 pages. We admitted into evidence additional documents from both sides with their agreement. We read the evidence in the bundle to which we were referred, and we give the page numbers of key documents that we relied upon when reaching our decision below.
6. The claimant gave evidence and in addition called the following witnesses:
  - Ms Loraine Hancock - Educational Psychologist in the Educational Psychology Service

## Case Numbers: 2201484/2019 & 2204769/2019

- Dr Christina Mowl – former Educational Psychologist in the Tri- Borough Educational Psychology Service (employed by Hammersmith and Fulham) (who gave evidence remotely by video)
  - Dr Isabella Hung, Clinical Psychologist who had prepared an expert medical report.
7. The expert medical report of Dr Hung was not a joint medical report, but was commissioned on behalf of the claimant on 2 October 2020 (without the permission of the tribunal) and only served on the respondent on 20 October 2020. The respondent asked us to consider either not admitting the report or allowing a postponement so that it could obtain medical expert evidence. We decided, however, to allow the report and not to adjourn. We gave oral reasons for our decision at the start of the hearing.
8. The claimant also submitted a written statement from Erik Dwyer, another Educational Psychologist who was still employed in the respondent's Educational Psychology Service. Mr Dwyer was the local staff representative for the Association of Educational Psychologists. He explained his reason for not attending the hearing in an email to the respondent. His evidence was on a very small point, that as it transpired, was not strongly disputed by the respondent.
9. For the respondent we heard evidence from:
- Ms Helen Kerlake, Assistant Principal Educational Psychologist, claimant's line manager
  - Dr Jeremy Monsen, Principal Educational Psychologist
  - Mr Russell Harding, accessibility specialist and IT trainer for the respondent
  - Ms Lisa Parkin, now Senior Human Resources Consultant, but was Employee Relations Team Leader (March 2017 – August 2019)
  - Ms Julie Ely – Bi Borough Assistant Director for Special Educational Needs and Educational Psychology
  - Mr Ian Heggs, Director for Education
10. As there was limited space in the tribunal room due to social distancing measures, we limited the number of people who could come in. We allowed the respondent to set up an audio link using Microsoft Teams so that its witnesses could hear the evidence. The claimant agreed to this.
11. We also made several adjustments because of the claimant's medical conditions. She brought her own chair. She was assisted by her brother with manipulating pages in the bundle while giving evidence and we allowed her to take breaks every hour as she needed. We encouraged her to indicate if she needed a break at any time. The hearing dates were arranged so that the claimant's evidence straddled a weekend and we took a rest day in the second week. The claimant did not attend in person on the last two days of the hearing, but followed the proceedings by a video link.

## **FINDINGS OF FACT**

12. Having considered all the evidence, we find the following facts on a balance of probabilities.
13. The parties will notice that not all the matters that they told us about are recorded in our findings of fact. That is because we have limited them to points that are relevant to the legal issues.

## **Background**

14. The respondent is a local authority. It is a large employer with a large HR function, its own in-house legal function and its own in-house occupational health service.
15. The respondent has a large number of written policies which are relevant to claim. The following were contained in the bundle
  - Improving Performance Policy (234A-3 – 234A-11) (Bi-Borough)
  - Employee Performance Improvement (Single Borough) (234A-3\* - 234A-15\*)
  - Sickness Absence Procedure (335A – 335R)
  - Disability Policy and Reasonable Adjustments Guidance (Single Borough) (270 – 288)
  - Dignity at Work Policy (270 – 269)
  - Bi-Borough Reasonable Adjustments Guidance (dated April 2016) (235 – 242)
  - Human Resources and Organisation development – Staff with a disability (Single Borough) (277 – 288)
16. The claimant was employed by the respondent as an Educational Psychologist (EP) in its Educational Psychology Consultation Service from 1 January 2014 until her dismissal on 3 October 2019. She was line managed by Helen Kerslake, Assistant Principal Education Psychologist, throughout her employment.
17. EPs work to promote the development, learning and well-being/mental health of children and young people, especially those with additional needs and/or other barriers to their development and learning (including those with Special Educational Needs and Disabilities (“SEND”)). A copy of the claimant’s job profile and the selection criteria / person specification for her role were at pages 336 – 341 of the bundle.
18. Prior to joining the respondent, the claimant had 7 years’ experience of working as a qualified EP in two local authorities. She had also worked as an Assistant EP from 2005.

## **The Respondent’s Educational Psychology Consultation Service**

19. At the time the claimant joined the respondent’s Educational Psychology Consultation Service (the “EPC Service”), it was operating as a Tri-Borough

## Case Numbers: 2201484/2019 & 2204769/2019

Service involving the respondent, Westminster City Council and the London Borough of Hammersmith and Fulham (LBHF). LBHF dropped out of the arrangement in April 2018 and the service became a Bi-Borough Service although there were ongoing joint CPD arrangements for an additional 12 months.

20. EP's employed in the EPC Service carried out the following types of work:
  - Educational, Health and Care Assessments (known in the Service as Tier 1 work) – this represented 70% of the work undertaken in the Service
  - Free (Tier 2) and Traded School Visits (Tier 3)
  - Panel work
  - Ad hoc discrete pieces of specially commissioned work.
21. The EHC Assessment Process is a statutory process where the needs of children are assessed by a variety of different specialists, including EPs, in order to formulate an Educational, Health and Care (EHC) Plan.
22. When undertaking EHRC (Tier 1) work, the EPs were required to meet the children and assess them from their professional perspective then prepare a written report in a particular format which would then be taken into consideration by the professional responsible for preparing the EHC Plan.
23. Timescales are very important. The whole process from request to production of an EHC Plan is required to take no more 20 weeks according to the relevant statutory provisions (242D – 242G). The internal deadline for the EP's EHC reports was set for six weeks. It was important this was met to avoid knock on delays.
24. The Free School visits (Tier 2 work) were offered to all state-maintained and funded schools in the three boroughs to support the Special Educational Needs (SEN) processes and practices within the schools. On average about 3 half days per year per school were provided.
25. In addition, schools were able to purchase a small number of Traded Visits from the EPC Service (Tier 3 work). Income generated from Traded Visits was used within the EPC Service and mainly subsidised staffing costs. The EPC Service as set a challenging target for generating income in this way.
26. Panel work involved the EP providing an expert opinion to special educational needs panels. This involved reading papers and appearing to give a verbal expert opinion on the level of support to offer children and their families. Written reports were not required. Panel appearances could lead to involvement in Tribunals if the cases were escalated to appeals. Panel work was counted as Tier 1 work.
27. The ad hoc discrete pieces of specially commissioned work, but were just that. They were often for particular schools, but might also be broader.



28. EP's employed within the EPC Service were allocated to particular schools for which they become the 'link' EP. This meant that they were the main contact for all queries from that school. The Link EP for a school would normally carry out all the Tier 2 and Tier 3 work for that school and also deal with the panel work for that school.
29. Educational psychologist services do not have to be provided by local authorities. The EPC Service therefore competed with private providers of the same services. In addition, many EPs work on a freelance basis. There was a Service Level Agreement in place between the EPC Service and the commissioners of EHCP work which meant the performance of the EPC Service scrutinised against key performance indicators. In addition, the schools could choose whether or not to purchase the Traded Visits (and support of a link EPC) from the EPC Service or from a private provider.

### **The Time Costed Deployment Model**

30. From September 2015, the EPC Service introduced a "time costed deployment model". It was an initiative of Dr Monsen who became Principal EP for the EPC Service in April 2015.
31. The model was a management tool used primarily to deploy staffing resources. It was built on a number of assumptions.
32. The starting point assumed that a full time Professional Grade EP was contracted to work a set number of hours, after annual leave and 5 days sick leave was taken into account. Not all of this time could be deployed on Tier 1-3 activities, however. The available 'deployable' time was reduced to take account of activities such as administration, supervision, attending staff meetings, continuing professional development and participation in Working Groups. This was known as Tier 0 work.
33. After Tier 0 work was discounted, and taking into account that most activities needed to be undertaken during school term times, it was calculated that the standard EP would have 966.6 operational hours per year. This was then broken down to 322.2 hours per term (636).
34. Different tasks had different times allocated to them within the model. The allocations for the Tier 1 work were:
  - Panel work was allocated 6 hours – this assumed 3 hours reading and 3 hours attendance at the panel
  - EHC assessments were allocated 18 hours – this included the assessment visit at the school and then writing up the report
35. These allocations were applied regardless of the actual hours spent on the work. There was limited opportunity to get extra time allocated. It could be agreed in exceptional circumstances, such as where a case was particularly challenging, however. The consequence was that when carrying out EHC assessments, EPs had two targets to meet:

## Case Numbers: 2201484/2019 & 2204769/2019

- their contribution to the EHC report had to be completed within six weeks
  - they should not spend more than 18 hours doing it
36. Because the work of the EPs was varied and because they had different personal circumstances, including some part time working for example, there was not a set pattern. As a general rule of thumb, however, the expectation was that a full time EP would complete around eight EHC assessments each term and be linked with around 8 schools.
37. It is relevant to note here that the respondent could and did, when needed, engage locums to do EHC reports for it. The bundle included a document setting out the details of locums used in the school year 2016/2017 with their associated costs (431A).

### Chronology

#### Early Period: January 2014 – September 2015

38. At the time the claimant joined the EPC Service, in January 2014, it did not have its time costed deployment model in place as it was not yet a traded service.
39. The claimant was not given a full workload initially on starting employment. As the model of practice in the EPC Service differed from that in her previous employment, Ms Kerslake arranged for her to have opportunities to shadow other EPs and initially allocated her fewer schools and statutory assessments than other full-time EPs. Initially The claimant had only four schools (compared to seven or eight for other full time EPs) (399A) and she built up to six.
40. Ms Kerslake deliberately kept the claimant's school allocation lower as it was evident to her from the beginning of the claimant's employment that the claimant was not finding it easy to keep up with report writing. In addition, after two terms in her new role the claimant began experiencing pain in her left arm, resulting in difficulty writing and typing written reports/notes and had talked to Ms Kerslake about the difficulties she was having. It was agreed that the claimant would be provided with support from the respondent's accessibility specialist and IT trainer, Mr Russell.
41. The claimant did not know what was causing her pain and was liaising with her GP to try and identify a possible cause and treatment options.
42. Mr Harding is specifically employed by the respondent to provide services to colleagues who have specific requirements for IT equipment and software because of disability, long-term injury, dyslexia or other such conditions. He is able to provide special equipment and individual customisation and programming of bespoke IT solutions, one-to-one training and ongoing support.
43. The first contact between the claimant and Mr Harding was on 25 November 2014 (347). Mr Harding installed specialist Dragon handsfree voice recognition software on the claimant's work laptop so that she would not

need to type as much. This was a standard starting point for addressing issues such as RSI. He also set up a desktop computer, ergonomic keyboard and mouse for the claimant at home (343). He provided the claimant with training in Dragon and worked with her on enhancements to the software.

44. This support continued into early 2015, but between April and August 2015 there was little contact between the claimant and Mr Harding. As far as Mr Harding was aware, the claimant was happy with everything.
45. The contact increased again after September 2015, however, as a result of a workstation assessment. The claimant reported to Mr Harding that she hadn't used Dragon as much as she had planned. She told him that the pain in her hands had been ongoing for several months at that time and did not seem to be caused entirely by computer use. She said she had had been advised to look again at keyboards, mice and IT solutions generally (344). This led to the claimant being given a special mouse at this time.

### **Complaints 2015 and 2016**

46. In November 2015, the headteacher of St Cuthbert with St Matthias CE Primary School, one of the claimant's link schools, complained to Ms Kerslake that the claimant was providing consultation paperwork very late.
47. Ms Kerslake and Dr Monsen supported the claimant in responding to the complaint (400 – 401). The claimant actually felt somewhat relieved about the complaint, as it highlighted the severity of the difficulties she was experiencing in keeping up with her work. She had been trying to manage this by herself with speaking to Ms Kerslake about it. The complaint meant that it brought the situation out into the open.
48. Ms Kerslake and the claimant met on 3 December 2015 and agreed a strategy with various measures to support the claimant tackle her backlog. It was agreed that the claimant would not be immediately referred to the respondent's occupational health department as she was awaiting an MRI Scan and so it would be sensible to wait until the results of this were known before making a referral.
49. Ms Kerslake emailed Dr Monsen after the meeting to inform of what had been agreed. The measures included:
  - having a colleague assist with visits in one of the claimant's schools
  - having the SEN coordinators at the schools assist by taking notes for the claimant during consultations
  - agreeing that the claimant would be firmer about not letting the schools take advantage of her goodwill by limiting the visits to 3 hours and agreeing realistic timescales for completion of any work

- providing administrative support to type up the claimant's consultations either from her handwriting or from her Dragon dictated and edited texts on a trial basis
50. Ms Kerslake also advised the claimant to try and avoid long email exchanges with people and instead focus on completing her core work. She also agreed with the claimant that Monsen should not be copied into emails "*about her OH needs and schools etc*". Ms Kerslake also reported that she was holding off allocating rota cases to the claimant (408).
51. Dr Monsen responded to Ms Kerslake's email saying:
- "This is really good news and very thorough. I think we monitor and follow your plan. [The claimant] has many strengths so we want to keep her."*  
(408)
52. When asked about this email, Monsen confirmed that he was worried the claimant may consider leaving the EPC service because of the complaints and he wanted to do everything he could to prevent this. This was particularly true because there was a shortage of good, trained EPs at that time. We accepted his evidence on this point.
53. A further complaint was made on 13 January 2016 by the headteacher of another of the claimant's allocated schools. She rang Ms Kerslake to, amongst other matters, raise concerns about the length of time C was taking to complete consultation records. Ms Kerslake did not tell the claimant about the complaint at the time because the headteacher told Ms Kerslake that she wanted to speak to the claimant directly (410). As she did not hear anything further, Ms Kerslake assumed the matter had been resolved between the headteacher and the claimant.

