

with effect from 25 February 2014 following an appeal against an earlier dismissal decision. The Claimant presented a claim form to the Tribunal on 7 February 2014. The Claimant prepared the claim form herself. She made claims of discrimination based upon the protected characteristics of race and disability, and she also made a claim that she had been unfairly dismissed. By a judgment a copy of which was sent to the parties on 21 April 2015 the Employment Tribunal sitting in Ashford dismissed all of the Claimant's claims.

- 3 The Claimant presented an appeal against that judgment, and the appeal was successful on one ground. There had been a preliminary hearing for case management purposes on 16 July 2014 at which the Employment Judge identified the provision, criterion or practice ('PCP') for the purposes of the claim under section 20 of the Equality Act 2010 as follows:

The Claimant was required to return to work from her sickness absence during the period September 2012 to December 2013 without a proper and fair investigation into her grievances.

At the hearing of the claim the Employment Tribunal adopted that formulation of the PCP in question.

- 4 By order dated 15 March 2016 the Employment Appeal Tribunal allowed the appeal and ordered that the matter be remitted to a differently constituted Tribunal for the rehearing of the claim in relation to reasonable adjustments under section 20 of the Equality Act 2010. The Employment Appeal Tribunal stated in the summary to the judgment that the Employment Tribunal had impermissibly recast the Claimant's PCP. The matter therefore came before us for rehearing on that one point.
- 5 As the commencement of this hearing Mr Massarella helpfully provided a skeleton argument which included a list of issues. In that list of issues were set out the PCPs which he contended had been applied by the Respondent. We set out that list of issues below, having changed the order and format slightly following discussions during the course of this hearing.

Disability

1. For the purposes of this hearing R concedes that disability is no longer in issue. C was, at the material time, a disabled person by virtue of:
 - 1.1. post-traumatic stress disorder following child abuse, triggered by alleged bullying at work; and / or
 - 1.2. reactive depression.

Knowledge

2. Did R know, or ought it reasonably to have known, that C was a disabled person at the material times?
3. Did R know, or ought it reasonably to have known, that C was likely to be placed at the relevant substantial disadvantage?

PCPs

4. It is submitted that the correct PCPs are as follows:

- 4.1. the 'arrangements' which R made to deal with C's grievance of 29th February 2012, as clarified at the meeting of 19th March 2012, alternatively its 'practice' in dealing with her grievance, specifically:
 - 4.1.1. the delay in the process adopted by Ms Haylett that took some four months from complaint to a potential outcome in July 2012 [Simler P, para 29];
 - 4.1.2. the setting aside of Ms Haylett's report and the commissioning of a fresh investigation from Mr Atkinson [Simler P, para 27];
 - 4.1.3. the delay (from 10th July 2012 to 11th January 2013) in conducting the fresh investigation [Simler P, para 29];
 - 4.1.4. the delay in (from 11th January 2013 to 21st May 2013) in concluding the decision and appeal process [Simler P, para 29];
 - 4.1.5. the further delay (to December 2013) in responding to C's Equality Act questionnaire, by which C was pursuing information which would enable her to come to terms with what had happened [Simler J, para 28];
- 4.2. the practice of not adequately consulting with and / or accounting to C for the processes and delay referred to above.
- 4.3. The requirement / pressure on C to return to work and / or to meet capability and attendance standards from September 2012 until the termination of her employment, in circumstances (as set out above) where her grievance had not been resolved in a proper and timely manner [Simler P, para 29].

Substantial disadvantage

5. The substantial disadvantage relied on by C is as follows:

An exacerbation of her disability / symptoms of mental ill-health, which made it harder for her to return to work and / or comply with R's capability and attendance requirements [Simler P, para 31].

Knowledge

6. Did R know, or ought it reasonably to have known, that C was likely to be placed at the relevant substantial disadvantage?

Reasonable adjustments

7. The reasonable adjustments contended for by C are as follows:
 - 7.1. delivering a proper grievance outcome within a reasonable period of time from the raising of the grievance on 29th February 2012, as clarified at the meeting of 19th March 2012, and / or preventing the extensive delay in providing an outcome to C;
 - 7.2. disclosing the Haylett investigation report to C in July 2012 and permitting her to respond to it;
 - 7.3. promptly acting upon the Haylett investigation report of July 2012, rather than setting it aside and commissioning a new report;
 - 7.4. adequately consulting with C as to the decision to commission a new grievance investigation and giving appropriate consideration to her views in that regard;

- 7.5. adequately consulting with / accounting to C for the delays set out above;
 - 7.6. disregarding the periods of absence which were caused or contributed to by R's delay in dealing with C's grievance for the purposes of attendance management and capability proceedings;
 - 7.7. not dismissing C and not upholding the decision to dismiss on appeal in the circumstances set out above.
8. C avers that, had a proper and timely outcome into her grievance been delivered in July 2012 she would have been able to return to work and meet the standards R required [Simler P, para 28].

