EMPLOYMENT TRIBUNALS

Claimant: Miss J Ward
Respondent: The Governing Body of Kingsbury High School

Heard at: Watford (by CVP)
On: 8 to 11 July 2024 (and panel only on 12 July and 12 August 2024)

Before: Employment Judge Dick
Ms W Ellis
Ms L Woodward

Representation
Claimant: Mr A Step-Marsden (pupil barrister)
Respondent: Mr R Winspear (barrister)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.

2. The complaint of unfavourable treatment because of something arising in consequence of disability is well-founded and succeeds.

3. The complaint of failure to make reasonable adjustments for disability by allowing the claimant to carry out her duties from home is well-founded and succeeds.

4. The complaint of failure to make reasonable adjustments for disability by allowing the claimant to work some days at home and some on the school premises is not well-founded and is dismissed.

5. Remedy will be determined at a hearing on a date to be fixed.

REASONS

INTRODUCTION; CLAIMS AND ISSUES

1. The claimant was employed by the respondent's school as a learning support assistant from 2014. She was dismissed in January 2023 after a prolonged period during which she had not attended the school. There was no dispute that at the material times the claimant was a disabled person within the meaning of the Equality Act 2010 ("EqA") because she had asthma and chronic obstructive pulmonary disease ("COPD").

2. Both before and during the Covid-19 pandemic the claimant had worked from home, but the respondent had formed the view that working from home was not sustainable in the long-term as the claimant's role required her to be on-site. The more recent of the claimant's absences had been supported by doctors' notes saying she was unfit to work through stress. It was the claimant's case that this stress was as a result of her being asked to return to work in circumstances where she believed, because of her disabilities, that to do so would endanger her health – by 2022 she had asked to be able to work from home all of the time. There was in reality little if any dispute that the claimant was able to work from home and was not able or willing to work on-site; the question was whether the respondent should have allowed her to work from home. The respondent's case was that it fairly dismissed the claimant because she was not capable of performing her duties (i.e., on site). The claimant's case was that her dismissal was unfair as well as being an act of discrimination arising from her disability, and also that the respondent's decision not to permit her to work from home amounted to a failure to make reasonable adjustments.

3. The factual and legal issues for us to decide were, as the parties agreed, unchanged from the list of issues set out in the Case Management Summary prepared by Judge Shields following a preliminary hearing on 5 December 2023. The list of issues is appended to these reasons. It was not in dispute, taking into account the dates of the ACAS conciliation process, that the complaints of unfair dismissal and discrimination arising from disability were in time. Time limits were in issue in the reasonable adjustments complaint.

4. Refences in the form [x] are to page x of the agreed bundle.

PROCEDURE, EVIDENCE etc.

5. Before the evidence was called we explained to the parties that we would read the witness statements but they should be sure to refer us to any documents of relevance in the agreed bundle during the course of the evidence or submissions. Both counsel helpfully suggested a number of pages which we

might read in advance as they would be dealt with during the course of the evidence. We also discussed the issues with the parties (see paragraph 3 above) and indicated that we would not need to hear evidence about remedy at this stage.

6. After taking time to read the statements, we heard evidence from the witnesses. In each case the usual procedure was adopted, i.e. their written statements stood as their evidence-in-chief and they were then cross-examined. The claimant gave evidence and the respondent called Mrs Sonia Bellot (at the relevant time the respondent's HR & Volunteering Manager) and Mr Frederick Watson (a parent governor).

7. At the conclusion of the evidence we heard oral submissions from both advocates and reserved judgment.

FACT FINDINGS

8. We find the following facts on the balance of probabilities. Where we have needed to resolve disputed facts we make that clear. We have not made findings on every fact presented to us, but merely on those which assist us to come to a decision bearing in mind the list of issues.

The claimant's disability

9. At the material times the claimant had chronic obstructive pulmonary disease and asthma. There was no dispute that this meant the claimant was disabled within the meaning of the Equality Act. Nor was there any dispute that the respondent was aware of this at all material times.

Start of the claimant's employment

10. On 1 September 2014 the claimant started work with the respondent as a Visual Impairment Learning Support Assistant in the respondent's school's Special Educational Needs ("SEN") Department. The school is a secondary school with around 2000 pupils on roll. Although the claimant was initially employed to cover for another employee who was ill, that employee never returned to work and so the claimant kept working for the respondent.

11. A significant proportion of the claimant's role involved "adapting" learning resources for visually impaired ("VI") students – changing the format of exercise books, worksheets, exam papers and so on, so that a particular student would be able to read them. In some cases this would mean editing the documents in a word processor but it was not necessarily that simple as sometimes the resources to be adapted were photocopies and contained diagrams which could not simply be enlarged due to their quality; sometimes the claimant would have to retype the documents. There were other aspects to the claimant's role and we return to those later.

12. The claimant worked directly for the Special Educational Needs Coordinator ("SENCo"), who at the time the claimant started was a Ms Nolan. The claimant's evidence was that Ms Nolan told her that her work would be adapting resources although there was a possibility that on the odd occasion she might be asked to support students directly in class. The claimant also said that she had been under the impression that a university degree (which she did not have) was required in order for her to work directly with children and that she told Ms Nolan that she would not be comfortable working directly with children. While we accept that the claimant believed that the majority of the work would be in adapting resources, it is clear in our judgment that the claimant accepted the role knowing that it might involve some direct work with children. We also accept that the claimant may well have been under the impression that a degree was needed for that work, but on the basis of the evidence presented by the respondent we accept that she was mistaken in that regard. We note that the "person specification" provided by the respondent for the job included as an essential requirement a qualification to at least NVQ Level 3 – while the claimant did not have such a qualification when she started the job, she did accept that fairly early on she completed an NVQ course, although she could not remember which level it was. We infer that it must have been at least Level 3, which is why the respondent would have sent her on the course.

Start of working from home

13. The claimant was diagnosed with COPD around 2018. The symptoms were severe shortness of breath, wheezing and an inability to move around for very long. It also made her vulnerable to chest infections. In October of that year the claimant had a severe asthma attack at the school and was taken to hospital in an ambulance. A note from a doctor dated 17 October 2018 was in the bundle. It was "in support of [the claimant] being able to work from home" and explained that the asthma did not interfere with the claimant's ability to do her job, however working from home would prevent her being exposed to pollens and pollution on the way to work, which would keep her asthma under better control. The doctor explained: "Asthma is a chronic condition with flare ups that can be exacerbated by pollution, infection and pollen among other things." The parties agreed that Ms Nolan allowed the claimant to work from home because of all of this. We were not provided with any written record of an agreement. The parties disputed whether the claimant was initially allowed to work from home for five days per week, as the claimant recalled, or whether she was to work two days at the school and three at home as Mrs Bellot asserted. On the basis of the record of a meeting of 11 March 2019, which records the claimant saying that when the arrangement initially commenced it was for five days, we prefer the claimant's evidence on this point. It is however clear that the practice soon changed to less than five days at home, around February 2019 – see the OH report at [83]. There was also a dispute as to how long the arrangement was to last. The claimant says no time limit was put on it, although the arrangement was to be subject to review. Mrs Bellot said that it was a short-term arrangement, for three months. On the basis that the parties were unlikely to have contemplated the situation improving, we prefer the claimant's evidence on that point.

Arrival of Mr Mann

14. Mr Thomas Mann took over from Ms Nolan as the claimant's line manager around December 2018/January 2019 (i.e. a few months after the claimant began working from home). We accept the claimant's evidence that soon after, Mr Mann began making comments about the claimant's work from home and that he didn't ask her directly about her disability, nor why any reasonable adjustments were necessary (although we note that he would be likely to have had access to any relevant paperwork on the subject, so he may not have felt the need to ask her).

15. The claimant provided the respondent with another doctor's letter dated 29 January 2019. Although Mrs Bellot characterised this letter as identical to the previous one, that was not correct. The letter contained new information that, as a result of having worked from home for three months, the claimant's asthma was much better controlled.

16. Whatever had or had not had not been agreed with Ms Nolan, the parties agreed that Mr Mann made clear to the claimant that he wanted her to come into the school more. "Fit notes" (i.e. notes from a doctor regarding fitness to work for the purposes of social security or statutory sick pay) show the claimant unfit to work from stress for much of the period between 24 January 2019 and 30 June 2019 (we assume that a gap during that time was because of the school holidays). As we understand it, the claimant was not attending the school but was in fact still working from home some of the time.