## **2016**

54. The claimant continued to undergo investigations into her pain throughout early 2016. Her condition was diagnosed as neuralgia and cervicalgia during this time. She was also evidently suffering from fatigue.
55. From 21 April to 26 May 2016, the claimant was absent from work. This was a total of five weeks. This resulted in a disrupted service to schools as her visits had to be covered by other EPs. In addition, the claimant was involved in a high profile case that became a Special Educational Needs Disabilities (SEND) tribunal case which had to be passed to another EP at short notice
56. The claimant returned to work on 26 May 2016. Initially this was on a 4 week phased return with reduced working days (2 days per week). The claimant was also given a reduced and adjusted workload. This included linking with fewer schools and having a higher proportion of panel work as it involved less writing (422).
57. The claimant also received additional support from Mr Harding following her return to work. The chronology he provided for the purposes of the tribunal

hearing shows a number of actions taken between April and September 2016 including providing the claimant with further specialist equipment and further training and support with Dragon

58. The claimant was referred to the respondent's occupational health service. The report of Dr Sophie Jukes, dated 28 July 2016, confirmed that the claimant had a long term condition with regards to her neck and shoulders and upper arms with pain especially in her upper arms and both hands. She noted that she had been referred to a pain specialist and was also taking part in a pain management course. Dr Jukes' opinion was that the claimant had "*a long term chronic condition that would likely fall under the Equality Act.*" (931).
59. Dr Jukes described the claimant's main difficulty as writing for long periods of time and recommended that the claimant should avoid writing and typing excessively or sitting for more than half an hour. She noted that the claimant was using Dragon and finding that her work was taking longer to do at that time, but commented that this would hopefully improve as she got used to the software.
60. She acknowledged that several adjustments had been made at that time and listed them in her report. They included:
  1. Desk and ergonomic keyboard and mouse for use in Kensington Town Hall
  2. Home base work desktop computer provided
  3. Dragon voice recognition software
  4. Phased return with reduced hours
  5. Reduce workload requiring less written or typed work
  6. Case load reduced as part of the phased return but also over the summer months because Tasnim's job tends to be less hectic over the summer months whilst the schools are on holidays
  7. Tasnim has had an iPad provided but currently she is having difficulty accessing the emails on it.
  8. Reduce patch of schools: Tasnim is not sure how long this restriction is possible to continue.
  9. Modification of the workload from September 2016, so if Tasnim has reduced school visits but more SEN panels results in her reading more but writing less. Tasnim tells me that she has been advised that she will have 5 schools on her case load from September 2016 as there will be a trainee Educational Psychologist dealing with one school but Tasnim's work load will be made up with an increase in the SEN panels.
  10. The Livescribe pen which records meetings which then needs to be transferred using the Dragon Software.
61. Dr Jukes recommended a specialist workstation assessment with Posterite be arranged via Occupational Health. There was also a recommendation to explore whether it would be possible for the claimant to have the support of an administrator to help with data entry, uploading documents and other admin tasks if feasible (931-933).
62. The Posturite assessment was undertaken on 19 September 2016.

63. Despite the adjustments, the claimant was still finding keeping up with her working very difficult. She was also in considerable pain and very fatigued. Ms Kerlake made the following note on 28 September 2016 (418)
- Tas has a GP appointment coming up. Things have been similar, ups and downs. She has been on medication for a long time and this is worrying Tas and needs to be looked at. Weekends and resting really helps for Mondays and Tuesday's which are then easier to manage. It gets more difficult as the week goes on. Tas has not been able to go to any of their community psychology sessions. Helen raised again the need for Tas to think about reducing to 4 days a week so that she can have a longer weekend rest break or have a day midweek to recover a bit. Tas is following an exercise routine and sometimes exercises in rooms in work.

### **September 2016 – December 2017: Long Term Sickness Absence**

64. Following the claimant's appointment with her GP, the claimant commenced a lengthy period of sickness absence. She was away from the workplace from 29 September 2016 until 17 December 2017. Throughout the period, the claimant's medical certificates referred to neuralgia, cervicalgia and/or chronic pain (725).
65. During this period, the claimant had some treatment for mental health conditions. She was assessed at a mental health clinic in March 2017. Her PHQ-9 score was 19/27 indicating some moderately severe symptoms of depression and her GAD-7 score was 19/21 indicating some severe symptoms of anxiety. She subsequently received some 1:1 guided self-help (911). There is no reference to this in the OH reports prepared in 2017, nor is there a reference to anxiety and depression on the medical certificates the claimant submitted.
66. Over the course of the period of absence the respondent managed the claimant's absence under its sickness absence management process. This included being referred to occupational health and attending meetings under the process.
67. It is relevant to note that during this period Dr Jukes prepared an occupational health report dated 2 March 2017, in which she advised that the claimant's *"condition will clearly fall under the Equality Act, but all the adjustments are being made by the employer. When Tasmin has targets set for her sickness absence it may be appropriate to have slightly more lenient targets i.e. 10 days rather than the statutory 6..."* (939-940)
68. The claimant was issued with a caution under the sickness policy on 4 April 2017. She was informed that if she did not return to work within one month (4 May 2017), consideration will be given to her dismissal (435A-B).
69. On 20 April 2017 the claimant sought permission to spend three months in India to have "targeted intensive rehabilitation" treatments. She suggested she be given two months' sick leave or disability leave, combined with one months' accrued leave for this trip, with a view to returning to work in August 2017. She also provided the respondent with some suggested adjustments she felt could help her.

70. The respondent does not offer “disability leave”. We note that in its document called Human Resources and Organisation development – Staff with a disability, there is a brief reference to staff with a disability taking additional time off. All it says is:

*“Managers may need to consider allowing a disabled employee more time off during work, than would normally be allowed, for assessment, treatment or rehabilitation.” (284)*

71. Ms Kerslake responded to the request for leave saying that the respondent was not able to delay the managing of her sickness absence and that she would refer the matter to Dr Jukes. In a report dated 18 May 2017, Dr Jukes reported that she was unable to give a definite guarantee that the claimant’s health would improve as a result of the course. She asked the claimant to provide further details from her consultants, but none were ever provided. In her report, Dr Jukes confirmed the claimant was not, as at that date, fit to return to work and she was unable to say when this was likely (940/941).

72. A Sickness Hearing Meeting was conducted with the claimant on 18 September 2017 (456-462). The respondent did not decide to terminate the claimant’s employment. A further meeting was arranged for 2 November 2017, by which time the claimant was well enough for a phased return to work.

73. We note that the on 25 October 2017, the claimant had requested that she be allowed to record the meeting of 2 November 2017 as an adjustment because of her difficulty in writing. This was not permitted by the respondent who said:

*“Though we fully understand that your disability relates to writing, at the meeting you will have the support of your EP representatives, who can also take notes on your behalf, and there will be a written outcome, therefore it would not be appropriate for the use a recording device.” (465)*

#### **Return to work: December 2017 – August 2018**

74. The claimant was well enough to return to work on 17 December 2017. She initially returned on a phased basis and did 2 days per week for 4 weeks. She met with Ms Kerslake who had developed a plan for reintegrating her back into the Educational Psychology Service Team. Ms Ms Kerslake’s aim was to use the period between the claimant’s return to work and the start of the new school year in September 2018 as a period whereby the respondent and the claimant would work together to ensure that all reasonable adjustments that the claimant needed were in place. It was understood that the claimant would be undertaking a reduced workload, but would aim to build her workload up.

75. The plan was not static and developed during the course of 2018. Part of that development process involved the claimant and Ms Kerslake agreeing and reviewing Tailored Adjustment Agreements which were meant to record details of the adjustments put in place and enable them to consider their

## Case Numbers: 2201484/2019 & 2204769/2019

effectiveness as an ongoing process. There were also a large number of line management meetings between Ms Kerslake and the claimant during this period.

76. The claimant had accrued a significant amount of annual leave during her period of sickness absence which she was required to take before 31 March 2018. This meant she spent 14 days at work during the first three months of 2017.
77. During this period an application was made to Access to Work which resulted in various pieces of equipment being provided for the claimant including a backpack and trolley bag.
78. Having used up her accrued annual leave, the claimant returned to full time working on 3 April 2018. However, she found it exhausting to travel into the offices five days a week. From 14 May 2018, she began to use her annual leave entitlement to have a day off in the week so that she could avoid travelling every day (294).
79. The claimant had asked if she could work from home from the date of her initial return. This was not possible until a workstation assessment had been undertaken of her home working environment and suitable equipment purchased. Ms Kerslake wanted to prioritise getting the claimant's workstation in the office set up as needed, before turning to her home environment. A home assessment was authorised in May 2018. It was undertaken on 21 June 2018 with the report being received on 13 July 2018. This led to the purchase of additional equipment.
80. In April 2018, it was agreed that the claimant would have support from a graduate intern. The support was intended to be for a limited period during which the claimant could apply for long term funding from Access to Work. The initial arrangement was 1 day per week from 23 April 2018. This was increased to one and a half days per week from 7 May 2018 (290).
81. An application was subsequently made to Access to Work to fund a support worker, but it was initially refused. This led to an appeal. The respondent continued to provide the graduate intern support while the appeal was pending.
82. The claimant took very few days sickness off during the period from December 2017 to August 2018. The total number of days she took off were 1.5 days. On 10 May 2018, Ms Kerslake informed the claimant that an adjustment would be made to the way the respondent's sickness absence procedure would be applied to her. Instead of the procedure being triggered after 3 days' absence, the trigger point would be altered to 5 days over the first 3 months starting 3 April 2018 (483)
83. During this period, Ms Kerslake informed the claimant that she would not be doing Tier 2 or Tier 3 work at this time. There were several reasons for this. The schools had been allocated EPs at the start of the 2017/2018 academic year and Ms Kerslake did not want to alter these arrangements mid-way



through the year. Ms Kerlake told us that the schools preferred the continuity of having the same link EP throughout the school year and we accept this as correct. This was also given as a reason why it was not appropriate, so far as the respondent was concerned, for the claimant to share any of the schools with other link EPs. The explanation Ms Kerlake gave to the claimant meant that the earliest the claimant would be allocated Tier 2 or Tier 3 work would be September 2018.

84. Another reason, which Ms Kerlake did not share with the claimant, was because some of the claimant's schools had either not contracted in to receive services from the EPC Service or had indicated that they did not wish to have the claimant as their link EP. St Cuthbert and St Matthaïs school and Bovington primary had opted not buy any trade visits for the school year 2016 – 2017 and the headteachers at Ark Brunel School and the Oratory Schools had told Ms Kerlake that they did not want the claimant to be their EP.
85. Ms Kerlake's additional reasons were because the EPC Service needed the claimant to be able to undertake the core work of an EP, which was the EHC work. Ms Kerlake was also concerned about the claimant's ability to sustain her return to work. The EHCs were discrete pieces of work which had set timescales for completion. By giving the claimant one at a time, it was easier for Ms Kerlake to manage the possibility of disruption to the EPC service if the claimant became unwell again. Allocating her this work also made it easier to measure the claimant's performance.
86. The claimant was also allocated Panel work. She and Ms Kerlake discussed other work (including social work supervision and ad hoc pieces of work) and that the claimant might be able to usefully do, but these discussions did not lead to anything significant.
87. Throughout this period, the claimant was also working extensively with Mr Harding to maximise the effectiveness of her use of Dragon. Their aim was to enable the claimant to be able to prepare an EHC report without having to type or use her mouse at all as the claimant was finding it painful to do this (426).
88. Ms Kerlake had direct contact with Mr Harding to find out how the IT adjustments required were progressing. On 18 June 2018, he emailed her and the claimant following having spent a very positive day (12 June) with the claimant. In his email he said: "...we are very far forward now, but it is not complete." He described needing two additional sessions in early July with the claimant and added:

*It is probably worth noting that all of the above I would consider should be "day one" interventions. What I mean by this is that I would usually aim to have all or most of it ready and in place immediately or very soon after a return to work. However, as you will be aware owing to a number of factors this has not been possible (no notice on RTW date, EP form changing, a/l commitments, complexity of the required programming etc.) Once all of the*

*above is in place and has been used to a period, then it will be appropriate to assess the effectiveness of the interventions.”*

89. We note he commented that, *“It is .... worth mentioning .... that whilst Tas’ case definitely merits the time spent this is exceptional. It is not possible to spend this amount of time for all or many cases.”* (973 – 974)
90. Mr Harding told the tribunal that on 12 June 2018 he had observed the claimant to be fluent in using the Dragon voice commands and that all of the coding work needed to ensure that Dragon worked with the EHC forms was in place. The two remaining sessions were needed, but were not very significant. In his mind, he anticipated all of the work being finally completed within around 6 weeks of 12 June 2018. In addition, he considered that the observations he undertook on 12 June 2018 were sufficient to satisfy him that they had optimised Dragon for the claimant’s use.
91. It is relevant to note that the relationship between Ms Kerlake and the claimant became increasingly strained during this period. In addition to line managing the claimant during this period, Ms Kerlake was also responsible for supervising her work from a practice perspective. This was creating a high workload for Ms Kerlake. Ultimately, it was agreed that the supervision role would be allocated to someone different. This was put into place in mid-June 2018.
92. An issue arose during this period with regard to note taking in the claimant’s meetings with Ms Kerlake. The claimant believed that Ms Kerlake had agreed to share the notes that she took during their supervision meetings with her. However, on 3 May 2018, Ms Kerlake replied to a request from the claimant for supervision notes for two previous supervisions, stating:

*“I don’t recall that was agreed that I would take notes and send them to you? I don’t do that for other Eps that I supervise. I take some notes on ‘Onenote’ on my iPad...they are notes for myself...”* 479
93. The notetaking issue spilled over into line management meetings and, in particular, into the process of reviewing the Tailored Adjustment Agreement. The claimant wanted the Tailored Adjustment Agreement to record in detail the full discussions that she and Ms Kerlake were having about her adjustments, whereas Ms Kerlake felt the agreement simply needed to document the outcome of the discussions. There were ongoing discussions and lengthy emails about this throughout the period from June to August 2018. We note that in an email to Ms Kerlake (copied to HR and Dr Mosen) dated 5 August 2018, the claimant stated that: *“Moving forward I think it would be helpful to have a note taker present a future meetings.”* (518)
94. In late June 2018, the claimant was referred by Ms Kerlake to occupational health. The claimant was consulted about the referral form.
95. The claimant attended the consultation with a different occupational health physician, Dr Kennedy on 18 July 2018. As was her legal right, the claimant

did not consent to the release of Dr Kennedy's report prepared on the same date. The primary reason for this was because Dr Kennedy did not have the claimant's file at the time of the consultation which meant the claimant had to tell him her entire medical history. She found this very distressing and felt the report was not accurate as a result.