Jurisdiction

9. Are any of C's complaints *prima facie* out of time?
 10. If so, does the Tribunal have jurisdiction to hear them by virtue of their amounting to 'conduct extending over a period'?
 11. If not, is it just and equitable to extend time to hear the complaints in all the circumstances?
- 6 Reference is made in that list on several occasions to the judgment of Simler P.¹ It is our understanding of the judgment that it was decided that the Ashford Tribunal impermissibly limited the PCP as set out in paragraph 16 of the EAT judgment, and that other matters had been set out by the Claimant in the claim form which were 'capable of being a PCP for these purposes.'² We do not read the EAT judgment as stating what the PCP was (or what the PCPs were), and as a consequence that is a matter for us to decide. That does not appear to be in dispute as Mr Massarella said in the list of issues that he submitted that the PCPs were as set out therein, rather than stating that it had been decided that they were PCPs.
- 7 We heard evidence from the Claimant. She also called Maureen Haylett who had been the Respondent's HR Manager and would ordinarily have been expected to give evidence for the Respondent. A witness order had been obtained by the Claimant to require her to attend to give evidence. We heard evidence for the Respondent from the following:
- John Atkinson – HR Manager
 - Samantha Elms – Chief Executive of the Respondent
 - Tim Garnham – Chair of Governors
 - Christina Moon – Executive Principal of the Respondent
- 8 We were provided with a bundle of some 650 pages. We have taken into account those documents to which we were referred. We have not taken into account those documents which were not addressed by any of the witnesses.

The facts

- 9 We make our findings of fact of course based on the evidence presented to us. It is not necessary or appropriate to record all the evidence, nor to

¹ Incidentally, it appears to us that perhaps the word 'not' ought to be inserted in line six of paragraph 31 of her judgment to read '... error in not addressing ...'

² See paragraph 29 of the EAT judgment.

make findings of fact on every point in dispute. We have had considerable difficulty with the Claimant's witness statement as unfortunately she has not always made it clear on what date an incident is alleged to have occurred. We are reasonably satisfied that we have been able to ascertain the correct chronology by linking the Claimant's evidence to that of others.

- 10 As its name suggests, the Respondent is an Academy, and has both primary and secondary departments. The Claimant became permanently employed from the beginning of the autumn term in September 2011 and taught Year 5 initially. She had previously worked for the Respondent for one year as cover for maternity leave. Ms Roberta Michalski was Deputy / Acting Head Teacher of the primary department. She did not give oral evidence, but a written statement was provided.
- 11 We were referred to a medical report from Oxleas NHS Foundation NHS Trust dated 2 November 2011 prepared for Greenwich Time to Talk which referred to the Claimant as having severe depression and anxiety caused by work stress bringing back memories of events which had taken place in the Claimant's childhood. The Respondent was not provided with a copy of that report.
- 12 Mr Massarella also referred us to discussions with Ms Michalski in September 2011, and notes of a meeting between Ms Michalski and the Claimant on 5 December 2011 although no oral evidence was given about these matters. The notes of the meeting refer to problems caused to the Claimant by the unexpected death of her aunt during the summer of 2011. There were discussions about workload. As far as the Claimant's health was concerned, the notes record that she felt better after a long weekend, was not sleeping well, and had opted for counselling 'to get her through a very difficult time in her life.' That ties in with the report mentioned in the preceding paragraph.
- 13 By the end of February 2012 the Claimant was experiencing difficulties at work. In a short email to Ms Michalski of 10 February 2012 the Claimant had complained about the behaviour of three pupils, and ended the email saying that was struggling to cope. We note also an email from Ms Poffley of 29 February 2012 to Ms Michalski recording a conversation of the preceding day with the Claimant. The email says that the Claimant's confidence was on the floor, she did not know who she could trust, and that people were telling unfounded lies about her and so on. The email specifically refers to difficulties with two pupils, and says that Mr Nicholas had undermined her, and that Ms Michalski had 'caused her to return to a vulnerable place'.
- 14 The Claimant was so upset that she went to see her GP first thing on the morning of 29 February 2012, and was provided with a form Med3 advising that the Claimant was not fit for work for a period of two weeks. It recorded the reason for that advice as being reactive depression and bullying. Later that day the Claimant telephoned Andy Nicholas, the Head Teacher of the primary school.³ There are no notes of that