17. An occupational health ("OH") report was prepared on 19 February 2019. By now the claimant was working from home for 3 out of 5 days per week. Regarding COPD, the report says: "This can result in shortness of breath and increased vulnerability to chest infections. There is treatment available, particularly in the form of inhalers but these are to help mitigate symptoms rather than irradiate [*sic*] the condition…. [the claimant] is experiencing symptoms on a daily basis, such that even when she is at her best she is breathless to some degree or feels heaviness in her chest. When she exerts herself she experiences further breathlessness. This means that on a typical day she is limited to walking perhaps 10 minutes on the flat before feeling too short of breath. It makes tackling flights of stairs more difficult and means that she must pace herself in her activities." The claimant is recorded as saying working from home was helping because it reduced her exposure to pollution and pollen, and to potential infections, and helped with stamina and resilience. (We note that in these circumstances the respondent's point that the claimant had rather a short walk to school is rather beside the point – the walk to school would not have been the only physical exertion during the claimant's work day and in any case the lack of that exertion was clearly helping.) The OH practitioner suggested that the respondent should assume that the Equality Act applied and recorded his opinion that the claimant was reliant on the working arrangement to help her manage with a full-time work commitment, noting that whether homeworking was sustainable was a matter for the respondent.

18. On 11 March 2019 a "sickness absence" meeting took place between the claimant, Mr Mann and Mrs Bellot. Notes from the meeting record the following:

> TMA [i.e. Mr Mann] also explained that AWA's [i.e. the claimant's] current role allows her to work in the current pattern agreed but this would have to be looked at for the medium to longer term. He also explained how the PT [part-time] working arrangement would impact on the sickness absences but it would mean a contractual change. TMA also explained that as AWA was on a FT [full-time] contract she would need to fulfil that obligation by being present in work 5 days and if she could not then we could look at PT options. In the meantime, AWA should look at working three days maybe Monday, Wednesday and Friday by way of graduated return and see how she got on. The Inclusion Faculty is a small one and is unable to sustain the arrangement for too long and there would be a need to increase what was in place. There was a need to move forward as it had now been 4 months.

19. The meeting notes make clear, as the claimant said in her evidence, that at that time she was open to considering part-time working.

20. As we have said, in March 2019, the claimant's GP's notes were recording that she was not fit for work due to stress. The claimant's evidence, which we accept, was: "I was so worried about going in to the school site. I was petrified about getting further infections, collapsing again, or putting my life at risk. The situation had a terrible effect on my mental health." Note then, that though the notes are saying the reasons for absence was stress, we accept that there was a link between that stress and the claimant's disability.

21. An OH report of 30 May 2019 said the claimant had been off sick with stress from March 2019. The claimant reported that the stress was "related to the management side of things rather than the content of her job role itself". The note continues: "Stress appears to be arising as a result of her interactions with the school in relation to her desire to work from home on a number of days per week and what she perceives as management resistance to agreeing to this." The practitioner recommended that the respondent make whatever efforts it could to be satisfied that it fully understood the reasons for the claimant feeling stressed and also urged the respondent to discuss work arrangements which could be made to accommodate the claimant's reduced exercise tolerance. It is important to note that all of this was before the Covid-19 pandemic began.

June 2019

22. Mr Alex Thomas started as the school's headteacher around June 2019.

23. On 17 June 2019, a meeting under Stage 2 of the respondent's Supporting Attendance in Schools policy took place. (Stage 1 had involved the meetings we refer to above.) Present were the deputy head Ms Regan, Mrs Bellot, the claimant and her union representative. The claimant said that from

January/February her manager (i.e. Mr Mann) had asked her to come in for two days per week, but there were no extra duties and she found she was doing work in the office that she could have done from home. Ms Regan told the claimant that the school wanted to "offer support where it could and moving forward" to get her "back to work".

24. Following the June meeting, the claimant's evidence was that she started a phased return to the school and saw a deterioration in her health, having more chest infections and experiencing shortness of breath and wheezing. Although we accept the point of counsel for the respondent that the number of fit notes provided by the claimant did not appear to increase – the claimant was unfit for work with COPD between 13 November 2019 and 1 December 2019 and with asthma between 10 and 22 March 2020 – that is not necessarily inconsistent with what the claimant said, and we accept her evidence.

The pandemic

25. The first "lockdown" as a result of the Covid-19 pandemic began on 21 March 2020. The claimant (and everyone else at the school) began working from home all the time. The claimant's evidence, which again we accept, was that her physical health improved but she also saw an improvement in the feelings of anxiety and depression which had been affecting her daily.

26. The end of the first lockdown coincided with the start of a new term, and on 4 September 2020 the claimant emailed Ms Regan asking to be allowed to continue to work from home. A fit note showed the claimant unfit for work due to "anxiety state" from 8 to 22 September 2020.

27. On 18 September 2020 the claimant spoke to Mr Thomas. It was not a formally minuted meeting but the claimant made her own note. They discussed the claimant assisting another department in order to make up her workload. On 23 September 2020 it was agreed that the claimant would be provided with a phone which would help her work for that other department.

28. On 2 October 2020 Mr Thomas and the claimant signed a agreement headed "Time limited agreement to work from home", which was in the form of a letter from Mr Thomas to the claimant. (The letter does not explicitly say that the claimant would work from home every day, though that is implicit.) The document specified a review date of the first week in December 2020. Mr Thomas referred to two conversations they had had, recording that he had said that the claimant's duties could be broken down into those that could and could not be done from home. Adapting materials was the key area of work that could be undertaken from home. This needed to be done but was becoming "less significant over time". Mr Thomas noted that the claimant said about 70% of her time was spent adapting materials and that support in class (i.e. directly supporting children in the classroom) was not an option for her. (Note that this does not necessarily mean that the whole of the other 30% could only be done at the school – adapting was not the only duty that could be done from home.)

Mr Thomas said that he would explore with Mrs Bellot the possibility of the claimant working part-time or undertaking alternative duties, not necessarily from the SEN department. The letter concluded by setting out the arrangements for providing the claimant with work. So at this point Mr Thomas was content for the claimant to work from home, albeit he had not agreed that the arrangement was sustainable for the long term.

29. We take judicial notice of the fact that the second lockdown began on 5 November 2020. From then, and through the third lockdown which began on 6 January 2021, the schools remained closed until 8 March 2021, although the staff and children were of course working from home over that time. What had been expressed to be a time-limited agreement for the claimant to work from home subject to review in December inevitably continued past then. Over that time, the claimant made a note, which we accept was accurate, of a meeting she had with Mr Mann on 19 November 2020. Mr Mann asked the claimant if her duties for the other department were impacting on her ability to carry out adaptions; she told him they were not.

30. On 4 January 2021 the claimant made a note of another (remote) meeting, which we again accept is accurate, this time with Mr Thomas. Mr Thomas told the claimant that Mr Mann was not happy with her carrying out duties for other departments as she was being paid from his budget. We accept that this was a legitimate concern on Mr Mann's behalf – if the claimant was spending a certain proportion of her time working for other departments, then clearly the SEN department was losing out. However we were not told whether any consideration was given to whether a member of staff from the other department might cover the SEN department's "lost" proportion in exchange for the claimant doing the other department's administrative and other work, even assuming that it was not possible to reallocate parts of budgets. Some of the work on site which the respondent required the claimant to do was playground supervision duty, which presumably need not have been done by someone specifically in the claimant's role. Some other of the work on site was working directly with children with SEN; presumably that would have had to have been done by an SEN learning support assistant, but we understand that the claimant was one of a number of people in that role; we were not told whether any consideration was given to reallocating duties between the claimant and her other colleagues, so that claimant took on more of their administrative work in exchange for them doing more of the on-site work (though clearly somebody was doing the on-site work in the claimant's absence). It may be that there were reasons why that could not happen – for example, we appreciate that the respondent may well have required some flexibility if, for example, members of staff were ill. But in the absence of any evidence from the people who may have made that decision, we simply cannot say.

31. At the start of the pandemic the claimant had been classed as a clinically extremely vulnerable person. The government's advice was that such people should "shield", and so the claimant stayed at home and avoided contact with others as much as was possible. The advice to shield officially ended on 1 April 2021. The week before that, on 24th of March 2021, Mrs Bellot sent an email to the claimant (addressed "Dear Colleague") explaining that following the

government's announcement about the end of shielding, the respondent was looking forward to welcoming her back to work and enquiring whether there was anything the respondent could do to support her return. This is the first, but not the last, example of correspondence from the respondent which did not acknowledge that this claimant had been working from home for medical reasons before, and for reasons unconnected with, the pandemic.