We note the report (968-970) included the following relevant information, albeit reminding ourselves that the respondent did not have access to this information:

- In response to the question, "Is the claimant fit to carry out the duties in the job description?", Dr Kennedy made the following assessment:

*"I would regard the symptoms and effects of Ms Kapasi's condition as likely to reduce her capability to carry out the duties of the role, compared to what would be the case if she was completely well. Only through observation in the workplace will the functional implications become assessable, for example in relation to performance and ability to meet organisational expectations for the position held. Her symptoms of pain and fatigue could be distracting and reduce her energy levels and work output to a degree. Indeed, she told me that she used to cover a specific area of schools, but is now more focused on carrying out statutory assessment with the balance increasingly towards office-working rather than doing school visits. My impression is that she is also still adjusting to the technological aids at work which have been provided in support of the difficulties she has experienced.*

*Her symptom experiences are likely to vary over time. Whilst mindful to help Ms Kapasi avoid becoming unduly tired or in too much pain it will very much be up to Ms Kapasi to advise management if she feels she is becoming unduly tired or uncomfortable— following which increased adjustments or a review of her fitness may be needed."*

- In response to the question, "Are there any short term/permanent adjustments to the work tasks or environment that would help facilitate rehabilitation?" Dr Kennedy's assessment was:

*"You have already implemented many of the suggestion that I would have advised. I would simply add consideration of time off to attend any appointments that might help assess her health and promote her recovery, and to adopt reasonable flexibility in her working hours and arrangements – for example, consideration of working from home at times, subject to business flexibilities and core requirements that require on site working."*

- In response to the question, "What is the likely time-scale for recovery?" Dr Kennedy made the following assessment:

*"The nature of Ms Kapasi's condition is such that a specific timescale for recovery cannot be advised with any certainty, the effects waxing and waning over time with the potential for acute relapses at times when symptoms can become more severe and functionally impairing. Whether or not effects are primarily physical, in terms of reduced energy and mobility or*

*cognitive with the potential for adverse effects on memory and concentration, will vary depending upon the individual's circumstances."*

96. On 18 July 2018, the claimant and Ms Kerlake met to have an initial discussion of the claimant's targets for the academic year 2018 – 2019. Ms Kerlake said that she would not set any Tier 2 or Tier 3 targets at that stage so that her targets would focus on EHCs and mediations. They also discussed other work the claimant could undertake. The claimant explained that she had been seen by Dr Kennedy, but had found the experience very difficult and upsetting and was waiting to receive the report (428).

### **Preparation for Workplan Meeting**

97. In August, Ms Kerlake and Monsen began to prepare to meet with the claimant ahead of the commencement of the new school year. Both were concerned that the claimant had not built her workload up to anywhere near full capacity. By 8 July 2018, the claimant had completed 4 Panels and 4 EHC assessments (1 in the Spring Term and 3 in the Summer Term). This was all the work that she had been allocated by Ms Kerlake, but amounted to about 20% of the workload of a full time EP (427).

98. In consultation with HR, Ms Kerlake and Dr Monsen decided that it was appropriate to initiate a performance improvement process for the claimant under the respondent's Improving Performance Policy. During the course of the hearing, a dispute arose between the parties as to which of the two performance management policies that were contained in the bundle applied at the relevant time. We find that it was the Bi-Borough Policy at page 234A.

99. That policy begins with an informal stage. It then moves through two formal stages before culminating in dismissal. The purpose of the policy, however, is said to be:

*"to help managers resolve performance issues and to help employees to understand the level of performance expected and to demonstrate their ability. The policy aims to make sure that employees have sufficient opportunity to improve. The emphasis at each stage of the procedure is to support the employee to improve."* (234A-4)

100. The policy goes on to say:

*"Where an employee's performance at work may be impaired by poor health or disability, that should be discussed appropriately and taken into consideration."* (234A – 4)

101. The policy says the following, under the heading **"The Informal Stage of the procedure"**

5. *Before the informal stage of the procedure can begin, the line manager should have written evidence that at least one 'one to one' supervision meeting has taken place in the last two months, at which work performance was discussed. The line manager should also ensure*

## Case Numbers: 2201484/2019 & 2204769/2019

*that the employee has a copy of his or her job description and person specification, a copy of his or her annual appraisal targets, and is aware of the Council's corporate values.*

6. *With these documents in place, if the line manager believes that improvement in performance is required, the employee will be notified by letter of a supervision meeting, to identify and discuss performance concerns. As this meeting is part of normal staff supervision, there is no right to be accompanied by a chosen representative. There is more information about the right to be accompanied in paragraphs 34 – 36 below.*
7. *At the supervision meeting the manager will specify the work areas or skills that are of a concern and will confirm what standards are expected. There will be a discussion about how the employee can improve his or her work performance to close the gap between the current and the satisfactory standard. The manager will ask if there are any health or medical conditions which may be affecting work performance. If this appears to be the case, or if the employee requests it, then a referral should be made to the Occupational Health Service. The referral will run in parallel with the informal stage of the procedure.*
8. *If there are any personal factors outside of work which are adversely affecting the employee's work performance, which the manager could not reasonably be expected to know about, the onus is on the employee to share these so far as possible, on a confidential basis with the line manager, so that they can be taken into account.*
9. *The manager will detail and confirm with the employee an action plan. This will incorporate any training requirements or work experience that are needed to support the employee. The manager will confirm how the action plan will be reviewed. The performance concerns will be worked on as part of normal management over a period of either one or two months, to be decided by the manager.*
10. *The manager will arrange at least one further supervision meeting during this informal stage to discuss how the employee is progressing. Again, this meeting is part of normal staff supervision, and there is no right to be accompanied. A note of the meeting will be given to the employee and kept on file.*
11. *At the end of the informal review period the manager will write to the employee to confirm either that the performance concerns have been resolved at the informal stage or that there are still performance concerns and that insufficient improvement has been made. In the case of insufficient improvement and concerns remaining, the first formal stage of the process will begin.*
12. *If the employee's performance is acceptable after the informal review period, the manager will confirm this in writing to the employee, explaining why this decision has been made. This letter will also inform*

*the employee that if their performance falls below standard again within six months they will become subject to the first formal stage and there will be no need to conduct another informal stage.” (234A-4 – 234A-5).*

102. At a meeting in early August 2018, Ms Parkin recommended that Ms Kerslake prepare a document that outlined, in detail, exactly what would be expected of the claimant in terms of work output. This became known as the Workplan. Ms Kerslake and Dr Monsen intended to meet with the claimant to go through the Workplan in draft with her at the end of August to get her input into it before finalising it.
103. KH prepared a proposed Work Plan. She sought HR feedback on the document from Ms Parkin, who reviewed it and made a slight amendment to it. (534A)
104. Ms Kerslake did not make an additional referral to Occupational Health in connection with Workplan. When asked about the requirement in paragraph 7 of the Improvement Performance Policy, she explained that she thought this applied where there had been no previous referrals.
105. Ms Kerslake did however email the Occupational Health service on 17 August 2018 to ask if Dr Kennedy could answer an additional question about the level of sickness absence to be expected from the claimant (964). Dr Kennedy’s short report (dated 12 September 2018) prepared in response, simply said that it was likely that the claimant would *“have/need more sick leave over the next 12 months than our typical/average employee with no existing medical problems”* (967)
106. The short report was never shared with Ms Kerslake. Occupational health treated the claimant as refusing consent for the release of this short report in addition to the main report. This was not accurate as the claimant had not been told about this additional request for information from Dr Kennedy.
107. Ms Kerslake and Dr Monsen also exchanged emails with Mr Harding to ensure they understood progress made with the IT interventions. On 7 August 2018, Mr Harding emailed them saying:  
  
*“I was concerned at the start of the year about Tas. We now have the things we need in place. Tas has also worked hard, achieved a lot in terms of getting to grips with the software adaptations. This bodes well for the future.”* (362A)
108. He then forwarded a second email to them dated 8 August 2018, which he had sent to the claimant. It contained information he had put together for the purposes of the claimant’s appeal to Access for Work for support worker funding. The email attached a table providing his assessment as to the work tasks that the claimant was able to undertake (522 – 523 and 436).
109. Mr Harding’s assessment was that the claimant could use Dragon to fully complete four key work tasks as quickly as any other employee, including

dictating emails and managing them in Outlook, writing up EHC reports and managing files. This covered around 70/80% of the claimant's role. There were five tasks that she could complete, but more slowly than other employees and one task that Dragon could not assist with.

110. Based on the assessment, the claimant was later granted funding for a Support Worker for 1.5 days per week for 6 months from Access to Work. This was confirmed on 18 September 2018. The purpose of the support was to assist with the tasks that the claimant could not do using Dragon or could not quickly enough.
111. The meeting with the claimant was arranged for 22 August 2018. Ms Kerslake and Dr Monsen anticipated that the meeting might be a difficult meeting and so decided that both of them should attend, rather than the meeting be conducted by Ms Kerslake alone. Ms Kerslake emailed the claimant on 15 August 2018 saying that she and Dr Monsen would like to meet the claimant before the beginning of the new school year to clarify her allocated work for that school year.
112. It is not disputed that Ms Kerslake and Dr Monsen did not write to the claimant to tell her that they were invoking the Improving Performance Policy in advance of the meeting. This was because they felt it would be better to explain this in person to the claimant. Ms Kerslake told us that she was concerned that the claimant would find the prospect of the meeting stressful and would go off on sickness absence if she was told the true nature of the meeting in advance.
113. Because of the claimant's perception in connection with the recent difficulties in communicating with Ms Kerslake, the claimant requested a note taker to be present at the meeting. When she was informed that this would not be possible, she sent an email to Monsen and KM saying the following:

*"Thank you for your reply. I'm hopeful it will be a positive meeting focused on my EP work arrangements. If there is going to be anything else on the agenda, please do let me know in advance.*

*I'm concerned by your decision that a note taker is not required. In light of recent events, which I will not expand on here, it seems clear that having an independent record of the contents of line management meetings, as well as action places, is important for everyone. This could be any other member of staff or due to the nature of my medical condition, I could use dictation device which is a recommended reasonable adjustment.*

*Jey, I appreciate that I am meeting with you for the first time but I cannot emphasise enough that I do not want to be left upset in any way I have been following previous time management meetings. My absolute priority is to stay healthy and focus on my EP role. I want to avoid all unnecessary stress and conversations that have a negative impact on my health.*

*I hope you will give the above some consideration."* (524)

114. Monsen replied saying:

*“Thank you for this - the purpose of tomorrow’s meeting is rather straightforward and involves Helen and I going through with you the operational plan for the start of the new term and your return to full time duties.*

*As such all that is needed is a checklist of Action Points which I will keep and type up.*

*Hope this clarifies.” (524)*

### **Workplan Contents**

115. The Workplan recorded that:

- As of 3 September 2018, the claimant would have all the reasonable adjustments and training in place as recommended by PH, Posturite, Access to Work and Mr Harding and that this included being able to work from home with the same or similar equipment in place as she had at the office base
- That she would continue to have the support of the graduate intern for 1.5 days per week until the week ending 25 October 2018, although this would be reviewed depending on the outcome of the Access to Work appeal
- The claimant would not be allocated any Tier 2 or Tier 3 work
- The claimant would attend 10 Panels over the course of the 2018/2019 academic year
- The bulk of her time would be sent doing EHC assessments and reports
- Certain other types of work would be allocated where possible and would be treated as Tier 1a

116. The workplan also incorporated a table breaking down the allocation of the claimant’s hours of work. Using the framework of the Time Costed Deployment Model it was envisaged that she would achieve 90% productivity during the first half term of the Autumn term, rising to 100% by Christmas. This equated to the completion of 7 EHC Reports (each taking 18 hours) before half term and 8 (each taking 18 hours) after half term, all of which needed to be completed within 6 week timescale.

117. The document noted that the percentage of work allocation required to be completed would be reviewed at Ms Kerlake’s discretion and that she and the claimant would meet fortnightly to monitor the volume of work, time-frames and to problem solve any issues.



118. Finally, it noted that if the claimant was not able to keep to the deadlines set, the respondent's formal Managing Poor Performance procedure would need to be invoked and that the respondent's agreed level of sick leave (over a 12 month rolling period) that triggers the Sickness Absence Policy would apply to the claimant (532C – 532D).

### Workplan Meeting - 22 August 2018

119. The meeting took place as arranged on 22 August 2018. A detailed note of the meeting produced by the claimant was contained in the bundle (532E – 532G). In addition, following the meeting, on 24 August 2018, Ms Kerslake emailed the claimant with an email that Dr Monsen had written but which he had been unable to send to the claimant.

120. The email said:

*“Dear Tasnim,*

*Thank you for meeting up with Helen and I today*

*1. The purpose of the meeting was to run through the operational plan for your return to fulltime work from the 3rd of September 2018 following a prolonged period of sickness/absence.*

*2. Our main aim was to re-assure ourselves that you were absolutely clearly about the plan involved and what you will need to deliver etc. and the management and practice supervision supports that were in place. At the end of the meeting you clearly stated that you were clear and did not have any further questions or queries.*

*3. Helen will meet you on the 14th September of your first two-weekly Line Managers review.*

*Many thanks Jey.” (526)*

121. The substantive discussions at the meeting lasted about 40 minutes.
122. Ms Kerslake and Dr Monsen presented the two page Workplan document to the claimant and gave her an opportunity to read it before discussing it. The claimant obtained the impression that the contents of the document were fixed and could not be changed as it had been agreed with HR. We find that this was a fair impression for her to have had based on the way the material was presented.
123. The claimant asked a number of questions about the document. A key question for her was why she had not been allocated any Link EP work and she asked about this several times. During the course of the discussion about this, Ms Kerslake informed the claimant that one of the schools the claimant had worked with had cancelled the contract with the respondent. The claimant was not reprimanded for this. In addition, Ms Kerslake told the claimant that none of the schools that she had previously worked with wanted her back. This was the first time she had told the claimant this.

124. Dr Monsen emphasised that the purpose of the document was to ensure that the claimant clearly understood the expectations on her and that it would help her to focus on these. There was a discussion about the perception that Ms Kerlake and Dr Monsen had of the claimant that she was spending a lot of time on things that were not core tasks. Dr Monsen gave, by way of an example, an email the claimant had sent to colleagues. The claimant was not reprimanded over this email.
125. Dr Monsen did say to the claimant at one point during the meeting, "*I think, if you don't like what you hear, you choose to hear what you want.*" Neither he nor Ms Kerlake shouted at the claimant during the meeting.
126. The claimant was upset about the conduct of the meeting and was off work sick for the next two days following the meeting. The claimant did not visit her GP.

### **Events following the Workplan Meeting**

127. Following the meeting, the claimant began to work to the Workplan. She did not reply to the email that she had been sent on 24 August 23018.
128. It is significant to note that on 13 September 2018, the claimant emailed Ms Kerlake, copying in Dr Monsen, to say:

"I'm saddened to say that I feel there has been a break down in trust and communication which has built- up since I returned from sickness absence. In previous meetings I have felt disrespected and intimidated, particularly on 19th July 2018 when I had to leave the room and the 22nd August 2018 after which I was unwell and needed to take sick leave.