³ He was actually employed by the Department for Education and was in the role of a part-time consultant to the Respondent.

conversation and it is this telephone conversation with Mr Nicholas that has throughout these proceedings been considered to be the grievance, or the first articulation of the grievance, which was subsequently investigated by the Respondent. Ms Haylett met Mr Nicholas and Ms Michalski for their regular weekly meeting on 1 March 2012. There are only manuscript notes of that meeting and we are reluctant to draw any firm conclusions from them. The issues appear to be that the Claimant said that she was being bullied by Ms Michalski, which was possibly connected to a failed lesson observation, and that there has been a parental complaint against the Claimant. It was also noted that the Claimant 'went on at meeting about suicidal boy!' It was agreed that Mr Nicholas would contact the Claimant shortly before her form Med3 was to expire on 14 March 2012 to discuss her return to work. The Claimant then provided another form Med3 covering a period of three weeks from 14 March 2012 stating that she had been advised that she was not fit for work, again because of reactive depression and bullying at work.

- 15 Mr Nicholas and Ms Michalski, together with Ms Haylett, had a further meeting on 15 March 2012 in preparation for a meeting with the Claimant on 19 March 2012 which had apparently already been arranged. On that date Mr Nicholas, Ms Haylett, and the Claimant met together with the Claimant's partner. This meeting is important.
- 16 The notes of the meeting were properly prepared and printed. They cover three pages and are detailed. The notes record that during the first part of the meeting the Claimant said that 'she felt bullied, accused, threatened, treated unfairly, attacked, [and that] personal information shared previously [had been] used against her.' The Claimant said that she wanted to work in an environment where she felt safe. The Claimant said that her aunt, to whom she was very close, had died in the summer of 2011 which had had a serious impact on her, but that as time passed she was feeling better, and that grieving was a normal process.
- 17 The Claimant was asked to set out her specific concerns. The Claimant referred to 'various incidents' since September 2011. She raised two principal matters. The first matter was that she said that Ms Michalski had told her in October that she (the Claimant) had caused an unnamed boy to have nightmares and feel suicidal. The Claimant did not know who the child was and whether she was still teaching him on a day-to-day basis. She was naturally concerned that she had caused any child to be afraid. The Claimant said that when she had again asked Ms Michalski for the identity of the child on 28 February 2012, Ms Michalski had casually said that it had been a case of mistaken identity. This occurred at a meeting intended to be for lesson observation feedback. The Claimant was angry that she had been caused unnecessary worry for four months.
- 18 The second matter raised related to a pupil 'M'. The Claimant said that she had been told by several other pupils that M was using racist language to them. The Claimant had asked the pupils to write down what M had said. She took the slips of paper to Ms Michalski who put them in the bin and said: 'That's what I think of that.' The Claimant said to Mr Nicholas that she was concerned that racist comments and behaviour

were being disregarded. She also mentioned having been undermined by Mr Nicholas in relation to pupil M.

19 Ms Haylett said that she had sufficient information from the meeting to work to resolve the issues and that she would begin an investigation in line with the informal process part of the Grievance Procedure. She said that she would interview seven named individuals, and that that would take a while to complete. The Claimant said that she did not wish to have anyone else interviewed. The Claimant is recorded as stating that she agreed that the informal process be used.

20 The Respondent's Grievance Procedure is in a relatively standard form. Importance is placed on exhausting the informal procedure in order to seek a resolution. The HR Manager is to meet with both the person raising the grievance and the member of staff against whom the grievance has been made, and then 'an informal initial meeting will be convened at the earliest opportunity at which both parties will be present.' Of significance for these proceedings the procedure then provides as follows:

If the employee decides that the grievance has not been adequately resolved informally they may submit a formal grievance. Any formal grievance should be submitted in writing to the HR Manager.

21 There was a further meeting of Mr Nicholas, Ms Michalski and Ms Haylett on 22 March 2012. Unfortunately again Ms Haylett only made manuscript notes and no typed notes of the meeting were prepared. It was not entirely clear to us what the purpose of this meeting was, and little evidence was given about it. The manuscript notes refer to it as a 'clarification meeting', but it does appear to have been at least partly for the purposes of investigating the points raised by the Claimant. We read the notes as saying that the two main areas of concern were as mentioned above, and that the Claimant's versions of events in respect of each needed to be clear. It was noted by Ms Haylett that the allegation of bullying was serious and had to be 'dealt with by the book'. It appears also that the meeting was partly for the purpose of how to deal with issues relating to the Claimant on a management basis as there are notes of Ms Haylett having raised concerns as to 'how seen by ET/law, no evidence that took seriously', and also 'in breach of our procedures – parental complaint – potential CP issue – Safeguarding officer'. Mention was also made of 'other parental complaints'.