32. The claimant met Mr Thomas and Mrs Bellot remotely on 20 April and 4 May 2021. The meetings were recorded in a letter from Mr Thomas to the claimant dated 4 May. It is clear from the letter that the claimant was still working, but from home. Mr Thomas recorded that "it was the expectation that all staff would be back in work from the first day of the summer term". Additionally they had discussed "the reduction in the quantity of adaptive work due to a reduction in VI students from September 2021 and the greater use of adaptive technologies". The claimant explained that the discussion of returning to school had created a degree of anxiety. She said she had not spoken to her GP about that but said that there were no circumstances in which she could see herself coming back – we note that the claimant's position now was entrenched, and that that was known to the respondent. The claimant also said that she felt that Mr Mann did not know what or how much she did. Mr Thomas told the claimant that she was not the only one with anxieties about being in school and that the school had a number of control measures in place to prevent (presumably he meant lessen) transmission of the virus. He suggested a number of "strategies", including a visit to the site for the claimant to familiarise herself with the journey, speaking to the claimant's union and contacting the respondent's employee assistance programme, which had councillors and resources that may help the claimant's anxiety. The letter makes no mention of the claimant's disability and is another example of correspondence which takes no account of the fact that the claimant was working from home before the pandemic. The letter refers to an individual risk assessment. In her oral evidence Mrs Bellot told us that she thought one would have been done , but we conclude that had one been done it would have been in the bundle. In our judgement Mr Thomas's letter might have been a perfectly reasonable response to someone without a disability who was anxious about contracting Covid-19. The suggestions it made were generic and we agree with the suggestion made on behalf of the claimant that the "strategies" were unlikely to have assisted her.

33. Fit notes recorded that the claimant was not fit for work on account of work-related stress from 19 to 29 April 2021 and from 26 May to 27th of July 2021. On 20 July 2021 another meeting took place under the respondent's supporting attendance policy and procedure for managing long-term sickness absences, between Mr Thomas, Mrs Bellot and the claimant. There was a brief discussion about the potential for the claimant taking medical retirement. Otherwise little of note (for the purposes of this case) was discussed. The claimant was told that she would be written to with an outcome, another review would be undertaken and there would be a referral to occupational health before any further meeting.

34. On 31 August 2021 (i.e. just before the start of the new school year) the claimant emailed Mrs Bellot to say that she was not comfortable returning to

the school. She indicated that she would be able to get on with other duties from home. She also enquired about the nature of the review which we refer to in the previous paragraph. In her reply Mrs Bellot said that the review would entail Mr Thomas looking at the current circumstances of the claimant's absence and where there was no significant improvement or reasonable expected return date, consideration would be given to progressing to a Stage 3 review meeting. Mrs Bellot also said:

> The position remains the same regarding your request to work from home - this unfortunately is not something that we can sustain. The school has been as supportive as it can but now that schools are fully open the provision of supporting students must include in class support.

35. In the claimant's response of 9 September 2021 she pointed out that she was not absent from work – she had been continuing with adaptations and other duties from home (as she told us in her evidence she had done from the start of term on 1 September).

36. A letter from the claimant's GP, addressed to whom it may concern and dated 10 September 2021, explained that the claimant had had frequent chest infections in the past however in the last year since working from home and leaving home only for shopping once a week she had had no chest infections, asthma or COPD exacerbation. She was vulnerable and at high risk of having severe complications if she developed a Covid-19 infection and was therefore very anxious about returning to work. The GP concluded, "we will appreciate your ongoing support for her to continue working from home".

37. On 12 September 2021 a "year leader" emailed Mrs Bellot to query the situation where the claimant was working from home whilst being deemed absent by the respondent. On 14 September Mrs Bellot replied to the claimant's email of 9 September 2021 to say, somewhat opaquely in our view: "I acknowledge that you are not absent from work under the terms of the supporting attendance procedures but you do however remain absent from work. This matter is the matter we are all seeking to address." Mrs Bellot then made clear that the claimant should continue to work from home on adaptation work but that that "should in no way be taken as an indicator that the school is agreeing or acceding to a request to work from home". Mrs Bellot also said that on the basis of the GP letter of 10 September there would be an immediate referral to occupational health for advice. The evidence presented to us did not provide us with sufficient clarity to say how long after September 2021 (if at all) the claimant continued to work from home.

38. Around September 2021 the claimant was referred to occupational health for the purposes of consideration of ill-health retirement. The claimant did not consent to share that report with the respondent. Her reasons for doing so were not explored at the hearing and we draw no conclusions about that.

Grievance

39. On 6 October 2021 the claimant emailed to Mr Thomas a formal complaint under the respondent's grievance policy and procedure, i.e. a grievance. Whilst on the face of the document it is hard to identify precisely what the specific grievance was, it would have been clear to anyone with knowledge of the situation that in substance it was a complaint that the issue whether the claimant could work from home had not yet been resolved. Mr Thomas took the view that as the complaint concerned him and Mrs Bellot, it was best dealt with by the school's governors, and accordingly passed it on. On behalf of the governors, the governors' clerk emailed the claimant to ask her to clarify her complaint. She did so by email on 13 October 2021, making clear that in fact her grievance was against Mr Mann. A Ms Kincaid, an Associate Assistant Headteacher, was assigned to deal with the grievance. She spoke to the claimant on 1 December 2021 and in an email the following day Ms Kincaid said that she would speak to Mr Mann, having set out three particular complaints that she had identified as having been made by the claimant. Ms Kincaid emailed the claimant again on 7 December 2021. The email concludes by saying that having investigated the claimant's concerns, Ms Kincaid believed she had addressed the three identified concerns and said that the matter was now closed. In our judgement the email did not resolve the claimant's grievance. It simply recited Mr Mann's response to the three concerns, making no findings about what the claimant or Mr Mann had said. In an email of 24 December, the claimant thanked Mrs Bellot "for the update". We do not regard this as the claimant having accepted the "resolution" – it is not even clear that the claimant was referring to the grievance, since the email she was responding to mentioned both the grievance and the issue of ill-health retirement; even if it had been a response to the outcome, the wording does no more than acknowledge receipt.

40. On 9 May 2022, some five months later, the claimant wrote back to the governors' clerk to say that she was unhappy with the way the grievance was dealt with and wished to reinstate the original grievance against Mr Thomas and HR (i.e. Mrs Bellot) as she had been bullied into accepting early retirement on medical grounds, which she said she had mentioned in the grievance. In fact, although the grievance mentioned ill-health retirement, that was in the context that the claimant was saying that she did not have sufficient information about it, rather than that she had been bullied. The clerk asked Mrs Bellot how they should proceed, and Mrs Bellot expressed some scepticism about whether the respondent was under an obligation to deal with the matter given the amount of time that had passed. It appears that the clerk did then pursue the matter, as in an email of 14 June 2022, clearly a response to a "chaser" from Mrs Bellot, the clerk says that they had emailed the claimant but never heard back from her. We accept that is what had happened, given the claimant's own evidence in her witness statement that in the end she did not pursue the complaint. However, we do not consider it surprising that the claimant decided not to pursue the point, given an email from the clerk to Mrs Bellot written on 13 May 2022 says: "I don't think it's appropriate to resurrect a grievance never had that request before. I will look at the policy and suggest she writes out a

new complaint and the first preference is an informal resolution." We consider that, in the circumstances, requiring the claimant to rewrite her complaint and then suggesting an informal resolution was not appropriate – the claimant was clearly seeking to make a formal complaint about what amounted to an informal "resolution" of her earlier complaint.