I feel very stressed about the arrangements you have put forward for the forthcoming meetings as there would be no independent account of the discussion and this I feel has significant implications on how I am being judged. For this reason, I'd like to ask you to reconsider my request [made on 10 September 2018] to put the reasonable adjustment of a colleague to scribe or use of a dictation device." (535)

129. Ms Kerlake replied on 17 September 2018 saying:

*"Dear Tas*

*I have now spoken to HR and received the following advice.*

*Employees do not have the legal right to record and internal meeting. Therefore, if an employee asks to record a meeting, as the employer, you must decide whether or not to limit the request. As a council it's not our practice to have 1:1 meetings between and employee and line managers recorded or scribed, and we don't encourage this.*

*It is totally acceptable for a manager to meet with their member of staff as part of regular one to tones without having it scribed or recorded. At the end*

*of the discussions an agreed action plan and summary of the meeting can be signed by both sides as a true record of the meeting.*

*Therefore I would like to go ahead with the plan I suggested originally for recording of the meeting. I will bring my laptop to the room and I will type the notes as well go along and we can agree them in the meeting.” (538)*

130. Because the claimant was seeking clarity around the process being applied to her, Ms Kerslake sent her a lengthy email to her on 26 September 2018 explaining that she was officially on the informal stage of the respondent’s Improving Work Performance Policy. The claimant was advised that the formal review period would end on 5 November 2018 and that the consequence of her not meeting the targets outlined in the Workplan would be progression to the formal stage of the procedure (546).
131. During the meetings with Ms Kerslake, the claimant told her that that it was taking her a lot longer than 18 hours to complete EHC assessments. Ms Kerslake responded that she appreciated that was something she found difficult. She noted that other EPs had the same difficulty, but it was something all EPs have to learn to adjust to.
132. In addition to attending regular meetings with Ms Kerslake, a meeting was arranged between the claimant and Dr Monsen, accompanied by a member of the respondent’s HR Team on 5 October 2018. The trigger for the meeting was the claimant’s email to Ms Kerslake of 13 September 2018. As a direct result of the meeting, Dr Monsen, proposed an “Agreed Protocol for 1 to 1’s” – Management Monitoring Sessions” which was intended to address the concerns about communication between the claimant and Ms Kerslake at their meetings and how this should best be documented.
133. Notwithstanding this intervention, the claimant continued to raise concerns with Dr Monsen. She wrote to him on 22 October 2018 to say that she was finding the performance management process stressful and, in particular, said that the reasons for putting onto formal monitoring had never been explained to her. The claimant also told Ms Kerslake she was finding the monitoring stressful and reiterated her request to have a person present in their meetings to provide an independent record of the meeting. On 24 October 2018, the claimant wrote to Dr Monsen asking him to reconsider her request for a scribe to be allocated to cover her meetings with Ms Kerslake. She said in her email that, it was *“humiliating to go through a monitoring process where my work output is measured against that of an EP without my health conditions and this has added unsurmountable stress and pain to my already chronic health condition.”* (583/4)
134. Between 29 October and 16 November 2018, the claimant was absent from work on sick leave. Her GP notes record that this was due to a flaring up of her chronic pain symptoms. There is a reference to *“Currently a lot of stress at work making it worse.”* (1036)
135. The claimant’s GP certified her as fit for work on a phased return of two days per week from 19 November to 2 December 2018 (1037). The reason she

was not able to return to full time work was because of her chronic pain. As it transpired, the claimant continued to work at most two days each week (excluding holidays) until 4 May 2019 when she went off on long term sick leave. She did not return to work after that date before her dismissal.

136. As a result of the claimant's sickness absence, Ms Kerlake decided to extend the period of informal performance monitoring to 3 December 2018.

**Performance Review and Sickness Absence Meetings – 3 and 6 December 2018**

137. Dr Monsen met the claimant on 26 November 2018 to tell her that the targets had not been met and that, as a result, the process was that she would progress to the first formal stage of the performance management process. Ms Kerlake wrote to the claimant on 3 December 2019 to formally confirm this. She included with her letter with the outcome of her review the claimant's performance against the targets she had been set on 22 August 2018 (587 – 589A).
138. When undertaking her review of the claimant's output between 3 September and 3 December 2018, Ms Kerlake excluded the first two weeks of term as not all schools start at the beginning of the first week and it is not easy to set up assessment work early in the Autumn term. This left an 11 week assessment period, from which she deducted the claimant's absence of 19 days leaving 7 weeks and 1 day remaining.
139. She noted that the claimant had fully completed 4 EHCs, nearly completed another one and had carried out the assessment work for a sixth. She calculated the claimant's work at 79%. She noted that other EPs would be expected to complete the equivalent of 12.5 EHCs in the same adjusted timeframe.
140. Her letter concluded: *"work performance has not reached an acceptable standard following your return to work in December 2017.... even though all support and reasonable adjustments have been put in place. This is because you have not been able to produce an adequate amount of work within the informal monitoring period. Your reduced output of work has had a very significant impact upon our service which we cannot be sustain."* (587-589).
141. Ms Kerlake also invited the claimant to attend a Sickness Review Meeting which took place on 6 December 2018. The review meeting was triggered by the fact that between 14 May and 16 November 2018, the claimant had had four separate sickness absence occurrences with a total of 18.5 days off work (590)
142. The meeting was conducted by Ms Kerlake. The claimant was accompanied by her trade union representative. HR was also in attendance and took a note of the meeting (592 – 593).
143. At the meeting, the claimant and her trade union representative explained that her sickness absences were disability related and argued that the normal sickness absence trigger of six days per 12 months should not

therefore be applied to the claimant. The claimant reminded everyone present that Dr Jukes had recommended that the standard sickness trigger threshold of 6 days per 12 months should be adjusted to 10 days. The respondent did not dispute that the claimant's absences were disability related.

144. The claimant and her trade union representative also sought to discuss the performance management process saying that it was unfair that the claimant was being required to perform at the same level as other EPs without her condition. They expressed the view that the performance management process was causing the claimant stress and causing the flare ups of her chronic pain condition. The respondent responded to say that the performance management process was separate.
145. The claimant and her representative also said that they should have been allowed to record the meeting. Although the claimant's trade union representative was taking notes, she said it was difficult to do so and participate fully in the meeting.
146. The outcome of the meeting was that the claimant was issued with a first caution under the respondent's sickness absence management process. She was told that her absence would be monitored for the following three months. The respondent agreed however to adjust the trigger for progression to the next stage of the process during this period from 3 days to 5 days (590).
147. On Sunday 9 December 2018, the claimant sent several emails to Ms Kerslake and Dr Monsen. Some of these were replies to emails sent to her while she was absent on sick leave (594 – 601). The claimant reiterated her concern that she was being performance managed.

#### **Email of 20 December 2018**

148. On 20 December 2018, Dr Monsen wrote to the claimant by email to inform her that he decided that she would no longer be given EHC Assessment work in 2019. He explained his rationale in his email, which concluded with him saying, "*I would like this letter to be discussed at your formal first review of work performance meeting with Helen Kerslake, HR and your Union Representative.*" (608).
149. The email explained:

*"As principal EP I need to balance your health needs against those of the service and importantly our clients and commissioners. Given the conversations you have been having this email should not come as any surprise to you. I am mindful of the impact your absence and work output is having on the team and also the wider organisational, reputational and trust issues at stake for the council if you do not meet your obligations to service users. Given this I have thought long and hard and have concluded that I cannot give you any more Education, Health and Care EP Assessment work in 2019.*

150. The email also explained the rationale for this decision as follows:

- *Following an extended period of sick leave (over a year) and a prolonged phased return to work since the end of December 2017, I introduced the formal monitoring stage to oversee your performance, starting on the 3rd of September 2018 (first day of the new school academic year for 2018-2019). This was initially for 2 months and was extended to 3 months when you had some further sickness. We wanted to provide an opportunity for you to work back up to 100% workload with all reasonable adjustments in place by the end of this period.*
- *This took into account that you had in place by then a range of comprehensive reasonable adjustments.*
- *You were given a clear plan detailing the work expected of you (mainly Statutory Work- assessment and report writing) with a reduced amount of work for the first 8 weeks and the type of work tasks was also adjusted. Where possible less important tasks which fulfilled our service requirements and where little writing was required were allocated to you, such as SEN Panel attendance and attending Mediations - but this work is very limited. We also triaged other work and gave you less complex tasks and tasks which avoided travelling. We decided not to allocate Tribunal (Court) work as this was stressful for you.*
- *I had already reluctantly made the decision not to allocate you any Traded Work (Tier 3) in the borough's schools (i.e. Non-Statutory work). This was because prior to the year-long extended sickness period you had had a period of 5 weeks of sickness related to the same chronic medical condition. The schools that were buying in our service at the time and had been allocated as their Link EP felt very let down and suffered in terms of being able to meet the needs of their pupils (e.g. paper work to support their Statutory Requests, reviews meeting summaries, intervention programmes etc).*
- *Other Educational Psychologists (EPs) then had to take on additional work and cover these schools during your subsequent year of absence. Upon your return in December 2017, I could not in good conscience risk-destabilizing the need for consistent positive links between our EPs and schools any further, in what is a very competitive trade psychology market. As a traded service we rely upon our traded work to meet annual income generation targets.*
- *Given the nature of a Statutory Traded Service, we work with some of the most vulnerable children/young people and families across the Bi-Borough. Our work is sensitive and complex. As a professional grouping of EPs we were also mindful of the need for efficacy, promptness and quality in our dealings with SEN colleagues, schools, and parent/carers.*
- *Sadly, over the three-months period described earlier, you had just over 21 days of sick leave. this has meant that allocated Statutory casework was not completed in the timeframes prescribed by Government (SEN Code of*

*Practice 2014). One report is over 6 weeks overdue. Given the nature of our work it is difficult for another EP to complete unfinished work. This would mean meeting parents/carers and teachers again and the pupil, etc. This goes against both the SEN legislation and good practice, not to mention credibility.*

- *It is therefore my view that your unreliability and inconsistency has meant that as Principal Educational Psychologist with a duty of care to our clients (e.g. vulnerable children/ young people, parents/carers not to mention schools and the Bi-Borough SEN Section). I cannot in good conscience continue to give you this type of work (i.e. SEN Statutory Work). The problem for me is that there is now very little in the way of EP tasks that I can allocate to you.*
- *This for me raises very real and pressing competency to practice issues, along with the ongoing fitness to work issues.” (607 - 608)*

### **Formal Performance Review**

151. On 21 December 2021, the claimant was notified by email by Ms Kerslake of an invitation to a formal review meeting under the performance management process scheduled for 17 January 2019 (643).
152. On 10 January 2019, Ms Kerslake made an occupational health referral for the claimant (622). Ms Kerslake copied the claimant in when emailing the referral form to occupational health, but did not consult the claimant with regard to the information contained in the form.
153. The claimant was seen by Dr Cooper on 11 February 2019 who prepared a report on the same date (935-937). Dr Cooper's report was not available at the Formal Performance Review Meeting.
154. The Formal Performance Review meeting took place on 17 January 2019. The claimant was accompanied by her trade union representative. Ms Kerslake conducted the meeting and was supported by a representative from the HR department. Notes were taken of the meeting (623-625).
155. The claimant was provided with the outcome of the meeting on 4 February 2019 in a letter from Ms Kerslake. The outcome was that the claimant was issued with first formal warning under the respondent's performance management policy. The letter also confirmed that the process would be suspended. This was because Dr Monsen had decided that the claimant was not to be given EHC work which left very little work against which to monitor the claimant's performance.

### **Claimant's Grievance**

156. On 7 February 2019, the claimant submitted a grievance under the respondent's Dignity at Work Policy. The claimant alleged the following:

- the respondent was incorrectly using its performance management policy to manage a health condition rather than a work performance issue,
- a number of the decisions taken by Ms Kerslake and Dr Monsen constituted discrimination arising from disability
- the stressful working environment created, including the Formal Sickness caution and First Formal Performance, together with comments made by Ms Kerslake and Dr Monsen had caused her to have a significant physical and emotional set back which had adversely impacted on her performance.

157. The claimant indicated that the outcomes she was seeking were:

- *“Independent review of my case, with a focus on the managerial practices and decision to instigate the Improving Performance Policy and Sickness Absence Procedure, and any subsequent outcomes that emerge following the conclusions of the review.*
- *To promote equality and fairness for current and future Bi-Borough employees by reviewing policies and treatment of employees with visible and hidden chronic health conditions.*
- *Disability and supervision training for Children’s Services Managers.*
- *Disability training for Human Resources (HR) colleagues.*
- *Occupational psychologist perspective to inform OH medical assessments.”*

158. She concluded her grievance with the following paragraph:

*“I appreciate the numerous reasonable adjustments have been put in place. However, I believe that there have also been significant discriminatory practices that have occurred that have led to the current situation. Hopefully this is an opportunity to review HR policies and material practices and conduct to ensure that employees with disabilities and health conditions are supported to maximise their ability to input into the Bi-Borough’s business and service needs.” (651-654)*

### **Occupational Health Assessment**

159. The claimant was seen by the respondent’s occupational health service on 11 February 2018. She was accompanied by her brother to the consultation. On this occasion she was seen by Dr Cooper. Dr Cooper’s report included the following by way of background information:

*“Ms Kapasi spoke to me about stress she is experiencing at work. She told me that from September 2018 she has had her performance monitored. She has had a first sickness absence warning in December 2018 and is expecting a final sickness absence warning. She told me that she is currently working two full days per week but feels she is struggling. She said that she has tried working for shorter days but found her productivity was*



*poorer. She feels under pressure to work more quickly. She said she was 'looking for OH advice with helping her managers to understand the impact of her chronic pain condition'. She worried whether the targets set for her are suitable and took into account her condition. She told me that work takes longer using Dragon dictation due to pain and concentration difficulties. She told me that it also takes a long time to listen to recordings and feels that this is not understood at work. She told me that she was not fully trained and the software was not fully functional until June 2018. She feels she is still learning to work with the equipment and frequently has to use her hands. She travels to work by train and underground.*

*Ms Kapasi told me that her work situation is difficult. She feels that her relationship with her line manager has deteriorated since July 2018. She became quite upset during the consultation speaking about the difficulties with her line manager and being monitored. She feels that these difficulties have aggravated her symptoms and caused sickness.*

*Ms Kapasi told me that she works from home where possible to complete reports etc now the home set up is in place. I note that she has the assistance of a support worker for 11 hours week. She appreciates the support because she said it helps her to complete her work tasks."*

160. Dr Cooper assessed the claimant as fit for work with adjustments. She saw no reason to recommend any further adjustments (934-938). The claimant did not refuse consent for the release of the report, but sought a number of amendments to it first.
161. On 1 March 2019, the claimant initiated the Acas early conciliation procedure. The Acas certificate was issued on 1 April 2019 (79). The claimant also applied for ill health early retirement at around this time.
162. Up until 13 March 2019, the claimant's medical certificates were saying that she was only fit to work 2 days per week because of chronic pain and fatigue. From 13 March 2019 onwards, the claimant's GP added "stress and anxiety" to the medical certificates (1039).
163. On 5 April 2019, Ms Kerslake spoke to Dr Cooper about the claimant. Ms Kerslake had emailed Dr Cooper to check if she was aware that the claimant was only working two days per week on the basis of her GP's medical certification. This led Dr Copper to call her. Ms Kerslake emailed Dr Monsen, and HR after the conversation setting out details of it. Her email said: –