22 Ms Haylett then carried out interviews with various members of staff on 23 March 2012. She interviewed Jodie Poffley, Alana Maw⁴ and Esme Lee, who were Teachers, and Mary Naughton-Dean, a Teaching Assistant. Ms Haylett also interviewed Ms Michalski again. Again, only manuscript notes were made. It is our view that the best practice is to prepare printed notes for approval or comment by the interviewee. That was not done and was a material failing on the part of Ms Haylett. It may have been obvious to Ms Haylett what those manuscript notes meant, but we find that it is not obvious to anyone looking at them afresh what

⁴ Spelled 'Allana Moore' by Ms Haylett

they mean. Further, some of the writing is difficult to read, and requires an element of guesswork. The importance of this point appears below.

- 23 The two matters raised by the Claimant were discussed by Ms Haylett with Ms Michalski. Ms Michalski said that the parent of the boy in question had raised the matter in September 2011, and that the parent had said that the problem was linked to the Claimant's behaviour. Ms Michalski said that she had raised the issue with the Claimant but had not revealed the boy's name nor said that he was not in her then current class. Ms Michalski also accepted that she had thrown the slips of paper concerning M into the bin, and had not looked at them. She commented that it was not an appropriate way for the Claimant to have dealt with the issue of alleged racist comments.
- 24 Events then took a different turn. There was a telephone conversation of a considerable length between Ms Haylett and the Claimant on 27 March 2012. That conversation was part of Ms Haylett's commendable efforts to keep in touch with the Claimant during her sickness absence. There was a discussion as to the way the Claimant was feeling at the time and the reasons for it. However, Ms Haylett also disclosed to the Claimant during that conversation that a complaint had recently been received involving the Claimant, and that Mr Nicholas had decided that a preliminary investigation should be conducted into that complaint. That had already been done and a further investigation was needed. Consequently there was to be a meeting on 17 April 2012. We find that the investigation process into the Claimant's complaints was not formally put on hold as a result of the complaint, but that priority was given to the complaint against her. There was an investigation meeting with the Claimant on 17 April 2012, and the Claimant was given an informal warning on 25 April 2012. The informal warning related to concerns about the appropriate and professional management of children, relationships with children and parents, the use of behaviour for learning strategies, and the use of school policies and procedures. There was to be a training and support package put in place. Mr Nicholas stated that the sanction imposed had taken into account the Claimant's bereavement, her state of health, and also her 'perception of certain aspects of the Academy's leadership.'
- 25 Ms Haylett telephoned the Claimant on 9 May 2012. The Claimant said that she had not yet read the letter of 25 April 2012. There was a substantial discussion about the Claimant's future, including the possibility of her resigning, and changing her career as the Claimant said that she was disillusioned with teaching. Although the notes were of course made by Ms Haylett, it is appropriate to record that they state that the Claimant thanked her for her 'support, wise advice and understanding.' It was agreed that Ms Haylett would telephone the Claimant again in two weeks for a 'duty of care call'. Ms Haylett tried to telephone the Claimant on several occasions at the end of May and the beginning of June 2012 without success and she left messages for the Claimant.
- 26 On 9 June 2012 a form Med3 was issued in respect of the Claimant for the period from 2 to 30 June 2012.