Further OH referral and meetings

41. Meanwhile, returning to the time shortly after the claimant first raised her grievance, on 12 October 2021 the claimant was again seen by occupational health. The report records, amongst other things:

> Ms Ward remains away from work at present on account of work related stress (certificated by her General Practitioner). Ms Ward told me that much of the stress and anxiety she is experiencing at the moment is derived from the pressure she perceives to come back to work in the school environment…
>
> The subject of working from home is something that she and I had discussed even before the Covid pandemic and I refer you to my Occupational Health report dated 19th February 2019. This outlined the rationale that Ms Ward had put forwards at that time, in relation to the reasons why home working would benefit her.
>
> The context of this is her diagnosis with chronic obstructive pulmonary disease in addition to her asthma.
>
> With the Covid pandemic, Ms Ward had the opportunity to work from home for a considerable period of time as part of the response to the pandemic. Her experience of this has reinforced her belief in the benefits of home working for her, and in particular she reports a significant reduction in the frequency and severity of chest infections, as a result of mixing with fewer people and having less exposure to community acquired infections.
>
> In addition, the ongoing potential to encounter Covid 19 infection is a source of anxiety for her. She has exercised her choice not to be vaccinated. She would be at greater risk of a more complicated Covid infection, on account of her underlying chest disease, compared with somebody who does not have her chest problems.
>
> In view of her underlying chest condition, Ms Ward experiences breathlessness on exertion. If she is exerting herself in the course of work activity then she will experience symptoms. There is logic behind her argument that, if she is engaging in social interaction and mingling with others in the course of work activity, this will increase her risk of chest infections, which she is more prone to because of her underlying health difficulties.
>
> …

> I have no recommendations for alteration in working hours, on medical grounds
> …
> If you had a role that Ms Ward could manage from home as part of a longer term and sustainable solution then this would be something to give consideration to.
> …
> [Y]ou have communicated… that it not a reasonable adjustment for Ms Ward's role to be undertaken exclusively from home.

42. On 1 July 2022 another meeting under the respondent's procedure for managing absences took place, between Mr Thomas, Mrs Bellot and the claimant. The claimant said that she did not wish to take ill-health retirement – she wanted to work from home. Mr Thomas said that the needs of the youngsters was such that her role needed to be in school to be effective. A letter from Mr Thomas relating the outcome of the meeting was sent to the claimant on 14 July 2022. Mr Thomas said that there were operational concerns in relation to the claimant's continuing absence and the effect this was having on the inclusion department. Unless the claimant returned to work on 1 September 2022, her case would be referred for a formal Stage 3 meeting to be heard by a panel of governors. The letter did note that the claimant had said that she had been allowed to work from home before Mr Mann took over as head of inclusion.

43. Another occupational health report followed an appointment on 14 October 2022. For this report we were provided with the original referral to the occupational health practitioner, which was prepared by Mrs Bellot. The referral explains the time-limited arrangement to work from home in September 2020, but makes no mention of the fact that the claimant had worked from home before the pandemic. The OH report itself notes that the claimant said that she had work from home before the pandemic. The OH practitioner, having opined that the disability provisions of the Equality Act would more than likely to apply to the claimant's stress, depression and COPD/asthma, said that "exploring working from home could count towards reasonable adjustment". Clearly, then, it was understood that working from home would help the claimant; indeed there was never any dispute about this, but rather about whether the respondent could reasonably accommodate that.

Nature of the claimant's work – work on site and from home

44. In the bundle was a written job description. In her oral evidence the claimant was unsure whether or when she had received a copy of this, but she did accept (and we agree) that it accurately described the role of Visual Impairment Learning Support Assistant. A list labelled 5.1 to 5.17 sets out the duties and responsibilities. We do not reproduce them all here, though we note the following. Points 5.1 to 5.5 – liaising with teachers and producing materials etc. – need not necessarily have been done on the school premises. 5.6 to 5.9, 5.17 – supporting students in class, participating in the roster for break time duties – could only realistically have been done at school. Others in the list – attending meetings etc. could probably have been done remotely, at least in part. We

also note that items 5.10 to 5.17 might be described as generic duties, i.e. duties common to many members of staff rather than visual impairment learning support assistants in particular – they include items such as contributing to annual reviews and attending parents' evenings.

45. Of some importance in this case was the question of what proportion of the claimant's work involved adapting resources. This was significant because there was no dispute that that work could have been and indeed was done by the claimant from home. The claimant's estimates in her written and oral evidence varied somewhat – on one occasion she estimated it was 100% although other times she said a minimum of 70%. As she said in her witness statement, it varied over time but there was no challenge to the broader point that it took up a substantial majority of her time. We did not hear evidence from any witness other than the claimant who was in a position to give a realistic estimate about this and we accept the claimant's evidence. We conclude that the claimant spent not less than 70% of her time doing adaptations, for all of the time she was working, i.e. we find this was the case up until the time she last worked for the respondent. It should be noted that this does not mean that all of the other 30% (or less) of work could only have been done on site - as the claimant told us in evidence, she had other duties such as ordering special books, which might also have been done off-site. We also note the claimant's evidence, which we accept, that when she was working from home there was enough work to fill the time (and the respondent made no suggestion that she had not been working properly and efficiently). Although some of the paperwork in the case suggests that Ms Nolan's successor Mr Mann may have expressed some scepticism about whether there was sufficient work for the claimant to do, we did not hear evidence from Mr Mann and there was no direct evidence from the respondent on the point; to the extent that there was a dispute, we accept the claimant's evidence.

46. The respondent suggested that the claimant's workload diminished, or was going to diminish, in two respects towards the end of her employment. First, it was apparent that both Mr Mann and Mr Thomas had formed the view that changes in technology had meant that the need for adaptions reduced significantly. However we heard from neither of those witnesses and the respondent presented no analysis to support such a view – it does not appear there was any attempt made to quantify this, either at the time of the claimant's employment and dismissal, nor in preparation for this case. In contrast the claimant, who we did hear from, told us that in the final six months she estimated that she spent about 90% of her time doing adaptations. We accept that evidence (the work for other departments, we infer, took up 10% or less of her time). Second, it was common ground that in September 2021 the number of visually impaired students requiring support reduced from 3 to 2. We accept the claimant's evidence that this did not simply mean a one third reduction in her workload, since the students who stayed had more severe needs than the student who had left. Ultimately, while we accept that by 2022 there might have been some reduction in the need for adaptations, in the absence of any analysis from the respondent on the point we can conclude no more than that. We do not accept that either of those things meant that the proportion of time the claimant spent doing adaptations fell, or would have fallen, below 70%.

Although, as counsel for the respondent fairly pointed out, the claimant had said, for example, that she had been in class about once a week (though she did not necessarily say all day) and referred to a particular day where she had provided support in class all day, that does not affect our final conclusion regarding 70%.

The Stage 3 meeting and dismissal

47. On 5 December 2022 the claimant was invited to a "stage 3 formal review meeting". The invitation letter explained the procedure – the case would be considered by a panel of the governing body, the claimant was entitled to be accompanied and would have the opportunity to put forward her case. The management case would be presented by Mr Thomas. The claimant was told that one of the options open to the panel was termination of her employment. The letter noted: "Regrettably your sickness absence has continued and you have now been absent continuously for in excess of 14 months."

48. We were shown a document prepared for the panel by Mr Thomas, said to detail a summary of events in relation to the claimant's long-term sickness absence. The report details the claimant's "absence from work" from 4 October 2021 – the situation before that time is not mentioned, nor is the fact that the claimant is disabled. The claimant's "incapacity" is described as "stress related problem / work related stress". Under the heading "return to work" the report says that there had been no attempt by the claimant to return to the workplace but that she had requested to work from home. It did not say that in fact she had worked from home previously. Under the heading issues for consideration were a number of points including whether the claimant was capable of "providing regular and efficient service", whether she needed more time to recover and whether her job could be kept open. The possibility of her working from home was not dealt with.

49. The Stage 3 meeting took place on 12 December 2022. The panel was made up of three governors, one of whom, Mr Watson, was the chair. Also present were: Mrs Bellot as the "governors' adviser", the clerk to the governors, Mr Thomas and the claimant. As well as hearing evidence from Mr Watson and Mrs Bellot, we were provided with minutes, the accuracy of which was not in dispute. Mr Watson's evidence was that as well as Mr Thomas's report the panel also had the following documents: the claimant's job description, the latest occupational health report (i.e. the report prepared following the appointment of 14 October 2022) and an email (which we also saw) written by the claimant to Mrs Bellot on 29 June 2022. The email set out the claimant's account of the circumstances of her accepting the job and explained that following the asthma attack in October 2018 she had been allowed to work from home and had no longer had to take time off sick because her conditions were being managed more effectively and she was not being exposed to triggers and pollutants as, she said, had been explained by her GP and occupational therapy. The claimant then said that after Mr Mann had taken over he had insisted that she attend school regularly and since then she had numerous absences from work. In addition to her "current conditions" this had now

affected her mental health and she now had anxiety, stress and depression for which she was on medication. She concluded by saying she always enjoyed her job and it was her intention to stay with the school until retirement.