*"Dr Cooper said:*

*She was very aware that TK is meant to be working full time but is only working 2 days at the moment.*

*Dr Cooper does indeed think that from a medical point of view she is fit to work full time in the role of an EP. She agreed with me that her symptoms are vague and there is not medical evidence for why she should be in so much pain and she should not be using her hands. She believes that she*

*may have some soreness in her hands but that 'her difficulties are largely psychological'.*

*In the consultation with Dr Cooper, TK was very vague and deferred to the person who she said was her brother a great deal and was a 'poor historian' in terms of remembering things from the past. She suspected therefore that she would 'not be a very good EP' because of this.*

*Dr Cooper obviously does not know everything about the current HR situation with TK but suggested that we could ask TK 'Do you feel you are able to work more than 2 days a week?' (She assumes she will say 'no') and we need to respond that we therefore need to make an adjustment and will need to adjust her contract to be 2 days a week only.*

*Dr Cooper described how her report was batted backwards and forwards between TK and her and was heavily edited by TK as a result.*

*Dr Cooper believes that TK's main issue is about being performance managed, which she doesn't like." (478A)*

### **III-Health Retirement Assessment**

164. On 16 April 2019, the claimant was further referred to the occupational health service for an ill-health retirement assessment. This was carried out by Dr Nwobodo who advised that:

*"...on balance of probabilities, she currently does not meet the criteria for ill Health Retirement..."*

*"I believe that she would benefit from further optimism of the supports she is currently receiving at work factoring in time element and impact of current workplace adaptations on her pace at work i.e. speed of typing and writing vs. speed of recording and using voice recognition software (especially at the initial stage of use when the software is still getting used to her voice profile and when she is learning the voice commands. Perhaps a case conference would be helpful to discuss the above and optimise adjustments at work to achievable levels and in doing so reducing stress levels at work." (945-947)*

### **Grievance Outcome and Appeal**

165. In the meantime, the claimant's grievance had been considered by Richard Stanley, Deputy Director of Education. Ms Kerslake and Dr Monsen provided a written response to the issues on 14 March 2018 (658 – 679). The claimant was invited to attend a grievance meeting on 22 March 2019. She was accompanied by a colleague at the meeting. Minutes were taken of the meeting (682 – 692) which lasted just less than three hours, including short adjournments to allow the claimant to take a break. The claimant also provided Mr Stanley with additional documents.
166. Following the meeting, Mr Stanley confirmed the outcome in a letter dated 17 April 2019 (699 – 702). His conclusion was that he could find no

substantial evidence to uphold the three areas of the claimant's grievance. He considered, however, having reviewed the detail of the claimant's case that there was important learning for the service, particularly around the management of long-term sickness and chronic health conditions. He therefore made the following recommendations to senior managers:

- A review of the current sickness absence procedures and policy, specifically around resolving matters with staff diagnosed with chronic health conditions and long-term absences that impact on their well-being, including procedures for obtaining medical assessments and advice;
- Training, guidance and support for Human Resources and Service managers on the management of a chronic health conditions should reference the learning from this case.

167. His letter does not explain why he felt these recommendations were important or necessary.

168. The claimant submitted her first employment tribunal claim on 30 April 2019.

169. She submitted an appeal against the grievance outcome on 1 May 2019 (709 – 712). In addition to the matters in her earlier grievance she also included an additional complaint about an email exchange she had with Dr Monsen.

170. On 15 April 2019, Ms Kerslake had emailed the claimant (copying Dr Monsen in) to say that the individual who was currently working as her support worker for 11 hours per week funded by Access to Work would shortly be reassigned. This was because Ms Kerslake believed that the Access to Work support was due to come to end on 26 April 2019 (698B). The claimant responded to the email on 18 April 2019 saying that it was upsetting to hear about this decision that had been taken without liaison with her and to explain that she was already in discussion with Access to Work about an extension (698A).

171. On 19 April 2019, which happened to be Good Friday, Dr Monsen responded saying:

*“Tas, would you like to reconsider the content and tone of this email and resend after due reflection – before I respond to you formally next week please.”* (698A)

He copied HR into his reply.

172. On 23 April 2019, which was the first day back to work after Easter Monday, towards the end of the working day, Dr Monsen sent a follow up email saying:

*“Dear Tas*

*I am really surprised, as you sent other emails today (that really weren't high priority from my perspective – Summer Birthday etc) that you have not shown me the courtesy as PEP of replying to my email – unless I hear from you tomorrow, I will assume your email to Helen stands.*

*I will reply and also arrange a face to face meeting – we haven't had the opportunity for ages to meet and I think your conduct and emails warrant some fresh reminders of minimum expectations in our busy professional psychology service. I'll be in touch.*

*I'm happy for you to bring a support that is acceptable to me as well."*

173. The claimant says that the initial response from Dr Monsen "felt very hostile". She had not wanted to send a knee jerk response to it, but waited until she had time to reflect on it, hence she did not reply while on holiday or immediately on her return.
174. Access to Work extended the support worker funding for a further period.
175. The claimant's grievance appeal was initially rejected on 8 May 2019 on the basis that she had failed to identify a procedural error. She was, however, invited to provide a further submission by 17 May 2019 if she wished which she did (715-16).

## **Second Long Term Absence**

176. On 29 April 2019, the claimant had visited her GP and been referred to a chronic fatigue syndrome (CFS) specialist team (1047).
177. The claimant became too unwell to attend work two days per week from 4 May 2019. She was certified as unfit to work by her GP who described her condition as "chronic fatigue, stress and anxiety" on her medical certificate. Her GP initially signed the claimant off until 28 May 2019. The sickness absence continued after this, however, and the claimant did not return to work before her subsequent dismissal. The claimant was prescribed an anti-depressant for her anxiety on 7 May 2021 (1047).
178. The claimant's medical certificate between 28 May and 28 June 2019 gave her reason for absence as "CFS, anxiety and work stress." Her anti-depressant dose was increased. Her GP notes say that the claimant had not yet heard from the CFS service (1048).
179. By 28 June 2019 however, the claimant had been to the CFS service and had had a confirmed diagnosis. The diagnosis was later confirmed in writing (880 – 884). We note that the claimant completed a Hospital Anxiety and depression assessment "scoring Anxiety 19/21 (severe) and Depression 15/21 (severe)" (881).
180. In addition to continuing to take an anti-depressant, the claimant was prescribed sleeping pills. Her medical certificate was extended to 5 August 2019. (1048) On 2 August 2010, her medical certificate was extended further

to 7 October 2019. The medication certificate said “CFS, chronic pain, anxiety and work stress” (1051).

### **Case Conference**

181. On 5 August 2019, the claimant attended an OH Physician appointment with Dr Cooper. The claimant informed Dr Cooper that she had been diagnosed with ME/CFS in June. Dr Cooper recorded this in the report that she prepared. Dr Cooper also recorded that the claimant reported “symptoms of significant anxiety and depression [including] impaired sleep, impaired concentration and some impairment in memory.” The report records that the claimant told Dr Cooper that she was taking medication for her pain and anti-depressant medication and had completed 11 out of 12 counselling sessions (755 - 26).
182. Dr Cooper’s assessment was that the claimant was unfit to carry out her role irrespective of any support that could be offered. Dr Cooper said that she could not predict when the claimant would be well enough to return and that it was likely to be several more months at least. She added, however, that there was no medical evidence that the claimant was permanently unfit for work given that she had been found not to meet the criteria for medical retirement (755-26 – 755-27).
183. On 12 August 2019, the claimant was invited to attend a case conference under the respondent’s sickness absence policy dealing with long term sickness absence. Present were the claimant and her colleague, Lorraine Hancock as well as Ms Kerlake, Dr Cooper and Lisa Parkin. Notes of the meeting were taken and shared with the claimant (745-746).
184. The claimant had not confirmed release of Dr Cooper’s most recent report as of 12 August 2019. The earlier report dated 11 February 2019 was available and the claimant’s medical certificates. It was noted that as of 7 October 2019, the claimant would have been absent for 22 weeks. It was also noted that the claimant had been assessed as not meeting the criteria for ill health retirement.
185. The respondent issued the claimant with a caution under the respondent’s absence management policy, that if she was not able to return to work within a month (by 12 September 2019), a recommendation would be made to the director about her continued employment with the respondent. This was confirmed in writing to the claimant on 16 August 2019 (747).
186. The claimant subsequently wrote a detailed addendum to Dr Cooper’s report which provided added factual detail (755-29 – 755-30). This included clarifying that her counselling was CBT. We note from additional information in the bundle that the claimant had 13 sessions of CBT between 5 April and 29 August 2019, the main purpose of which was to help her manage her pain. The letter from her treating therapist dated 17 September 2019 records:

*“During our sessions, we collected PHQ9 and GAD7 scores. [The claimant scored in the severe range for both]. We discussed this and noted that this*

*may be likely since you are currently going through a work tribunal and that this was a very distressing time for you.” (913)*

187. On 9 August 2019, the claimant complained to the respondent about the time that it was taking to hear her grievance appeal and also submitted a second grievance about her pay. Sarah Newman, Acting Bi-Borough Executive Director of Children’s Services was appointed to consider both and sent the claimant a holding reply on 19 August 2019 (750).
188. On 6 September 2019, the claimant initiated a second Acas early conciliation process. This came to an end on 6 October 2019 (80).
189. On 19 September 2019, the claimant submitted an appeal against the medical rejection of her application for ill Health Retirement (862 – 864).

### **Sickness Panel Meeting and Dismissal**

190. The claimant was invited to attend a Sickness Panel Meeting on 2 October 2019. In attendance were Julie Ely (who chaired the meeting), the claimant, Ms Hancock and Ms Kerlake. Representatives from the HR department, including Lisa Parkin, were also present in a support capacity. Minutes were taken of the meeting (850 – 851).
191. In the course of the discussions, Ms Ely asked the claimant if she could describe her role. This was a question to which Ms Ely already knew the answer, having had the role of an EP outlined to her by Ms Kerlake. In addition, Ms Ely asked the claimant more than once what she thought happened to her work when she was absent due to illness, even though Ms Kerlake had outlined this to her. A full note of the questions is at page 857 of the bundle.
192. Ms Hancock, who was present at the meeting as the claimant’s work colleague told us that she thought these questions were unnecessary and found the tone used by Ms Ely when asking these questions shocking. She distinguished between Ms Ely using a formal tone in parts of the meeting and a sharp tone when asking these questions. She did not intervene or say anything, however, and nor did the claimant.
193. Ms Ely accepted, when giving evidence, that her tone was formal at the meeting and that she was insistent that the claimant answer her. This was because she wanted to check the claimant’s understanding. We find that Ms Ely’s tone became slightly sharper when the claimant failed to initially answer the questions she was asking. Had her tone been inappropriate, it is likely that one of the HR Team members would have interjected or Ms Hancock or the claimant would have objected. Ms Parkin’s evidence to us was that she did not consider Ms Ely’s tone to have been inappropriate.
194. The claimant said that since July 2018 she had repeatedly expressed concerns which she felt had been dismissed or ignored. This had led to her submitting grievances which were outstanding, as was the appeal against the rejection of her application for ill health retirement. She confirmed that she was not fit to return to work, even with the adjustments that had been

made. She also said that she did not know when she would be fit to return to work. She did not put forward any other suggestions by way of further adjustments that would assist her.

195. Following the meeting, Ms Ely recommended to Ian Hegg that the claimant should be dismissed. On 3 October 2019, Ian Hegg wrote to the claimant to terminate the claimant's employment. In his letter he said:

*"There is naturally sympathy with you that your health remains so poor, but Helen pointed out the consequences of your extensive time off on the work of the department, both in terms of the effects on service users. On your team colleagues who covered your workload and the extra costs of hiring locum staff to cover your work.*

*The pack of papers referred at the hearing included the outcome letter from the case conference held on 12 August 2019 confirming that you had been issued with a formal caution that your continuing absence from work could not be sustained. Further to this Helen presented recent advice from the Council's Occupational Health Service that states you are unfit to carry out the duties of an EP, irrespective of any support that could be offered and that no adjustments to the work environment or work tasks would help rehabilitation or an early return to work. You confirmed that this was the case; you cannot envisage yourself returning to work in the near future.*

*In response you said that you had on numerous occasions raised your concerns about emails and meetings with various people and HR but these had either been dismissed or ignored.*

*You also stated that you had an outstanding grievance appeal a further grievance and an appeal against the decision not to award you ill health retirement pending and none of this had been referenced in Helen's report. Further, you hoped Julie would take this into account when making her recommendation.*

*Julie has reflected carefully on everything that was raised and discussed and has come to the decision to recommend your dismissal to me. This is a decision that I support as your level of absence and its negative effect on the running of the service cannot be accommodated any longer.*

*Your employment will be terminated on the grounds of your incapability to carry out the job for which you are employed." (851 A – 851B).*

196. The claimant's dismissal was effective immediately on 3 October 2019 and she was paid in lieu of her entitlement to three months' notice. The letter confirmed that the claimant had a right to appeal against her dismissal.