- 27 The Claimant rang Ms Haylett back on 11 June 2012. The Claimant said that she had not been feeling well for various reasons. The notes made by Ms Haylett record the Claimant as saying that she did not wish to decide about resigning at that stage as she was 'not a quitter'. The Claimant also said that she had been advised by a lawyer to submit a formal grievance in connection with a possible personal injury claim. She asked for a copy of the procedure. Ms Haylett suggesting a 'clear the air' meeting or mediation, and that if the Claimant was not happy with the outcome then she could submit a formal grievance. There was also discussion about seeking to enable the Claimant to return to work, and the provision of support for that purpose, including an Occupational Health referral.
- 28 Following that conversation Ms Haylett wrote to the Claimant on 14 June 2012 to arrange an Absence Review Meeting for 18 June. That meeting took place on 21 June 2012. After discussions about the Claimant's health there was mention of the grievance. The notes record the Claimant as saying that she was 'aware of plans to hold clear the air, way forward meetings' when she was able to return to work. The Claimant also mentioned that she had other grievances, such as the allocation and use of Teaching Assistants. There was a discussion about the Occupational Health referral. Medical consent forms were provided to the Claimant, which she said that she would sign and return. Mr Nicholas is recorded as having commented that realistically any OH report could not be discussed until September of that year.
- 29 Ms Haylett spoke to the Claimant again on the telephone on 5 July 2012. There was a discussion about the arrangements for the Claimant's return to work on the following Monday, 9 July. It was proposed that there would be a clear the air meeting with Ms Michalski and Ms Haylett on the Tuesday. Ms Haylett said that the informal grievance was being brought to a close, and that a report was being prepared for the executive based upon the information which had been collected.
- 30 The Claimant returned to work on 9 July 2012, and there was a meeting on that day of the Claimant, Mr Nicholas and Ms Haylett. It was held for the purpose of assisting her return to work. The Claimant signed medical consent forms for the purpose of having an Occupational Health appointment in September after the Claimant had returned to work for the autumn term.⁵ The notes of the meeting record that the Claimant agreed that it was preferable to have an OH appointment in September and that she was happy with the return to work plan which was proposed. That included a meeting for the following day with Ms Michalski to 'clear the air'.
- 31 That meeting was held on 10 July 2012, with Ms Haylett present. Typed notes were prepared. The meeting was stated to be part of the informal grievance procedure, but the allegations were not to be discussed. The notes record that Ms Michalski wanted the Claimant back at work, and for relationships to be rebuilt without grudges. The Claimant said that

⁵ Those consent forms appear to have been mislaid later and the Claimant was asked for a further form on 11 September 2012.

she wanted to feel safe and respected. That is not intended to be a complete analysis of the meeting, but in an attempt to give a flavour of it. It was a positive meeting.

- 32 Ms Haylett produced her seven page report on 10 July 2012. Ms Haylett said in cross-examination that she accepted that the investigation into the Claimant's grievance had been too slow, but put that down to the unavailability of the Claimant, and the complexity involved in getting information from Mr Nicholas and Ms Michalski. No further details were supplied of such complexity. Ms Haylett also said that it had been delayed by the complaint made by a parent against the Claimant.
- 33 The report was presented to Mrs Elms and Mrs Moon on 11 July 2012. The purpose of the report was to enable them to come to a conclusion on the Claimant's grievance as part of the informal process without further discussion with the Claimant. It was intended that a letter containing the outcome of the grievance could be prepared based upon the report. We note in passing that this process is not included in the Respondent's Grievance Procedure, but nevertheless it was what was anticipated by Mrs Elms and Mrs Moon.
- 34 In the report Ms Haylett recorded the fact of the telephone conversation of 29 February 2012 when the Claimant complained to Mr Nicholas of bullying, and the meeting of 19 March 2012. Ms Haylett mentioned the two principal concerns raised by the Claimant and that she had interviewed various members of staff. She did not set out any details of those interviews, nor did she append her manuscript notes of the interviews.
- 35 Ms Haylett then set out her findings in two relatively short paragraphs. She concluded that the factual allegations made by the Claimant were correct, and that the difference between the Claimant and Ms Michalski was the manner, or the perception of the manner, in which the issues were dealt with. Ms Haylett then went on to say that 'there were a number of justified concerns regarding [the Claimant's] holistic performance as a class teacher.' She continued by saying there were concerns about how Ms Michalski and Mr Nicholas had dealt with those matters, and the health and wellbeing of the Claimant. She recommended that
- Ms Michalski be given an informal verbal warning for using inappropriate approaches to seek to address justified concerns regarding the holistic performance and well-being of a teacher, which was not in line with the values of the Academy, our own policies, procedures, structure and working practices.
- 36 We do not know how Ms Haylett could have considered it appropriate to make comments about the Claimant's performance, not about how any performance issues had been dealt with, when the purpose of the report was to provide the executive with information concerning the very specific issues raised by the Claimant in her grievance which Ms Haylett had been investigating.
- 37 Both Mrs Elms and Mrs Moon concluded that the report was substantially inadequate for its intended purpose. The principal concern was that there was no, or insufficient, evidence provided to support such

findings as had been made by Ms Haylett relating to the grievance issues, nor the recommendations which had been made. Ms Haylett was instructed to provide the evidence on which she had relied. Further Mrs Elms and Mrs Moon considered (quite rightly) that the report went beyond just considering the grievance as it raised issues about the Claimant's 'holistic performance', and also how Ms Michalski and Mr Nicholas had dealt with such issues.