50. We note that the panel were not provided with information about the claimant's grievance (see above) which had at least in part been against the person now presenting what was essentially the case against her remaining in employment. Despite the unsatisfactory resolution of that grievance, given that the claimant had ultimately not pursued the grievance (albeit for what we consider to be understandable reasons) and given also that she raised no objection during the meeting, we do not consider this to have been a significant procedural irregularity.

51. We also note that if Mr Watson's recollection is correct (and there was no suggestion to the contrary) the panel do not appear to been provided with the respondent's absence policy nor with any written consideration about the practicalities of the claimant working from home either part-time or full-time. Even taking into account that the panel had the claimant's account by way of the email we summarise above, it seems to us that the information provided to the panel provided an incomplete picture of the situation. We regard this as a serious failing, which no doubt contributed to what we go on to find was the panel's failure properly to scrutinise the management case as presented by Mr Thomas.

52. At the start of the meeting the claimant confirmed that she was content to proceed unaccompanied. Mr Thomas's submissions to the panel are then set out in the minutes. He told the panel that the claimant's role was to adapt resources for visually impaired students and support them with work in the classroom. Mr Thomas said that the claimant was a clinically vulnerable employee and had shielded until March 2021. Risk assessment was discussed and the claimant said that she was still anxious about returning. Mr Thomas mentioned some of the meetings and occupational health reports we have referred to above and said that the claimant's absence from work due to ill health commenced on 4 October 2021. We do not set out all of the rest of Mr Thomas's submissions, but we note that under the subheading "return to work" Mr Thomas is recorded as saying the following:

> There has been no attempt by AW to return to the workplace, she has requested to work from home. A temporary arrangement was in place in December 2018 which was reviewed with the SENCO and the meeting did not go well and a mediator engaged. Hybrid working and other options have been discussed but not been successful. Risk assessments have been discussed.

53. In our view this was liable to give the panel the erroneous impression that the 2018 working from home did not go well. We note also that there is no mention there that in 2020/2021 the claimant also worked successfully from home (though the panel of course might have assumed that had been the case given that many others did that for at least some of that time). In concluding, Mr Thomas told the panel that, to paraphrase, the claimant was good at her job.

He said that the panel was asked, in view of the claimant's continued absence which now amounted to over 14 months with no anticipated date of return, to consider whether her role could be kept open any further.

54. The minutes then record the claimant's submissions. The first half of this record largely mirrors the contents of the email the panel was given. The second half records the claimant saying that during shielding she had been able to work from home and essentially suggesting that there was no reason why that could not have continued. It was obvious, she said, that coming into the classroom affected her asthma and COPD.

55. The next part of the minutes record questions from the panel to the claimant and Mr Thomas and their answers. The claimant was asked to explain how support could be given to visually impaired students remotely and she said that although she could not support them from home she could support them by adapting the resources from home. The claimant later explained what resources she was adapting, and that she could adapt resources from home with a laptop and phone. When asked where the role was performed from 2014 to 2019 she said that she was adapting resources in the school office and on the odd occasion she went into class. Mr Thomas was asked whether the working from home model had been explored. His reply was:

> There is not sufficient full-time work required for adaptations from home, adaptations are required periodically. The team are looking to work flexible and how they are deployed is flexible across the whole school. Working from home is not an efficient way to support students. The period of the pandemic, the experience of the students was not positive as it could have been.

56. On the basis of the evidence we heard, the use of the word periodically misstated the position, or at least could have been misinterpreted – the claimant was spending the majority of her time doing adaptations.

57. Mr Thomas was asked if it was a full-time role at home. He replied: "No, there is not that many visually impaired pupils at the school for this role to be full-time, other students also need to be supported." There was no exploration of whether the role might be done part-time and therefore no exploration of what proportion of a full-time role such a part-time role would occupy. Towards the end of the questions the claimant made clear that she would not be prepared to come back into the school. In response to a question about whether other roles had been explored which the claimant could carry out remotely Mr Thomas replied: "Some discussions have taken place; however, all support staff work on site and provide a wider role at the school. We have no roles that work from home."

58. At no point during the meeting was the panel told that the claimant was disabled. Nor were they told that the school/respondent was or might be under a duty to consider making reasonable adjustments. There was no mention of any of the provisions of the Equality Act, either explicit or implicit.

59. During the course of his oral evidence it was put to Mr Watson that it might have been open to the panel to recommend that the claimant be allowed to work from home rather than being dismissed. He said that he did not think that was the process as he thought the prospect of dismissal had been made very clear in the correspondence. He accepted that the panel did not consider allocating those duties which the claimant could not do to another member of staff. On the basis of Mr Watson's evidence we conclude that the panel considered that their remit was confined to the narrow issue of saying whether dismissal, as effectively recommended by Mr Thomas (though he did not say so in so many words), was appropriate. Although Mr Watson told us that in the hearing the panel had understood that there simply was not enough work for the claimant to carry on working from home adapting materials, we consider that the scrutiny that Mr Watson accepted was part of the panel's role (acting as a "critical friend" was how he put it) was absent. There was no attempt to analyse how much of the claimant's role could have been done from home. When asked why the panel had preferred Mr Thomas's representations to the claimant's, Mr Watson said that things such as the length of time of the absence, the cost and the value that had against the students themselves had to be considered. The reality, he said, was that the students were not getting the support they need. But in our judgement those things were not in fact considered during the course of the meeting or at least not in any depth. Steps short of dismissal simply do not appear to have been discussed. The panel do not appear to have been informed that the claimant had for some time been able to undertake duties for other departments from home. When asked about his understanding of the proportion of the claimant's job that was taken up by adapting materials, Mr Watson said that he was unable to give a figure but could only say that his understanding was it was a very small proportion, by which he said he meant less than 30%. On the basis of the findings we have already made, this was a fundamental and significant misunderstanding; it appears to have come about because there was simply no analysis of Mr Thomas's assertion that there was not sufficient work to make up a full-time role. When asked whether the panel might have had the power to order further investigations or to require statistics and analysis from Mr Thomas before making a decision, Mr Watson said that he did not know but that he thought the panel had enough information from the parties to make a decision. We conclude that in all the circumstances there was insufficient scrutiny by the panel of the management's case. The panel simply did not consider whether there were any alternatives to dismissal. In our judgment this was a significant failing given that, had the analysis been conducted, it could well have been concluded that there was work that the claimant could do from home that was sufficient to fill a significant proportion of a full-time role. While the respondent might ultimately have concluded that there were good reasons not to proceed with such an option, in the absence of any analysis about the practicalities, we conclude that a fair process was not followed. In the absence of the analysis, either during the course of the dismissal or during the course of these proceedings, the likely result of a fair process can only be a matter of speculation, at least at this stage.

60. On 3 January 2023 Mr Watson wrote to the claimant with the outcome of the meeting. He said that the unanimous decision of the panel was that the

claimant's employment would be terminated. The reasons given were as follows:

> The panel have decided that, given your long-term sickness absence and the medical advice submitted by the Occupational Health Physician, you will not provide regular and efficient service and you are not to be capable of fulfilling the terms of your employment contract as you informed the panel that due to your medical conditions you would not return to school. Governors have unanimously concluded that to fulfil the roles and responsibilities of the post, you would be required to work at the school within a classroom.
>
> The panel considered the impact of your continued sickness on the service and the students, and the mitigation that you put forward.
>
> Regrettably, the panel have decided to terminate your services from the school for reasons of lack of capability due to your continued long-term sickness absence.

61. We were not addressed by either party on the issue whether the claimant should have taken the opportunity to appeal against the decision. Since neither party raised the point, we have not taken it into consideration

LAW

Unfair dismissal

62. S 94 of the Employment Rights Act 1996 "ERA" confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that they were dismissed by the employer (see s 95 ERA), but in this case the respondent admits that it dismissed the claimant.

63. S 98 ERA deals with the fairness of dismissals in two stages. First, the employer must show that it had a potentially fair reason for the dismissal within section 98 (1) and (2). Second, if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

64. So far as the first stage of fairness is concerned, S 98 ERA provides, so far as is relevant:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and

> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do
>
> …
>
> (3) In subsection (2)(a)—
>
> (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality
>
> …

65. So in this case it is for the respondent to prove that the principal reason for the claimant's dismissal was capability (i.e. a reason falling within ss (2)).