### **Concluding Matters – Appeal and Grievance Appeal**

197. On 17 October 2019, the claimant appealed against the respondent's decision to dismiss her. It was a concise appeal which said:

*“My dismissal was wrong because RBKC failed to take account of the issues raised in my grievances and the impact of those on my sick record, August 2018 to date.*

*My dismissal was therefore procedurally flawed (by the failure to take into account relevant and decisive matters) and wrong in conclusion (because I could have returned to work, if supported). “*

198. As it transpired, an appeal hearing was never conducted. This appears to have been because it was not possible to arrange a date when the claimant could attend. The respondent appointed the Director of Housing Needs and Supply to conduct the appeal and invited the claimant to attend an appeal meeting on 2 January 2020 (867). The claimant was unable to attend on this date. The respondent sent alternative dates to her, but she failed to respond to agree a suitable date.
199. On 18 October 2019, the claimant was sent the outcome from her grievance appeal (853-850) by Sarah Newman, Acting Bi-Borough Executive Director of Children’s Services. Ms Newman met the claimant on 11 October to discuss the first grievance appeal and the second grievance.
200. Ms Newman upheld the claimant’s second grievance. Her position with regard to the first grievance is not clear. She was sympathetic to the claimant’s position and in her letter said:

*“In relation to the original grievance investigation, I find the evidence that Richard Stanley relied on to support his findings to be robust.*

*You outlined how you enjoyed the educational psychology role, and how much professional pride you afford to work completed in this capacity. You were able to acknowledge the need for professional standards and performance targets and were clear about the remit of managing a service to deliver good outcomes for children. You do not feel that your performance fell short of the required standards and were visibly upset by any suggestion that this was the case. You gave me a glimpse of your passion for this work and I think we agreed how sad it is that we have reached this situation, where a professional who considered they had given so much to the role felt they were now unable to do it.*

*You expressed your view that the policies that ought to offer an employee protection and support; the sickness policy; the improving performance policy and the dignity at work policy have been used to support managers and the Council to dismiss you rather than make successful adjustments that enable you to fulfil the requirements of the educational psychologist role. I think this is the crux of your first Grievance. Unfortunately you considered that the adjustments made by the Council were not successful in enabling you to fulfil your role. There is evidence however that your managers were identifying appropriate support and they were put in place, to varying success- perhaps some being more useful had they been applied sooner. As time went on, your role was adjusted to allow you to undertake work successfully. This was not a positive adjustment from your perspective.*



*In addition to the role adjustment concerns were raised about your ability to perform the tasks required in a timely way. Rather than this being a supportive measure assisting your return to work, you considered this had the negative impact of causing further deterioration to your health and caused you a level of stress that then led to a further period of sickness that you weren't able to return from.*

*Human resources policies are designed to assist managers getting the very best out of their employees. the paperwork produced by managers indicates their positive intention to enable you to continue to practice as an educational psychologist within the council and they tried a number of reasonable adjustments to support these efforts. It is really unfortunate that they were not successful. I find myself wondering what else might have been helpful for you to have reached a more satisfactory resolution at this point- rather than you enduring the conflict and distress that you say ensued as the perceptions of your performance started to differ between you and your managers.*

*I have thought very carefully about the application of procedures in this matter, and whether the managers could or should have done anything differently. The support to you whilst retaining quality service delivery is evident in the paperwork. That the support was unsuccessful and that the application of performance improvement process was unhelpful is also clear. It seems appropriate in these circumstances that you turned to the dignity at work policy to find resolution- hoping, in your mind, to rebuild relationships and resume the career you are passionate about. Unfortunately this process hasn't delivered for you and the pause in the appeals process has only served to cause further distress.*

*In these very difficult circumstances, it seems appropriate to acknowledge the support we gave to you, but which have unfortunately not delivered a successful and productive return to work for you, for example implementing adjustments to your role to afford you an opportunity to demonstrate you could undertake the tasks required by managers. I would like to extend my sincere apologies for this.*

*Your employment with Royal Borough of Kensington and Chelsea has subsequently ended as a result of your continued and prolonged ill-health, but you highlighted you'd like to know further employees would experience a better application of our human resource policies which you believed have failed you. I would like to think the changes being made will assist with this.*

....

*Finally, I would like to use this opportunity to emphasise my sincere regret that we haven't been able to reach a more satisfactory resolution to your First Grievance for you personally."*

201. The claimant presented her second claim to the employment tribunal on 5 November 2019 (48).

202. The outcome of the claimant's appeal against the rejection of her application for ill health retirement was received on 25 November 2019. Her appeal was rejected. The panel considering the appeal decided that the claimant had not presented any new medical information. They upheld Dr Nwbodo's original recommendation that, because there were further treatments that could be tried which might result in an improvement to the claimant's health, it was not possible for him to recommend permanent ill health retirement. (866).

## **LAW**

### **Scope of the Equality Act 2010**

203. Sections 39 and 40 of the Equality Act 2010 set out a list of conduct which is prohibited in employment situations by an employer of an employee with a protected characteristic. Prohibited conduct includes subjecting the employee to a detriment, dismissal and harassment. By subsection 212(1) of the Equality Act, a *detriment* does not include conduct that amounts to harassment. It must be one or the other – it cannot be both.

### **Time limits – discrimination**

204. The relevant time-limit is at section 123 Equality Act 2010. According to section 123(1)(a) the tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates.
205. The normal three-month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act.
206. By subsection 123(3)(b), a failure to do something is treated as occurring when the person in question decided on it. In the absence of evidence to the contrary. A person is taken to decide on a failure to do something when that person does an act which is inconsistent with doing it or, in the absence of such an inconsistent act, on the expiry of the period on which that person might reasonably have been expected to do it.
207. By subsection 123(3)(a), conduct extending over a period is to be treated as done at the end of the period.
208. In *Hendricks v Metropolitan Police Commissioner* [2002] EWCA Civ 1686, the Court of Appeal stated that the test to determine whether a complaint was part of an act extending over a period was whether there was an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably. An example is found in the case of *Hale v Brighton and Sussex University Hospitals NHS Trust* UKEAT/0342/17 where it was determined that the respondent's decision to instigate disciplinary proceedings against the claimant created a state of affairs that continued until the conclusion of the disciplinary process.

209. It is not necessary to take an all-or-nothing approach to continuing acts. The tribunal can decide that some acts should be grouped into a continuing act, while others remain unconnected (*Lyfar v Brighton and Sussex University Hospitals Trust* [2006] EWCA Civ 1548; The tribunal in *Lyfar* grouped the 17 alleged individual acts of discrimination into four continuing acts, only one of which was in time).
210. A refusal of a request, where it is repeated over time, may constitute a continuing act (*Cast v Croydon College* [1998] IRLR 318).
211. A distinction needs to be drawn between a continuing act and a one-off act that has continuing consequences (*Barclays Bank plc v Kapur and others* [1992] ICR 208;). This distinction will depend on the facts in each case. (*Sougrin v Haringey Health Authority* [1992] IRLR 416, CA)
212. Alternatively, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable as provided for in section 123(1)(b).
213. The tribunal has a wide discretion to extend time on a just and equitable basis. As confirmed by the Court of Appeal in *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, the best approach is for the tribunal to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. This will include the length of and reasons for the delay, but may, depending on the circumstances, include some or all of the suggested list from the case of *British Coal Corporation v Keeble* [1997] IRLR 36 set out below, as well as other potentially relevant factors:
- The extent to which the cogency of the evidence is likely to be affected by the delay.
  - The extent to which the party sued had co-operated with any requests for information.
  - The promptness with which the claimant acted once they knew of the possibility of taking action.
  - The steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action
214. It is for the claimant to show that it would be just and equitable to extend time. The exercise of discretion should be the exception, not the rule (*Bexley Community Centre (t/a Leisure Link) v Robertson* [2003] EWCA Civ 576).

### **Definition of Disability**

215. Disability is a protected characteristic under section 4 of The Equality Act 2010 (the Act).
216. In order to be disabled for the purposes of the Equality Act 2010, a person must meet the requirements in section 6 of the Equality Act 2010. These are supplemented by the provisions of Part 1 of Schedule 1. The tribunal should also have reference to the “Employment: Statutory Code of Practice” and

the “Guidance on matters to be taken into account in determining questions relating to the definition of disability” published by the Equality and Human Rights Commission (EHCR).

217. Section 6(1) of the Equality Act 2010 says that a person has a disability if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.
218. There are four key questions:
  - Does the person have a physical or mental impairment?
  - Does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
  - Is that effect substantial?
  - Is that effect long-term?
219. The EHRC Guidance tells us that physical or mental impairment should be given its ordinary meaning (paragraph A3).
220. The EHRC Code explains that the term "mental impairment" is intended to cover "a wide range of impairments relating to mental functioning, including what are often known as learning disabilities" (paragraph 6 of Appendix 1, EHRC Code).
221. In addition, it may not always be possible, nor is it necessary, to categorise a condition as either a physical or a mental impairment. The underlying cause of the impairment may be hard to establish. There may be adverse effects which are both physical and mental in nature. (Paragraph A6)
222. It is not necessary to consider how an impairment is caused, nor is it necessary for a claimant to establish a medically diagnosed cause for their impairment. It is the effect of an impairment that must be considered (Paragraph A7).
223. “Day-to-day activities” are things people do on a regular or daily basis. This can include general work-related activities, but not unusual or specialised activities.
224. “Substantial” effect means more than minor or trivial (section 212(1) Equality Act 2010).
225. A person may have more than one impairment, any one of which alone would not have a substantial effect. In such a case, account should be taken of whether the impairments together have a substantial effect overall on the person’s ability to carry out normal day-to-day activities. (EHRC Guidance paragraph B6).

226. When considering adverse effect, any medical treatment [or other measures] is to be disregarded (paragraph 5(1), Schedule 1, Equality Act 2010)
227. According to paragraph 2(1)(a) – (c) of Schedule 1 of the Equality Act, the effect of an impairment will be considered to be long term if:
- It has lasted for at least 12 months;
  - It is likely to last for at least 12 months; or
  - It is likely to last for the rest of the life of the person affected.
228. Paragraph 2(2) says that if an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
229. The cumulative effect of related impairments should be taken into account when determining whether the person has experienced a long-term effect for the purposes of meeting the definition of a disabled person. The substantial adverse effect of an impairment which has developed from, or is likely to develop from, another impairment should be taken into account when determining whether the effect has lasted, or is likely to last at least twelve months, or for the rest of the life of the person affected (EHRC Guidance, Paragraph C2).

## **Harassment**

230. Section 40(1)(a) of the Act provides that an employer must not, in relation to employment by it, harass a person who is one of its employees. The definition of harassment is contained in section 26 of the Act
231. Section 26(1) of the Equality Act 2010 provides:
- “A person (A) harasses another (B) if
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
  - (b) the conduct has the purpose or effect of—
    - (i) violating B's dignity, or
    - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”
232. A similar causation test applies to claims under section 26 as described above to claims under section 13. The unwanted conduct must be shown “to be related” to the relevant protected characteristic.
233. The shifting burden of proof rules set out in section 136 of the Act can be helpful in considering this question. The burden is on the claimant to establish, on the balance of probabilities, facts that in the absence of an

adequate explanation from the respondent, show he has been subjected to unwanted conduct related to the relevant characteristic. If he succeeds, the burden transfers to the respondent to show prove otherwise.

234. Harassment does not have to be deliberate to be unlawful. If A's unwanted conduct (related to the relevant protected characteristic) was deliberate and is shown to have had the *purpose* of violating B's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, the definition of harassment is made out. There is no need to consider the effect of the unwanted conduct.
235. If the conduct was not deliberate, it may still constitute unlawful harassment. In deciding whether conduct has *the effect* of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, we must consider the factors set out in section 26 (4), namely:
- (a) the perception of B;
  - (b) the other circumstances of the case;
  - (c) whether it is reasonable for the conduct to have that affect.
236. The shifting burden of proof rules can be also be helpful in considering the question as to whether unwanted conduct was deliberate.

### **Reasonable Adjustments**

237. Section 39(5) of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer.
238. Section 20(3) provides that where a provision, criterion or practice (a PCP) applied by or on behalf of an employer, places a disabled person at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to have to take in order to avoid the disadvantage.
239. Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments. This duty necessarily involves the disabled person being more favourably treated than in recognition of their special needs.
240. The duty to make reasonable adjustments only arises where the employer has knowledge (actual or constructive) that its employee is disabled and likely to be placed at a substantial disadvantage as (Paragraph 20 (1)(b) Schedule 8 of the Equality Act 2010).
241. In *Environment Agency v Rowan* 2008 ICR 218 and *General Dynamics Information Technology Ltd v Carranza* 2015 IRLR 4 the EAT gave general guidance on the approach to be taken in reasonable adjustment claims.
242. A tribunal must first identify:
- the PCP applied by or on behalf of the employer

- the identity of non-disabled comparators; and
  - the nature and extent of the substantial disadvantage suffered by the claimant in comparison with the comparators
243. Once these matters have been identified then the tribunal will be able to assess the likelihood of adjustments alleviating those disadvantages identified. The issue is whether the employer had made reasonable adjustments as matter of fact, not whether it failed to consider them.
244. The test of reasonableness imports an objective standard. The tribunal must examine the issue not just from the perspective of the claimant, but also take into account wider implications including the operational objectives of the employer. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case.
245. The Statutory Code of Practice on Employment 2011, published by the Equalities and Human Rights Commission, contains guidance in Chapter 6 on the duty to make reasonable adjustments. Paragraph 6.28 sets out some of the factors which might be taken into account in determining whether it is reasonable for an employer to have to take a particular step in order to comply with the duty to make reasonable adjustments. These include whether taking the step would be effective in preventing the substantial disadvantage, the practicability of the step, the cost to the employer and the extent of the employer's financial and other resources.

### **Discrimination Arising from Disability**

246. Subsection 15(1) of the Equality Act 2010 provides that:

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.

247. Limb (a) involves a two-stage test:

- (1) Did the claimant's disability cause, have the consequence of, or result in, "something"?
- (2) Did the employer treat the claimant unfavourably because of that "something"?

It does not matter which way round these questions are approached.

248. According to subsection 15(2), subsection 15(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. It is not necessary, however, for A to be aware that

the "something" arises in consequence of B's disability (*City of York Council v Grosset* [2018] EWCA Civ 1105).

249. The concept of unfavourable treatment is unique to section 15. In the case of *Williams v Trustees of Swansea University Pension and Assurance Scheme and another* [2018] UKSC 65, the Supreme Court said it was a similar to a detriment. In particular, there is a requirement that the disabled person "must have been put at a disadvantage." No comparator or comparison is required.
250. Known as the test of objective justification, the leading case on limb (b) is *Bilka-Kaufhaus GmbH v Weber von Hartz* [1987] ICR 110, ECJ. The Court held that, to justify an objective which has a discriminatory effect, an employer must show that the means chosen for achieving that objective:
- correspond to a real need on the part of the undertaking
  - are appropriate with a view to achieving the objective in question, and
  - are necessary to that end.
251. A balancing act is required. The discriminatory effect of the treatment has to be balanced against the employer's reasons for it. To be proportionate, the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so (*Homer v Chief Constable of West Yorkshire* [2012] UKSC 15)
252. When determining whether or not a measure is proportionate it is relevant for the tribunal to consider whether or not a lesser measure could have achieved the employer's legitimate aim (*Naeem v Secretary of State for Justice* [2017] UKSC 27). The tribunal should consider whether the measure taken was proportionate at the time the unfavourable treatment was applied (*The Trustees of Swansea University Pension & Assurance Scheme and another v Williams* UKEAT/0415/14).
253. The tribunal is required to make an objective assessment which does not depend on the subjective thought processes of the employer. This question is not to be decided by reference to an analysis of the employer's thoughts and actions. The question is whether the treatment, objectively assessed, at the time it occurred, a proportionate means to achieve a legitimate aim irrespective of the process adopted by the employer.
254. We must also consider the guidance contained in the EHRC Statutory Code of Practice that is relevant to this question. This is contained, in particular at paragraph 5.12 which states that:
- "It is for the employer to justify the treatment. They must produce evidence to support their assertion that it is justified and not rely on mere generalisations."*
255. The guidance in paragraphs 4.28 – 4.32 is also relevant.