- 38 Ms Haylett put together some further documentation which she provided to Mrs Elms early on 17 July 2012 covered by a document referred to as 'Further Briefing'. Ms Haylett said that she had trawled through the file and drawn out of it the documentation which she had collected.⁶ The document also included a section headed 'Current Update' in which reference was made for the first time to two parents not wanting the Claimant to be the teacher of their children from the next term. In a summary Ms Haylett set out what decisions she said were required.
- 39 It was at that time intended that there should have been a meeting of Mrs Elms and Ms Haylett to discuss the documentation later that day. In the meantime it was decided that Ms Haylett's employment was to be terminated forthwith for reasons not in any way connected with the Claimant or the report about the Claimant's grievance. That dismissal was effected by Mrs Elms at the pre-arranged meeting.
- 40 There was then that day a tragedy affecting the school involving the death of a pupil, and Mrs Elms was not able to consider the further papers immediately. Despite the tragedy, Mrs Elms held a meeting with the Claimant on 18 July. Proper notes were prepared of that meeting. It had originally been intended that the meeting was to be with Ms Haylett, and in the circumstances Mrs Elms was not prepared for it. As she said in cross-examination, she became involved in the meeting all of a sudden. She had not been able to read the various documents by then supplied by Ms Haylett. Mrs Elms explained that Ms Haylett had just left the Respondent, and that she (Mrs Elms) would take over considering the grievance, but that it would take a little time for her to catch up. Further, she said, as the summer holidays were about to begin not all staff would be available. The Claimant said that she had been concerned that Ms Haylett had not obtained a clear understanding of the situation, and that things had not been properly communicated. When asked, the Claimant specifically stated that she preferred that the grievance be dealt with via the informal process. The Claimant said that it would be useful to write everything down for the benefit of Mrs Elms, and Mrs Elms requested that she do so. Mrs Elms gave the Claimant her email address.
- 41 The notes of the meeting record that Mrs Elms asked the Claimant about how she was feeling to be back in school, to which the Claimant said that she was feeling good. She added that she was having counselling and had learned that she was prone to PTSD because of childhood experiences and that that could be triggered by situations. She had gone through months of feeling bad over situations.

⁶ For details see [291]

- 42 Mr Massarella referred in his submissions to the evidence of Mrs Elms in cross-examination concerning her involvement with the grievance. Mrs Elms confirmed that the intended process was that she and Mrs Moon would be able to make a decision based upon the report, and she accepted that they could themselves have made further enquiries and held a hearing to explore the evidence, although that would not have been her normal practice. In particular Ms Michalski could have been required to give evidence. Mrs Elms was referred to notes of Mrs Haylett's interview with Ms Michalski of 3 March 2017 from which it appeared that Ms Michalski was asked to go through the two major allegations made by the Claimant. Mrs Elms accepted that it was worrying if the Claimant had not been told by Ms Michalski that the boy was no longer in her class, and further that the notes confirmed that Ms Michalski had not told her. The Claimant was therefore correct in her allegation on that point. Mrs Elms added that she had expected Mrs Haylett to include that evidence in her report. Mrs Elms also accepted that the notes referred to Ms Michalski having thrown the notes concerning racist comments in the bin without looking at them, and that she would have upheld the Claimant's allegation on that point also.
- 43 The Claimant did not contact Mrs Elms following the meeting of 18 July 2012, and on 17 August 2012 Mrs Elms wrote to the Claimant reminding her that she had agreed to set out her concerns in writing. The Claimant replied on 22 August saying that she had expected to receive a decision letter and had not been expecting a request for her 'to start again'. Mrs Elms then replied to that email saying that she had understood that it had been agreed on 18 July 2012 that the Claimant would commit her concerns to paper, and she sent a copy of the minutes of the meeting to the Claimant.
- 44 The Claimant replied to that email by a letter dated 2 September 2012. She said that she had felt intimidated at the unexpected meeting on 18 July 2012 and pressured into agreeing to put the grievances into writing. She said that she had decided that it would not be beneficial to her health and general well-being to detail her complaints in writing. Importantly the Claimant said that the notes of the meeting of 19 March 2012 were an accurate record of her grievance. Further, she said, she was confident that the investigation by Ms Haylett would provide sufficient information for a decision to be made. She asked for a decision as a matter of urgency.
- 45 The Claimant was advised by her GP on 3 September 2012 that she was not fit for work because of depression. The period stated in the form Med3 was from that date to 3 October 2012. The Claimant did not return to work thereafter.
- 46 John Atkinson started work for the Respondent as its Human Resources Manager in place of Ms Haylett in early September 2012. He wrote to the Claimant on 11 September introducing himself. He said that he had studied the papers to see if there was sufficient information to compile a list of allegations to avoid any risk of a misunderstanding. He enclosed with that letter a list of the incidents which he said appeared to be the

key ones.⁷ He asked that the Claimant comment on the draft list so as to reach agreement on it. Mr Atkinson also referred to the support programme which had been agreed during the summer term, and said that he wished to refer the Claimant to Occupational Health.