66. The second stage of fairness is governed by s 98 (4) ERA:

> (4) … the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

67. In deciding fairness, we therefore must have regard to the reason shown by the respondent and to the resources etc. of the respondent. In general, the assessment of fairness must be governed by the band of reasonable responses test set out by the Employment Appeal Tribunal ("EAT") in *Iceland Frozen Foods Ltd* v *Jones* 1983 ICR 17. In applying s 98(4), it is not for us to substitute our judgment for that of the employer and to say what we would have done. Rather, we must determine whether in the particular circumstances of this case the decision to dismiss the claimant fell within the band of reasonable responses open to a reasonable employer.

68. In the specific case of incapability through illness, the relevant part of the list of issues is based on a number of authorities which we need not summarise here as the law was not in dispute.

69. In the event that the dismissal was unfair, we would go on to consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed, in accordance with the principles in *Polkey* v *AE Dayton Services Ltd* [1987] UKHL 8.

Discrimination Generally

70. The Equality Act 2010 ("EqA") prohibits discrimination on the grounds of various "protected characteristics", set out at sections 5 to 18. An employer must not discriminate against an employee by (amongst other things) dismissing them or by subjecting them to any other detriment and has a duty to make reasonable adjustments (section 39). There was no dispute here that the claimant was the respondent's employee within the meaning the Act. Nor was there any dispute that the respondent would be liable under s 109 for any contraventions of the Act done by other employees.

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

Discrimination arising from disability

72. By s 15 EqA:

> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

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

74. As Langstaff J explained in *Basildon and Thurrock NHS Foundation Trust* v *Weerasinghe* 2016 ICR 305, two separate causative steps need to be established for a claim to succeed under s 15:
    a. the disability had the consequence of "something", and
    b. the claimant was treated unfavourably because of that something.

75. In *Pnaiser* v *NHS England and anor* 2016 IRLR 170 and then again in *Sheikholeslami* v *University of Edinburgh* 2018 IRLR 1090 Simler J approached the issue in the other order (which is, as was made clear in *Weerasinghe*, open to the Tribunal). In *Sheikholeslami*, her Ladyship said:

> On causation, the approach to S.15… is now well established... In short, this provision requires an investigation of two distinct causative issues:
>
> (i) did A treat B unfavourably because of an (identified) something? and
>
> (ii) did that something arise in consequence of B's disability?
>
> The first issue involves a [subjective] examination of the putative discriminator's state of mind to determine what consciously or

> unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment (it need not be the main or sole reason) then stage (i) is satisfied. The second issue is a question of objective fact [i.e. it will not depend on the person's thought processes] for an employment tribunal to decide in light of the evidence.

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

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

Burden of proof in discrimination cases

78. S 136 of the EqA makes provisions about the burden of proof. If there are facts from which the Tribunal could decide, in the absence of any other explanation, that there was a contravention of the Act, the Tribunal must hold that there was a contravention, unless the respondent proves that that there was not a contravention. S 136 requires careful attention where there is room for doubt as to the facts necessary to establish discrimination, but has nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another (*Hewage* v *Grampian Health Board* [2012] UKSC 37). In this case given the clear factual findings we were able to make regarding the "discrimination arising" complaint, we did not need to apply s 136.

Reasonable adjustments

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

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

81. We were referred in submissions to *Secretary of State for Work and Pensions and others* v *Wilson* UKEAT/0289/09/DA, where the claimant had declined to contemplate anything other than working from home when her work required contact with the public, which she could not do from home. The Tribunal at first instance was found to have erred in concluding that the respondent had failed to make reasonable adjustments – on the evidence before the Tribunal, home working was not practicable and the Tribunal did not make a clear finding with regard to the feasibility of home working. The adjustment proposed (i.e. home working) would not enable the Claimant to return to work as there was no work available for her to do at home and/or it was not feasible for her to do any work from home. It does not appear that the case is authority for any particular principle beyond that the Tribunal must consider the extent to which taking the step would prevent the effect for which the duty is imposed and the extent to which it is practicable for it to take that step. In any case, it also appears that in *Wilson* it was impossible/impracticable for the claimant to do *any* of her work at home.

82. So far as the burden of proof is concerned, it is for the claimant to establish that the duty has arisen and that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that

there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. It will then be for the respondent to show that it did not fail to comply with the duty. (*Project Management Institute* v *Latif* UKEAT/0028/07.)

Time limits in discrimination claims

83. In discrimination claims, by s 123 EqA a complaint must be brought after the end of (a) the period of 3 months starting with the date of the act complained of or (b) such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. Failure to so something is to be treated as occurring when the person in question decided on it. In the absence of evidence to the contrary a person is to be taken to decide on failure to do something (a) when they do an act inconsistent with doing it or (b) if they do no inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it. In *Humphries* v *Chevler Packaging Ltd* EAT 0224/06 the EAT confirmed that a failure to act is not a continuing act but an omission and that in a reasonable adjustments claim time therefore begins to run when an employer decides not to make the reasonable adjustment.

84. It was said in *Robertson* v *Bexley Community Centre t/a Leisure Link* 2003 IRLR 434 that time limits in the Employment Tribunal are exercised strictly and that a decision to extend time is the exception rather than the rule. However, in *Jones* v *Secretary of State for Health and Social Care* 2024 EAT 2 it was suggested that a greater focus should be placed on other authorities such as *Abertawe Bro Morgannwg University Local Health Board* v *Morgan* 2018 ICR, in which the discretion was referred to as having a wide breadth. Two factors almost always relevant to the exercise of the discretion will be the length of and reasons for the delay and whether the delay has prejudiced the respondent *Southwark London Borough Council* v *Afolabi* 2003 ICR 800. The balance of prejudice should be considered (*Szmidt* v *AC Produce Imports Ltd* EAT 0291/14). Other factors which may be relevant include: the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the respondent has co-operated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action (see for example *Department of Constitutional Affairs* v *Jones* 2008 IRLR 128).

85. We were referred to *Adedeji* v *University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23 – in dismissing the appeal in that case, Underhill LJ had said that there was no good reason for the claimant presenting his case late. However, it seems clear that the case is not authority for the proposition that lack of a good reason will always be fatal to an application to extend time. The lack of a reason is simply one of the factors that should be

taken into account (nor was the contrary suggested by counsel for the respondent, who drew our attention to the case to point out that the factors set out in *British Coal Corpn* v *Keeble* [1997] IRLR 336 (drawing on s 33 of the Limitation Act 1980, which does not apply to Employment Tribunals) should not be applied prescriptively).

CONCLUSIONS

86. At the time of the claimant's dismissal two significant things were the case. First, the claimant was physically capable of working from home; there was in fact no dispute about that. Second, the claimant genuinely and reasonably believed that she could not work at the school; indeed the respondent itself asserted that she was incapable of doing so. Whilst, at the time of her dismissal, the most proximate course of that incapability was the claimant's anxiety and/or stress, the anxiety/stress were inextricably linked in our judgement with the claimant's disability. Her COPD and asthma meant that she had a genuine and reasonable fear/concern that going in to school could cause her to be seriously unwell, whether by exposure to pollutants on the way, or by contracting chest infections through contact with staff and children. The fear/concern, in our judgment, plainly resulted in the anxiety/stress (and that is not simply a matter of common sense or inference, but is also clear from the occupational health reports and from the claimant's evidence). The incapability resulted in turn from the anxiety/stress. By that chain of reasoning, it was ultimately the claimant's disability (in combination with the circumstances) which caused her incapability. The fact that, as the respondent pointed out, the claimant's decision not to have a Covid-19 vaccine failed to alleviate the anxiety as it might have done does not change that. Also, the fear was obviously exacerbated by the prevalence of Covid-19, but was not based entirely upon it. Yet in our judgement the claimant was treated like any other employee who was reluctant to return to work because of the pandemic, without any consideration being given to her particular circumstances, i.e. her disability and the fact that she had previously needed to work from home before the pandemic. It was also apparent on the evidence we heard that the claimant's absence from school seem to be equated with absence from work, even in circumstances when the respondent knew she was in fact working, albeit from home.

Unfair dismissal

87. We find that the respondent has proved that the reason for dismissal was capability, in the sense that the respondent concluded (correctly) that the claimant was not capable by reason of her health of working on site, i.e. she was not capable of performing at least some work of the kind which she was employed to do (and this would remain the case long-term). This was potentially a fair reason for dismissal.