## Unfair Dismissal

256. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason for the dismissal. In this case that reason was capability which is one of the fair reasons found in section 98(2).
257. We are required to decide whether the dismissal is fair or unfair having regard to the test set out in section 98(4) which says that
258. ‘... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.’
259. In other words, we must decide whether it was reasonable for the respondent to dismiss the claimant for capability in all the circumstances of the case. We accept entirely that the law does not require employers to indefinitely retain employees who are not capable of working due to ill health.
260. We have reminded ourselves of the key authorities that deal with reasonableness in this context. These include the leading case of *East Lindsey District Council v Daubney* [1977] ICR 566 together with the subsequent authorities including *Hart v A R Marshall & Sons (Bulwell) Ltd* [1977] IRLR 61), *BS v Dundee City Council* [2013] CSIH 91, *Monmouthshire County Council v Harris* [2015] UKEAT/0010/15) and *O'Brien v Bolton St Catherine's Academy* [2017] EWCA Civ 145, *City of York Council v Grosset* [2018] EWCA Civ 1105t and *DL Insurance Services Limited v O'Conner* [2018] UK EAT 0230/17/2302.
261. The question is whether dismissal, at the time it took place, was within the band of reasonable responses open to a reasonable employer. It is not for us to substitute our own decision. The band of reasonable responses test applies to the procedure followed and to the decision to dismiss. We have reminded ourselves of the sound advice the EAT gave tribunals in the case of *DB Schenker Rail (UK) Ltd v Doolan* [2010] UKEAT/0053/09 where it noted how easy it can be for tribunals to fall into the substitution mindset in cases of ill-health and to guard against this.
262. When considering the question of the employer's reasonableness, we also reminded ourselves that we must take into account the process as a whole, including the appeal stage.

## ANALYSIS AND CONCLUSIONS

### Time limits – discrimination

263. Although we have not upheld any of the claimant's complaints of discrimination, we are satisfied that if we had, they are properly viewed as part of an ongoing situation or a continuing state affairs. They all relate to the respondent's management of the situation created as a result of the claimant's disabilities.
264. We conclude the tribunal has jurisdiction to consider them all, going back to when the respondent first became aware that the claimant was suffering from chronic pain and this would give her protection under the Equality Act 2010.

### Was the claimant disabled within the meaning of section 6 of the Equality Act 2010 and what knowledge did the respondent have or ought to have had of this?

265. Turning to the substance of the claim, we first considered whether the claimant was disabled and whether the respondent knew or ought to have known this.
266. The claimant's claim is based on her having three conditions which she says separately amount to disabilities under the Equality Act 2010. The three conditions are:
- chronic pain
  - Chronic Fatigue Syndrome/Myalgia Encephalomyelitis (CFS/ME)
  - anxiety and depression
267. The respondent accepts that the claimant meets the definition in the Equality Act by virtue of her chronic pain and that it knew this from 28 July 2016 because of the opinion expressed by Dr Jukes (931).
268. We find that the claimant also meets the definition of a disabled person for the purposes of the Equality Act 2010 in relation to the condition CFS/ME and the respondent was or ought to have been aware that the claimant had this condition and was disabled as a result of it from 28 May 2019.
269. The possibility of the claimant having CFS/ME did not come to light until the spring of 2019. It was not mentioned as a possible diagnosis in the February 2019 OH report, but is referred to as a possible diagnosis under investigation in the report of Dr Nwobodo dated 16 April 2019. The claimant first submitted a medical certificate which referred to "chronic fatigue" on 7 May 2019.
270. As at this time, the respondent was aware and had been aware for years, that the claimant was suffering from fatigue as a result of not sleeping well due to her chronic pain. It was therefore fully aware of the effects of CFS, even if it was not aware of the label those effects were later given.

271. We do not consider the information in Dr Nwobodo's report or the 7 May fit note are sufficient, even when combined, to impute knowledge to the respondent of CFS as at 7 May 2019. The reference to chronic fatigue on the sick note without the inclusion of the word "syndrome" can be read as meaning the ongoing fatigue that the claimant had been experiencing had become chronic.
272. On 28 May 2019, however, the claimant's fit note included an express reference to "CFS". We consider this was sufficient to impart actual knowledge to the respondent of the CFS. In addition, bearing in mind the respondent's historical knowledge of the claimant's fatigue, this ought to have led the respondent to recognise that the CFS was not a new condition, but one that had been ongoing for many months.
273. The tribunal panel are aware that it can take a long time for people with CFS to receive a diagnosis. They are therefore likely to have the condition for significant periods of time before being diagnosed. We consider this is a matter of common knowledge, but if we are incorrect, it is something that the respondent could have found out very easily by asking one of its OH doctors.
274. For this reason, we find that the claimant meets the definition of a disabled person in respect of the CFS in addition to the Chronic Pain, as the condition had had a long term substantial adverse effect on the claimant's ability to carry out normal day-to-day activities for longer than 12 months. Both conditions were present from 2016 onwards. The substantial adverse effect varied, but was recurring over the long term.
275. Turning to the position regarding anxiety and depression we find that that this condition also amounts to a disability for the purposes of the Equality Act 2010, but the respondent could not reasonably be expected to be aware that it did at the relevant time.
276. The claimant had a severe episode of anxiety and depression in 2017. Although she did not take medication at this time, she received talking treatments for the condition. The condition then recurred in 2019. On this occasion it was severe enough to require medication.
277. Although the claimant's own medical report suggests that the severity of the claimant's anxiety and depression were not sufficient to be considered a disability (987) we do not think this is an accurate assessment. Based on her GAD-7 and PHQ-9 scores on both occasions, the condition appears to us to have been severe enough to impact on the claimant's day-to-day activities in both 2017 and 2019.
278. The respondent, however, was not aware that the claimant was being treated for anxiety and depression in 2017. In addition, the condition was not referred to on her medical certificate in 2019 until 13 March 2019. At that point the condition was described as stress and anxiety rather than anxiety and depression. The claimant had not been prescribed medication when she saw Dr Nwobodo in April 2016, but did tell him that she had been

experiencing a lot of stress and anxiety and was on a waiting list for CBT. She did not say anything further about her specific medical conditions at the 12 August 2019 sickness case conference.

279. We consider, based on what the respondent knew, it was reasonable for it to assume the references to stress and anxiety as an additional condition on the sickness certificates was most likely a reference to the feelings the claimant was experiencing as a result of the respondent's processes, rather than to a separate medication condition which amounted to a potential disability.
280. It was not until the respondent received the OH report of Dr Cooper (dated 5 August 2019) and her addendum, that it became aware that the claimant was reporting significant symptoms of anxiety and depression and had been prescribed antidepressants.
281. The respondent ought therefore reasonably to have been aware that the claimant had anxiety and depression and it was significant. However, even with this information, we do not consider that the respondent ought reasonably to have realised the condition was long term. The report does not say how long the claimant had been taking medication and refers to her having had 11 weeks of CBT treatment as of 5 August 2019. The respondent concluded, not unreasonably in our view, that the condition was short rather than long term. The respondent therefore did not have actual or constructive knowledge that the claimant was disabled by virtue of anxiety and depression.

## **Harassment**

282. We next considered the claimant's allegations of harassment. The reason for approaching the claimant's allegations in this order is because of the definition of detriment found in section 212(1) of the Equality Act 2010.
283. We consider that the allegations of harassment numbered 14(b) – (f), 14(i) and 14(l) more properly fall to be considered as detriments under section 39(2) (c) of the Equality Act 2010 rather than as incidents of harassment under section 40(1)(a) of the Equality Act 2010. We have however considered whether the remaining allegations constitute harassment related to disability.
284. Dealing first with the allegations arising out of the meeting on 22 August 2018, we have found, as a matter of fact, that the meeting was a difficult meeting and that the discussion at the meeting was upsetting for the claimant. We do not doubt that the short subsequent sickness absence that followed the meeting was entirely genuine. We do not consider that the meeting was conducted in a deliberately hostile or intimidating manner or that the way it was conducted created a hostile or intimidating environment for the claimant. If it did, it was not reasonable for it have done so. There were difficult messages, but they were delivered professionally and appropriately.

285. We have also found that Ms Kerslake and Dr Monsen deliberately did not tell the claimant in advance of the meeting precisely what they were intending to discuss at the meeting. They gave her enough information, however, for her to understand that there was going to be a discussion about her targets for the following academic year and their expectations. The claimant had understood that something would change with the start of the new school term for several months.
286. In our view, sending the claimant a more detailed written invitation to the meeting would have made little difference to the tone of the discussions at the meeting. It was always going to be a difficult and upsetting meeting for the claimant. It is possible that if a written invitation had been sent, this would have caused the claimant to become extremely anxious in advance of the meeting. Instead, Ms Kerslake and Dr Monsen wanted to explain what was happening in person as they considered this would be kinder. They did have concern that writing to the claimant in advance might delay the meeting because she might go off sick, but this was secondary to their concern for her welfare.
287. Our factual finding is that Ms Kerslake did not shout *"I think, if you don't like what you hear, you choose to hear what you want"* at the claimant at the meeting. Dr Monsen made a comment of this nature, in the course of a discussion where the claimant appeared not to be accepting what Ms Kerslake was telling her, despite her repeating it several times. The comment was discourteous, but understood in that context it was not a comment that related to the claimant's disability.
288. We also found that the claimant was not reprimanded for loss of a school account or for joint working with colleagues. These matters were discussed, but there was a context that justified raising them. Ms Kerslake did tell the claimant that her schools did not want her back, but this was true in some cases. Ms Kerslake did not say this to upset the claimant. She knew that hearing this information would be upsetting which was why she had not told the claimant previously, but when the claimant kept challenging the decision not to give her link schools, Ms Kerslake shared the complete picture with her.
289. Finally, we do consider that the claimant's contribution to the meeting (by way of work suggestions and attempted input into her work plan) was dismissed, but not out of hand. When the claimant asked questions or made suggestions, she was given a reasoned answer. In addition, the plan was presented to her as something that had been agreed with HR with little or no scope to change it. The behaviour of Ms Kerslake and Dr Monsen in relation to this does not amount to harassment of the claimant.
290. The next allegation of harassment we have considered is the allegation that Dr Monsen's emails of 19 and 23 April 2019 subjected the claimant to the harassment. We find it surprising that Dr Monsen sent the first email he sent as there was nothing inappropriate about the tone of the email the claimant had sent to Ms Kerslake. We consider the second email, asking for a quick

response, was unreasonably demanding, in light of the Easter bank holiday weekend.

291. Taken together, we consider the emails to be clumsy and insensitive, but we do not consider them to be “very hostile” or meet the threshold required to constitute harassment. Neither of the emails was discourteous and they were not threatening. The correct interpretation was that they were unnecessarily protective of Ms Kerslake and revealed where Dr Monsen’s loyalties as a manager lay. In our view, the claimant’s perception of this conduct as hostile was not reasonable in the circumstances.
292. The final allegation of harassment we have considered is allegation 14(h). Our finding as a matter of fact was that there was no hostile and intimidating conduct by Julie Ely at the sickness absence hearing in the way the claimant was questioned by her. The meeting was a formal meeting and required a formal tone from Ms Ely. The question Ms Ely asked more than once was relevant to the decision she was required to make. She only repeated the question because the claimant was not answering it. We consider there must have been an element of frustration in her voice, which both the claimant and Ms Hancock perceived, but this did not cross the threshold into harassment. In other words, the claimant’s perception of the conduct as hostile and intimidating was not reasonable in the circumstances. As soon as the claimant answered the question, Ms Ely moved on.
293. Our conclusion is that none of the allegations of harassment succeed.

### **Reasonable Adjustments**

294. It is not in dispute that the respondent provided a great deal of equipment and support to the claimant in an effort to help her carry out her role. Her claim for reasonable adjustments focusses on just three additional areas of adjustments that she feels the respondent should have made. We deal with each of them in turn.
295. The first area of adjustments was the provision of a scribe or a recording facility. We do not consider that the respondent’s failure to provide these was a failure to comply with a duty to make reasonable adjustments.
296. The claimant says that she was put to a substantial disadvantage when compared to employees who did not share her disability, because her disability meant that she found it difficult to take notes in line management meetings.
297. The respondent says there was no requirement applied that employees take notes in line management meetings. We do not consider this to be correct. It may not have been an express requirement, but it is certainly implied. Employees are expected to recall the discussions that have taken place at line management meetings and to carry out agreed action. Unless they are able to rely on their memories, some form of recording is essential. This is two way of course and applies to the line manager as well as to the employee. However, the implied requirement that was applied was to take a brief note sufficient to aid recollection after the meeting.

298. The claimant's ability to take detailed handwritten notes during line management meetings was impaired by her chronic pain. She was, however, able to make brief notes and, based on the evidence of the detailed notes she made of the Work Plan meeting that took place on 22 August 2018, capable of converting these into detailed typed notes if she wished. The claimant told us she found this to very tiring which is unsurprising given the level of detail she wanted to record. A person without the same conditions as the claimant would also have had difficulties taking a detailed note of the meetings (at the same time as participating in the meeting) but would have likely found it less tiring to turn their brief notes into detailed notes afterwards.
299. The reason the claimant wanted to record the meetings in such detail was because of the lack of trust that had grown between her and her line manager. This was not necessitated by any requirement imposed on the claimant by the respondent, but was due to the claimant's personal choice.
300. In our judgment, the respondent was not under a duty to take steps that enabled the claimant to take a full and detailed note of line management meetings.
301. In any event, we do not accept that if the claimant had been given permission to use a recording device this would have ameliorated the disadvantage the claimant says she experienced. Based on her evidence of the length of time it took her to undertake assessments when using a recording device, we consider no time would have been saved by using a recording device. Although the claimant could have used Dragon to auto-transcribe the recordings of the meetings, these would have needed to be heavily edited to make sense. This would have been enormously time consuming.
302. The claimant also wanted the respondent to arrange for a scribe to attend the meetings to take a note. It was not unreasonable for the respondent to refuse this for two linked reasons. The respondent did not have the resource to provide a scribe. It could have allowed the claimant to use her support worker time for this purpose, but this meant that limited resource was not then available to assist the claimant with her core work. In addition, the respondent was concerned about confidentiality. The meetings were intended to be confidential one-to-one meetings between a line manager and employee. Having the graduate intern present would have had an impact on this which the respondent was entitled to refuse.
303. Although not relevant to our analysis, we note that the respondent did try to resolve the claimant's concern in a number of ways. This included Ms Kerslake typing notes up during the meeting that that could be agreed and through Dr Monsen's intervention and the adoption of a synectics approach to notetaking at meetings.
304. The second area of adjustments cited by the claimant captures the key dispute at the heart of this case. The claimant's biggest grievance concerns

the respondent's decision to apply its performance management policy to her when it did and that when it did so, it set her performance targets that were impossible for her to meet. The two adjustments she says the respondent should have put in place were delaying the implementation of the performance management policy and adjusting the work targets.