- 47 The Claimant wrote to Mr Atkinson on 26 October 2012 a five page letter in which she said that she was upset that no decision had been made concerning her grievance. She then set out in considerable detail what she said were 'exact details of the core issues to be addressed.' We do not consider it to be that straightforward. While the Claimant did list as numbers 1 and 2 the two matters mentioned above, she also made some wide-ranging allegations, such as 'many incidents' of severe bullying by Ms Michalski, and further details relating to the two principal complaints.
- 48 Mr Atkinson replied on 31 October 2012 thanking the Claimant for her letter which he said set out full particulars of her historic grievances. He said that the Respondent took allegations of workplace bullying and harassment extremely seriously and that he would undertake a comprehensive investigation. He acknowledged that there had been a delay in resolving the grievances. He noted as causes of the delay the fact that Ms Haylett had left, that it had taken time to find a replacement for her, that the Claimant had been absent due to illness, that he had not had a comprehensive list of the complaints until receipt of the Claimant's letter of 26 October, and that he had to rely on other people's notes. Mr Atkinson said he would expedite the investigation.
- 49 On 5 November 2012 Mr Atkinson sent to the Claimant a table setting out what he understood the complaints made by the Claimant to be. They were broken down into fifteen separate complaints and against each Mr Atkinson had set out the name of the alleged perpetrator. There were also columns for the names of any witnesses, and the sources of evidence. The Claimant did not respond to the letter. Mr Atkinson then sent an email to the Claimant on 19 November 2012 saying that he had set up interviews with those named in his table for that day and asking the Claimant for the names of any other people she wished to have interviewed. The Claimant did not supply any further names.
- 50 For the purposes of maintaining a proper chronology we record that an Occupational Health report was prepared dated 21 November 2012 following an assessment of the Claimant on 14 November 2012. It recorded that the symptoms of reactive depression 'probably began in September 2011.' The report referred to her then recent bereavement, health problems, and 'an interview with the Head Teacher following an alleged parental complaint.' That reference was presumably to the meeting on 17 April 2012 followed up by the warning on 25 April 2012. The report did not specifically make any mention of disability within the 2010 Act. The diagnosis and prognosis were as follows:

My diagnosis is that Ms Lamb is suffering from resolving reactive depression and given her previous medical history, her prognosis for full recover should be good.

⁷ Unfortunately that list was not in the bundle before us.

- 51 Recommendations were made. The first recommendation is as follows:
- Ms Lamb needs to resolve the outstanding issues relating to her complaint which was raised in March 2012. She thought this had been resolved and she has been quite upset by the thought of further pending investigation which is required as this will be necessary to achieve a conclusion to this episode.
- 52 Mr Atkinson wrote to the Claimant again on 22 November 2012 saying the he would like to meet with her to clarify one or two points concerning the grievance. He suggested three possible dates, and various venues. It appears that a meeting was arranged for 5 December 2012, but then the Claimant sent an email that day saying she would not be attending. On that same day Mr Atkinson wrote to the Claimant with nine questions he wished the Claimant to answer, requesting replies by 10 December 2012. That was later extended to 17 December 2012. Mr Atkinson accepted in cross-examination that the answers to four of the questions could have been gleaned from the notes of the meeting of 19 March 2012.
- 53 In the letter of 5 December 2012 Mr Atkinson also said that he had concluded that the grievance had to be dealt with as a formal grievance under the Respondent's policy, and he sent the Claimant a copy of the policy. As already noted the policy provides that an employee may decide that a grievance be dealt with on a formal basis if she is not satisfied with the outcome of the informal procedure. Mr Atkinson accepted that that was a decision to be made by the employee and not the employer.
- 54 A further form Med3 was issued to the Claimant on 29 November 2012 covering a period of two months.
- 55 By 20 December 2012 the Claimant had not provided any replies to the questions posed by Mr Atkinson, and on that day Mr Atkinson wrote to her saying that he would proceed to complete his report, and that he had listed 16 January 2013 at 9 am as the date and time for the grievance hearing. He again asked the Claimant for replies to the questions. He told the Claimant that the Academy would be closed from 21 December 2012 until 7 January 2013.
- 56 Mr Atkinson then completed his report and a copy was sent to the Claimant on 11 January 2013. It is in our view a professional piece of work and very different from the documents prepared by Ms Haylett. There is an introduction in which is set out a summary of what had occurred in connection with the Claimant's grievance since 19 March 2012, and the methodology adopted by Mr Atkinson. The different matters raised by the Claimant were then considered under the fifteen different headings which had been identified by Mr Atkinson in his table of 5 November 2012. Mr Atkinson set out each of the complaints which he had extracted from the letter of 26 October 2012, and the evidence he had been able to obtain about it. He concluded by saying:
- I trust that this report should enable the person who is elected to determine the grievance in deciding whether or not such grievance should be upheld and whether any follow up action is necessary.