88. We accept that the respondent consulted the claimant and carried out a reasonable investigation into her health, by way of the numerous meetings and occupational health referrals which we set out above, over a number of years.

We accept also that the school was in possession of all of the relevant medical information which it needed to have about the claimant (though not all of that was passed to the respondent decision makers). We further accept that it was reasonable for the respondent to make the decision when it did – the situation had been going on for some years and was unlikely to resolve itself in the claimant's favour. Waiting longer would have changed nothing (putting aside for a moment the question whether the panel should have asked for further information). We accept that the decision makers acted in good faith.

89. However, we consider that the decision to dismiss the claimant was rendered unfair by the combined effect of flaws in the process adopted at the Stage 3 meeting and of flaws in the reasoning of the panel which made the decision. Instead of properly scrutinising the management case, the panel simply adopted the management suggestion. In particular, that lack of scrutiny caused the panel to fall into the error of concluding that a large majority of the work that the claimant was doing could not have been done from home; in fact, as we have found, that was not the case and the claimant was still capable of doing a sizeable majority of her work, because she could have done the adaptations (and some other duties) from home. While it may be that the proportion of adaptation work might have fallen in future, there was no proper analysis of how significant any reduction might be. Nor was there any consideration of whether those duties which the claimant could not do from home could reasonably have been covered by other members of staff, either from the SEN or other departments. While there might have been sound business reasons for saying they could not have been, in the absence of any analysis by the management, that can only be a matter of speculation. Similarly while there might have been sound budgetary reasons why the claimant could not spend, say, 20% of her time doing work (from home) for other departments, the respondent does not seem to have considered whether the "missing" 20% could be covered by way of a swap by staff from the other departments. The panel also failed to consider whether there were any realistic alternatives to dismissal. If, for example, there had been some effort to quantify the proportion of her work the claimant could do from home, then consideration might have been given to offering the claimant a part-time role. But it was not, and so it is not clear to us whether or not there might have been sound business reasons for the respondent refusing to offer the claimant part-time work. We do not regard it as an answer to that point that the claimant agreed in evidence that she had not been interested in part-time work. She was not asked in the Stage 3 hearing. Her view might well have changed had she realised that it was the only alternative to dismissal or had she been made an offer of part-time work that was close to full-time work (e.g. 80% of full-time hours). Again it might be that there would have been sound business reasons for declining to offer such an arrangement, but in the absence of any analysis we simply do not know.

90. In light of those failures, we find that no reasonable employer would have dismissed the claimant, at least without any further enquiry or further scrutiny of the management's case. The respondent clearly had sufficient resources to do what it did not do. We therefore find that the complaint of unfair dismissal is well-founded.

91. We consider it appropriate to offer the parties a further opportunity to call evidence and to make submissions before deciding on the question whether the claimant's employment would have ended in any event had there been a fair process (the *Polkey* point).

Discrimination arising from disability

92. There was no dispute that dismissal could amount to unfavourable treatment within the meaning of s 15 EqA. The "something arising" pleaded in this case was "the respondent's assessment that the claimant could not perform her role". In answering the question whether the respondent's assessment arose in consequence of the claimant's disability, Mr Winspear for the respondent urged us to focus on the disability as pleaded, i.e. COPD and asthma. His overarching submission was that the claimant had failed to prove a causal link between her disability and the decision to dismiss. He pointed out that the more recent of the claimant's absences had been put down to stress and anxiety; only earlier and fewer absences had been attributed to the pleaded disability. The more recent absences had, he said, on the claimant's case been because of anxiety from fear of catching Covid-19; there was no causative link proven between the claimant's disability and her fear of getting Covid-19. Although he accepted that there was evidence saying that the claimant was at high risk of complications were she to contract Covid-19, it was crucial, he said, that the context was that the claimant had exercised her choice not to have the vaccine. This was significant as if she had been vaccinated she would not have been at severe risk; her fear of getting Covid-19 arose out of her choice not to get a vaccine, not her pleaded disabilities. It did not necessarily follow that the stress was in consequence of the disability. For the reasons we have set out above, we disagree. Although there may well be a few links in the chain of reasoning, at one end of the chain we have the claimant's disability and at the other end of the chain we have her inability to perform her role (and the respondent's assessment of that fact). Whilst there may have been other factors such as the choice not to have the vaccine, it is still right to say in our judgment that the respondent's assessment that the claimant could not perform her role arose in consequence of her disability.

93. In the circumstances of this case there was no need for us to enquire into the mind of the decision-makers – there was no real dispute that the unfavourable treatment, i.e. the dismissal, was because of the respondent's assessment that the claimant could not perform her role. While Mr Winspear submitted that that the claimant was not dismissed because of her inability to work in person but rather because of her refusal to come back to work, in circumstances where no one was realistically arguing the claimant was able to work in person, we do not regard that as a significant distinction. In any case, the reason given to the claimant in writing for her dismissal was capability due to long-term sickness absence, not the claimant's refusal to come into work.

94. The "something arising" was the respondent's assessment that the claimant could not perform her role. This arose objectively because of the claimant's disability. The unfavourable treatment was because of that something – the

claimant was dismissed because the respondent's panel thought she was unfit, i.e could not perform her role.

95. The respondent submitted in the alternative that, should the claimant succeed in proving that the dismissal arose in consequence of the disability, then the treatment (i.e. the dismissal) was a proportionate means of achieving a legitimate aim. The respondent said that the legitimate aim was ensuring the provision of an adequate level of learning support for visually impaired students. Clearly that was a legitimate aim. The question for us was one of proportionality. Mr Winspear submitted that the inclusion department had a limited budget and could not afford for the claimant only to be doing adaptive work (i.e. from home) because that would not use up all of her budgeted full-time hours, and the need for that work was also diminishing. While the claimant might have worked for other departments, that would have left a "hole" in the inclusion department and the visually impaired students would suffer without someone to provide support for them. It was entirely within the school's discretion, argued Mr Winspear, to require the claimant to do more in-class support. A reduction to a part-time role was discussed but never taken up as the claimant said (in evidence) that she was not interested (although, we note that while it may have been discussed at an earlier stage, it was never in fact offered). In the circumstances, said Mr Winspear, there was nothing less discriminatory the school could have done when the claimant was saying she would never come back; the school had to dismiss her so that she could be replaced by someone who could provide the level of service that they required. Largely for the reasons we have already set out, we disagree. The respondent failed to conduct any analysis into whether the "in-person" parts of the claimant's role could have been done by other staff and failed also to conduct any analysis into whether the need for the adapting work was diminishing and if so by what proportion. This applied particularly at the time the decision was made to dismiss the claimant, i.e. at the Stage 3 meeting. While the headteacher may well have believed that neither of these were practicable, we were not provided with evidence to show whether or not the basis for that belief was sound and, more to the point, nor were the panel who actually made the decision to dismiss the claimant. It was not made clear to us why something less discriminatory, such as offering the claimant a part-time role from home, or having her work full-time at home while other members of staff (whether from her department or not) covered the "on-site" work, could not have been done instead. It follows that the treatment was not in our judgment an appropriate and reasonably necessary way of achieving the respondent's legitimate aim, having balanced the respondent's needs against the claimant's. We therefore find that the complaint of discrimination arising from disability is well founded.

Time limits – reasonable adjustments

96. The issue whether the claimant should be permitted to work from home was clearly under consideration for some time. For much of that time it will have been obvious to the claimant that the respondent was not likely finally to agree to her working from home. Equally, it is clear that for a variety of reasons the

respondent did in fact permit the claimant to work from home at least up until September 2021. It may be more accurate to say that there were a series of decisions on whether the claimant should be permitted to work from home, given the repeated change in circumstances both of the claimant and in the nation more generally. The question then is when the last such decision was made. Although Mrs Bellot's reply to the claimant's email of 31 August 2021 indicated that the position remained the same regarding the request to work from home (i.e. that is was not something the respondent could "sustain"), clearly it was something that the respondent had sustained up until that point. The 14 September 2021 email was ambiguous – although Mrs Bellot tried to explicitly make clear that there was no agreement to the claimant working from home, she did also explicitly tell her that she should continue working from home. We consider that the closest that the position came to certainty was later, when in the letter of 14 July 2022 the claimant was told that if she did not return to work by 1 September 2022 her case would be referred for a formal Stage 3 meeting. We therefore find that the decision was made on or shortly before 14 July 2022 and communicated to the claimant on that date. In order for the "reasonable adjustments" claim to have been in time, then, the claimant would have to had begun early conciliation in mid-October 2022. Early conciliation in fact began on 24 March 2023 and so the reasonable adjustments claim is some five months out of time.