305. We do not consider that the application of the performance management policy to the claimant, of itself, placed the claimant at a substantial disadvantage compared to employees that did not have her condition. There is nothing inherent in the policy that caused the claimant any disadvantage. The policy merely provides a framework for setting employees targets, measuring them against those targets and taking action depending on whether the targets are met or not in the timescales that are set. Any disadvantage arises out of the way the policy is applied, including the particular targets and the timescales for improvement that are set and not the application of the policy framework.
306. In this case, the claimant was put at a substantial disadvantage compared to an employee who did not have her disability as a result of the particular work targets that were set. She was unable to meet them because she could not produce as much work as other employees or work as fast as they could. The detriment that flowed from this was she could not meet the targets she was set, with the result that she was given a formal warning under the policy and faced potential dismissal.
307. The claimant argues that the respondent could have adjusted the work targets to ameliorate this disadvantage by setting a work target that the claimant could meet. This needs to be viewed in the context of the adjustments that had been made. The fact that the respondent had made other adjustments does not prevent us from reaching a finding that it should have adjusted the work target it set, but it is relevant as we must undertake consider all the circumstances of the case.
308. The respondent had already supported the claimant through the provision of equipment, a support worker and specialist software. In doing so it had sought to provide the claimant with tools that would enable her to produce more work in a shorter time. Unfortunately, giving the claimant these tools did not solve the underlying issue.
309. The respondent had also adjusted the work it required the claimant to undertake. Rather than require her to complete all of the aspects of the work of an EP, the respondent focussed its requirements on particular aspects of the role, i.e. EHC assessments and panels. The claimant has raised this particular as a complaint under section 15 of the Equality Act 20210 and so we say nothing further about it here other than to note it.
310. The respondent set the claimant a target (initially) of completing 90% of the work a non-disabled EP would be expected to carry out. This was a challenging target. Although the claimant's work output improved during the early period of assessment, the effort that this required was not sustainable and the claimant became unwell.



311. When measuring the claimant against this target between September and December 2018, the respondent made a further adjustment, which was to discount the periods she was absent due to her disabilities.
312. It is unclear as to what level the work targets would have needed to be set to enable the claimant to meet them. The respondent set an initial target of 90% as a guide. Had the claimant not met this, but been able to achieve a sustainable level of reduced output, it is likely we would be finding in her favour on this point. We would be asking ourselves whether it was reasonable to impose an obligation on the respondent to accommodate a reduced output from her.
313. The respondent was not able to accommodate the claimant taking longer than six weeks to complete the EHC assessment reports, because of the statutory timescales involved in the EHC assessment work and the involvement of vulnerable children. It could potentially have accommodated her taking more than 18 hours to complete each EHC assessment report, which was the reality in the claimant's case. This would have meant her completing less reports compared to other non-disabled employees. The adjustment would have been to the Time Costed Deployment Model. This was something that the respondent did not seem to be prepared to consider or understand.
314. In this case, however, the complexities of the claimant's condition meant that there would always be considerable ebb and flow in her output. This required a high level of flexibility from the respondent, which was not something that the respondent was easily able to accommodate given the work of the EP team. The claimant was not only completing fewer reports, she was also missing the deadlines. For this reason, we consider that the adjustment to the work targets to accommodate this degree of flexibility was not a reasonable adjustment.
315. The claimant has invited us to find that the respondent's decision to apply the policy to her at the time it did, made her situation and conditions worse. Her suggestion is that delaying the imposition of the performance management policy would have led to a different outcome. This allegation is repeated as a section 15 complaint and comes into our decision making when considering if she was unfairly dismissed.
316. For the sake of completeness, however, we confirm here in the section on reasonable adjustments that we do not consider this to be correct. The claimant had benefited from a long lead-in time from January to September 2018 before the performance management framework was introduced. There was no evidence before us that led to us believing that she would have been better able to cope with being performance managed had there been further delay on the part of the respondent.
317. The last area of adjustments concerns the application of the respondent's sickness absence management policy to the claimant. She was at a substantial disadvantage compared to a non-disabled employee in relation

to this policy because her disabilities caused her to be absent from work more frequently than people who did not have her medical conditions.

318. The respondent recognised the claimant's disadvantage and adjusted the trigger points for taking action in relation to the claimant's sickness absence because of it. It did this when considering the first formal warning issued under the policy in December 2018 and later when moving from the case conference stage to the final dismissal stage under the long term absence part of the policy. In the former case, it did not issue the first warning under the sickness policy until the claimant had taken 18.5 days sickness absence and set a more generous trigger than it would normally set before the following three months. Before moving from the case conference to the dismissal stage, it waited nearly two months rather than apply the month set out in the policy. This was to enable the claimant to reach the end of her medical certificate.
319. We consider the adjustments that were made were reasonable in the circumstances and that there was no failure by the respondent to meet the duty it was under.
320. The claimant argues that the respondent ought to have discounted disability related sickness absence caused by applying the performance management policy to her when applying the sickness absence policy to her. We do not consider this to be a reasonable adjustment to expect the respondent to have to make in circumstances where we have found that the respondent's decision to apply the performance management policy to her did not constitute unlawful discrimination or was outside the range of reasonable responses of a reasonable employer.
321. In any event, we are not satisfied that the claimant presented sufficiently cogent evidence that the flare up of her condition or the anxiety and depression that she developed was caused by the performance management process. The claimant's chronic pain and chronic fatigue syndrome were fluctuating conditions which had led to the claimant having a lengthy absence from work when she was not being performance managed. There was no reason for the respondent to believe that the performance management process was the cause of the claimant's second long term absence.
322. The claimant has cited other potential adjustments the respondent should have made. We find that for most of them, the adjustments were either made or only not made because the claimant did not want to explore them.
323. Throughout the time that the claimant was employed as an EP the respondent made adjustments to the content of her role, which were designed to assist her. She was also offered the opportunity to alter her working hours and move to become part time. The claimant declined to pursue this opportunity, but did work in reality part time on full pay for extended periods of time through the use of holiday and paid sick leave. The respondent also allowed the claimant to work from home. None of these were effective in avoiding the claimant's second lengthy period of absence.

324. The respondent did not grant the claimant disability leave when she sought it during her first period of absence. She did not ask for similar leave again. We do not consider such leave would have effectively prevented the disadvantage the claimant experienced under the sickness absence policy. The claimant produced no evidence to show that taking a period of disability leave, as opposed to a period of sickness absence, would have made any difference to the long term absence that led to her dismissal.

### **Discrimination arising from Disability**

325. We next considered the claimant's claims under section 15 of the Equality Act 2010.
326. We have found that each of the allegations cited by the claimant occurred as alleged. In our judgment, each constituted unfavourable treatment because of something arising in consequence of the claimant's disabilities. However, in each case, our decision is that the unfavourable treatment was objectively justified and does not therefore constitute unlawful discrimination.
327. The umbrella aim cited by the respondent of ensuring an acceptable level of attendance/improvement for the delivery of its statutory obligations/services provided by the EPs was a legitimate one. We have considered in each case, however, whether the treatment was a proportionate means of achieving that aim.
328. Although not strictly accurate that the respondent limited the scope of the claimant's duties to EHC Assessment Reports alone, this work did form the bulk of what she was expected to do. We note that she was given panel work and had some other responsibilities, but EHC Assessment Reports were her core work. In particular, she was restricted from undertaking link EP work in schools.
329. The decision to focus on the EHC assessment reports was a direct consequence of the claimant's lengthy sickness absence and the difficulties that she had experienced in schools prior to her sickness absence. These were things that arose because of the claimant's disabilities.
330. We consider it was proportionate for the respondent to restrict the claimant's work as it did. When the claimant returned to work on a phased return, it was appropriate for the respondent to reduce the activities she was undertaking. EHC Assessment Reports form the core part of the work of an EP and it was sensible and therefore proportionate to focus on working towards her being able to complete these within the required statutory timescales using the equipment provided to her.
331. The claimant was unhappy about the focus on EHC reports because they were written reports and represented one of the most challenging part of her role. However, the EHC Assessment Reports were also discrete pieces of work the claimant could focus on, one at a time. This was also helpful to

the respondent as it reduced the potential adverse impact to service delivery if the claimant became unwell. It meant that the schools would continue with an uninterrupted link EP service and the only impact would be on individual assessment reports.

332. The respondent did require the claimant to meet work and attendance targets set out in the Operational Work Plan presented to her on 22 August 2018. The respondent did not know when setting the targets whether the claimant would be able to meet them or not. It hoped it was setting them at a level that the claimant could meet rather than imposing unrealistic requirements on the claimant, but its decision making around the target level was based on the requirements of the service and the level of deviation from standard performance output and attendance that it believed it could tolerate.
333. As it transpired the claimant was unable to meet any of the targets because of the impact of her disabilities on both her performance and her ability to attend work reliably. The respondent adopted a twin track approach keeping the performance and absence processes separate.
334. In our judgment, the respondent was entitled to invoke the policies and use them as a framework for monitoring the claimant's performance and attendance. This was a proportionate means of achieving its legitimate aim.
335. As the claimant's performance and attendance did not meet the required standards, the respondent was entitled to move the claimant through the stages of its processes. On the performance side, the respondent got as far as issuing her with a formal warning and then suspended the process. On the sickness absence side, it got as far as a first caution when the position changed and the claimant became unwell on a long term basis again. We consider that the respondent's actions in relation to the issuing of a formal warnings under both policies was objectively justified. The decisions were taken within the framework of the processes which contained a number of safeguards for the claimant and helped ensured proportionality.
336. The decision by Dr Monsen of 20 December 2018, to stop the claimant undertaking EHC assessment work, was not part of either process. The rationale for the decision is explained in the email containing the decision. It is consistent with the legitimate aim set out above.
337. The question for us is whether preventing the claimant from undertaking EHC work was proportionate or did Dr Monsen's decision discriminate against her more than was necessary in the circumstances. Unlike some of the other decisions we have had to make, this one is much more finely balanced.
338. The impact of the decision to leave the claimant with very little to do in her role. The duties she was carrying out had been reduced so significantly that when Dr Monsen decided that she should not undertake EHC Assessment work this left her with very little else. There was so little the claimant was doing that it was impossible to meaningfully measure her performance. It

also became impossible for the claimant to demonstrate any improvement in her performance. Had the respondent continued with the performance management process the decision would have left the claimant in an impossible position.

339. We have decided that the decision was proportionate for two reasons. First, it was not set in stone. Dr Monsen's letter made it clear that the decision should be discussed as part of the performance management process. This enabled the claimant to challenge the decision if she wanted. She didn't. The worsening of her medical condition meant that she was only able to work two days per week at this time and instead of arguing that she be allowed to return to EHC work, she decided to submit an application for ill health retirement.
340. Secondly, the respondent suspended the performance management process. This took any pressure off the claimant while she went through the process of making her ill health retirement application, but also allowed her to submit a grievance.
341. As it transpired, the claimant's medical condition became worse and she became unfit to do any work. This superseded the performance management process.
342. Turning to the respondent's decision to dismiss the claimant, this was taken because of something arising from the claimant's disability.
343. At the time of the decision to dismiss, the claimant was again on long term sickness absence. The absence had effectively begun on 29 October 2018. From that date onwards the most the claimant had been able to work was two days per week for a five month period. This had been followed by a period of full absence of five months. The medical advice was the claimant's condition would improve, and in light of her recent diagnosis of CFS, there were new treatments that she could try. None of the doctors were able to confirm, with any degree of certainty, that the claimant would be able to return to work within a foreseeable or reasonable period of time. The claimant herself accepted this at the Sickness Panel Meeting and did not propose any alternatives to dismissal.
344. We consider the decision to dismiss the claimant was objectively justified in the circumstances. The respondent had tried to support the claimant and enable her to continue working through a variety of means which had not been successful. This was not the first period of long term sickness absence the claimant had had. Although she had returned to work following her earlier period of sickness absence, she had not, at any time, been able to perform at the level the respondent considered it needed her to perform in order to effectively run the EP service. It was now faced with a scenario where the claimant was unlikely to be a position to return to work at all for a significant period of time.

## Unfair Dismissal

345. We also consider that the decision to dismiss the claimant was fair. The reason for dismissal was capability. At the time of her dismissal, the claimant was not capable of fulfilling her role and there was no prospect that she would become capable of doing her role within a reasonable period of time.
346. We consider that the process the respondent followed in relation to the claimant's dismissal was within the range of reasonable responses of a reasonable employer. The respondent obtained an up to date medical report and ensured that its decision was informed by that. It also invited the claimant to attend a meeting to discuss that report and any alternatives to dismissal. She was informed of the meeting in advance by letter and allowed to bring a work colleague to the meeting. She was fully aware that dismissal was a likely consequence of the meeting. The respondent considered the claimant's representations at the meeting.
347. Although the claimant submitted an appeal against the decision to dismiss her, no appeal meeting was held. The respondent invited her to attend an appeal meeting, but she was not able to attend. Alternative dates were sent to her, but she failed to respond to agree a convenient date.
348. Although the absence of a meaningful appeal can render an otherwise fair dismissal unfair, we do not consider this to be the case here. The claimant's prognosis had not changed. By the time the appeal would have been heard, the claimant's grievance appeal had been concluded. Ms Newman's appeal outcome letter is very sympathetic to the claimant and apologises to her for her distress, but she does not identify alternative actions that the respondent ought to have taken or criticise the decision to dismiss the claimant.
349. We do not consider it is strictly necessary to review the earlier events in order to decide if the dismissal was fair. The claimant's long term sickness absence superseded the earlier processes. However, for the sake of completeness, we also record that we consider that all of the following fall within the range of reasonable responses of a reasonable employer:
- The introduction of the workplan in August 2018 and the targets it contained
  - The decision not to invite the claimant to the workplan meeting in writing, setting out the full purpose of the meeting
  - The monitoring arrangements
  - The decisions to give the claimant warnings under the performance management process and the sickness absence procedures
  - The suspension of the performance management process following the decision by Dr Monsen not to give the claimant any further EHC assessment work.

**Case Numbers: 2201484/2019 & 2204769/2019**

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**Employment Judge E Burns  
9 July 2021**

Sent to the parties on:

.09/07/2021

For the Tribunals Office