97. Although the claimant clearly had some personal difficulties during those five months, as we have found, she was able to work from home. We therefore find that there was no particular personal reason for the claimant not to have presented a claim in time. That however is not the end of the matter. Although the respondent had communicated its decision in July, in some ways the decision was still liable to review, in the sense that the points being decided as part of the Stage 3 process were inextricably linked with the issue of working from home. An occupational health report, which mentioned working from home as a possible reasonable adjustment, was obtained as late as 14 October 2022. As we have already found, although the panel who made the decision to dismiss do not appear to have thought that it would have been appropriate for them to suggest working from home as an alternative to dismissal, the panel should in fact have considered that. The panel did not meet to make their decision until December 2022 and the decision was not communicated to the claimant until January 2023. We consider in all the circumstances that it was reasonable of the claimant to have waited until she received that final decision in January. We further consider that it was not unreasonable for her to have taken until the end of March to begin early conciliation. So far as the balance of prejudice is concerned, on behalf of the respondent Mr Winspear submitted that the claimant would be caused little prejudice by a refusal to extend time limits since her other claims would be unaffected. The respondent, he argued, would be caused significant prejudice. Mrs Bellot had had trouble in her evidence recalling conversations that took place some years ago so the quality of her evidence was impacted. The claimant had also been prevented from calling Mr Mann as a witness as he had left the respondent's employment. (It was not in fact made clear to us why that should prevent the respondent from calling him as a witness.) The respondent, Mr Winspear suggested, might also have been in a better position to call evidence about the capacity of the

inclusion department had the claim been made earlier. But it seems to us that Mr Mann was not the only witness who might have been in the position to give that evidence, and evidence about the refusal to permit the claimant to work from home more generally. For example, the headteacher Mr Thomas, so far as we are aware, still works for the school. Mr Thomas presumably has a heavy workload, but that position is not affected by the issue with time limits. We are also of the view that, given the issues in the claims which are in time, the reality is that the issue of working from home would have been the subject of litigation regardless of the time limits point – as Mr Step-Marsden put it on the claimant's behalf, the reasonable adjustments complaint is intrinsically linked to the complaint of unfair dismissal. We are therefore of the view that the respondent will in fact suffer little or no material prejudice if time limits are extended. We find that it is just and equitable in all the circumstances to extend time.

98. We should say that even if the claim had been considerably more out of time – for example if we had found that the decision was made as early as 31 August 2021 – we would still have considered, for the same reasons, that an extension of time would be just and equitable.

Reasonable adjustments

99. We initially queried with the parties whether the PCP as set out in the list of issues could in law amount to a PCP, given that it was phrased as the respondent requiring the claimant to work from the school's premises. On a very literal interpretation that was something that applied only to the claimant and so might not be said to amount to a policy etc. However, the respondent realistically conceded that it would not be appropriate to take such a technical point, particularly given that it in its own grounds of response it said: "It is accepted the Respondent had a PCP that the Claimant was required to work from the school premises". We therefore have no hesitation in finding that the respondent had a PCP which, however one phrases it, had the effect of requiring that the claimant should work from the school's premises.

100. The first real issue for us to decide, then, was whether the PCP put the claimant at a substantial disadvantage compared to someone without her disability. In our judgment it did. We do not accept the respondent's submission that the claimant failed to identify a specific disadvantage. The claimant had COPD and asthma. There was undisputed evidence that the journey to work, short as it was, and going into the school, exposed the claimant to the triggers of pollen and pollution and thereby subjected the claimant to an increased risk of infections and/or asthma attacks. Letters from the claimant's GP made clear that when she was not going into work she was managing her condition better. While those letters would at least to some extent have been based on the claimant's self-reporting, we have accepted the claimant's evidence about her condition at the relevant time. The claimant also suffered significant fatigue, as a result of her disability, even from the short journey and the exertion necessary to move around the school. In our judgment the existence of the PCP, and the respondent's clear intentions to apply it to the claimant, also caused her considerable anxiety given her disability. None of these disadvantages, which

were substantial, would have been experienced by someone without the claimant's disability.

101. The next issue then is what steps could have been taken to avoid the disadvantage. One step suggested by the claimant, as set out in the list of issues, was allowing the claimant to work some days at home and some days on school premises. By the relevant time that was no longer an option – the claimant had made clear that she was not prepared to come into the premises at all. Taking that step could not have avoided the disadvantage, so it would not amount to a reasonable adjustment.

102. The other step suggested by the claimant was allowing the claimant to carry out her duties from home. While the respondent was correct to suggest that doing this could not have entirely eliminated the risks the claimant faced, it clearly could have avoided some of the disadvantages, or have avoided all of the disadvantages happening so often.

103. The real issue so far as is reasonable adjustments are concerned is in our view whether it was reasonable for the respondent to have taken the step of permitting the claimant to carry out her duties at home. We accept that it was not possible for the claimant to carry out some of her duties from home, although we have already found that it would have been possible for her to carry out the majority of them from home. For the reasons we have already given, we are not satisfied that it would have been impracticable for those other "on-site" duties to have been done by other members of staff with the claimant making up the balance of her time with those other members' of staff off-site duties. Nor are we satisfied that it would have been impracticable for the respondent to have offered the claimant part-time work, doing only her off-site duties. We consider that in the circumstances the burden was on the respondent to satisfy us that the adjustment would not have been reasonable, since the claimant had in our judgment established a prima facie case that the duty to make adjustments had arisen and that there were facts from which it could reasonably be inferred, absent an explanation, that the duty had been breached. Given the lack of analysis to which we refer above, the respondent did not meet that burden. We therefore conclude that it would have been reasonable for the respondent to have taken the step of permitting the claimant to work from home. The respondent did not take that step. We therefore find that the complaint of failure to make reasonable adjustments is well-founded as regards that suggested adjustment.

Remedy etc.

104. EJ Dick has made orders in a separate document concerning a remedy hearing. Finally, EJ Dick apologises to the parties for the time it has taken to produce this written judgment and reasons.

APPENDIX

Edited Version of the List of Issues set out by District Tribunal Judge Shields (sitting as an Employment Judge) following the hearing of 5 December 2023

Time limits

1.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.1.2 If not, was there conduct extending over a period?

1.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.1.4.1 Why were the complaints not made to the Tribunal in time?

1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2.Unfair dismissal

2.1 What was the reason or principal reason for dismissal?

2.2 Was it a potentially fair reason? The respondent says the reason was capability (long term absence)

2.3 If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

2.3.1 The respondent genuinely believed the claimant was no longer capable of performing their duties;

2.3.2 The respondent adequately consulted the claimant;

2.3.3 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

2.3.4 Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;

2.3.5 Dismissal was within the range of reasonable responses.

2.4 Alternatively, was there a substantial other reason for the dismissal?

3. Remedy for unfair dismissal

[…]

4. Disability

4.1 The claimant has a disability as defined in section 6 of the Equality Act 2010 at the time of the events: this is specified as chronic obstructive pulmonary disease (COPD) and asthma.

5. Discrimination arising from disability (Equality Act 2010 section 15)

5.1 Did the respondent treat the claimant unfavourably by:

5.1.1 dismissing the Claimant on the grounds of capability.

5.2 Did the following things arise in consequence of the claimant's disability:

5.2.1 the Respondent's assessment that she could not perform her role.

5.3 Did the respondent dismiss the claimant because of the Claimant's inability to work safely from the physical workplace?

5.4 Was the treatment a proportionate means of achieving a legitimate aim?

5.5 The Tribunal will decide in particular:

5.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

5.5.2 could something less discriminatory have been done instead;

5.5.3 how should the needs of the claimant and the respondent be balanced?

6. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

6.1 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

6.1.1 Did the respondent require the claimant to work from the school's premises?

6.2 Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability?

6.3 What steps could have been taken to avoid the disadvantage? The claimant suggests:

6.3.1 allowing the claimant to work some days at home, and some days on the school premises, or

6.3.2 allowing the Claimant to carry out her duties from home.

6.4 Was it reasonable for the respondent to have to take those steps?

6.5 Did the respondent fail to take those steps?

7. Remedy for discrimination

[….]

Employment Judge Dick

8 October 2024

REASONS SENT TO THE PARTIES ON

9 October 2024.....

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FOR THE TRIBUNAL OFFICE

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