We comment that that is precisely what Mrs Elms and Mrs Moon expected such a report to do, and in respect of which the report prepared by Ms Haylett had signally failed. However, as we comment below, the report was based upon a fundamental misconception as to the limited nature of the issues which the Claimant wanted to be investigated, and that she had wanted it to be investigated on an informal basis.

- 57 Mr Atkinson accepted in cross-examination that there was a valid criticism to be made in respect of the time that his investigation had taken. A grievance hearing did take place on 18 January 2013 chaired by Mr Nichols. He was the Head Teacher of the Secondary School and had not previously been involved. The Claimant took part in the hearing by telephone. Mr Nichols set out his conclusions on the various complaints in a letter of 11 February 2013. It is not relevant to set out the conclusion reached on each of the fifteen matters. It suffices to say that the various elements of the grievance were not upheld. Towards the end of the letter Mr Nichols said the following:

It is regrettable that it has taken the time that it has to reach a conclusion in relation to these matters. I understand that it had initially been hoped that matters could be resolved informally but over the course of time and taking into account factors such as the change of HR personnel, your ill-health and the delay in receiving from you full written particulars of your grievance, we unfortunately find ourselves reaching this conclusion almost a year after your initial period of absence in February 2012.

- 58 The Claimant's GP provided her with a further form Med3 on 21 January 2013 for a period of two months, citing the condition as being PTSD.
- 59 The Claimant appealed against the outcome of the grievance by a letter of 26 February 2013. The grounds were set out in detail over five pages. The Claimant also added that she felt she had been constructively dismissed. That initially caused some confusion which was soon dispelled. The Claimant had not intended to resign.
- 60 Mr Garnham was appointed to hear the appeal and he wrote to the Claimant on 6 March 2013 acknowledging that letter. He said that in the letter of appeal the Claimant had raised matters not previously raised by her in writing. Mr Garnham asked for clarification of some points. He said that he had asked Mr Atkinson to investigate the new issues raised. Although it was not in the bundle, there is reference to a letter or email of 21 March 2013 from the Claimant to Mr Atkinson directing him back to the Claimant's HR file.
- 61 Mr Atkinson prepared a supplemental report, a copy of which was sent to the Claimant on 18 April 2013 for her consideration. That report was as well organised and as thorough as the principal report. The Claimant was invited to supply any comments by 3 May 2013. She did not provide any comments.
- 62 Mr Garnham sent his decision on the appeal to the Claimant in a letter of 21 May 2013. That again is a detailed letter in which each of the grounds of appeal was addressed separately. The appeal was dismissed. In cross-examination Mr Garnham accepted that in coming to his conclusions he had relied upon the report and information supplied by Mr Atkinson. Mr Garnham repeated the sentiment concerning delay

originally expressed by Mr Nichols and said that he hoped to be able to look forward to the Claimant being reintegrated into the school.

- 63 The Respondent has a 'Policy and Procedure for Managing Absence for all Academy Staff'. It is not an unduly formalistic or mechanical policy. The section relating to long term absences of over 4 – 6 weeks is especially general. It refers to such absences being for a variety of reasons and the way they are dealt with needing to reflect the particular circumstances of the case. Reference is made to the obtaining of OH reports. The policy simply provides that after taking into account material factors and with advice from HR the Headteacher may recommend that the employment be terminated on the grounds of incapability due to ill health. The final decision is to be taken by two senior team members at a meeting.
- 64 Mr Atkinson wrote to the Claimant on 30 May 2013 concerning a return to work of the Claimant. He suggested a meeting on 5 June 2013 to discuss a reintegration programme. If she were still unwell, then Mr Atkinson asked that forms Med3 be supplied. Mr Atkinson sent a reminder email on 4 June 2013 and then wrote a letter to the Claimant on 5 June 2013. He said that the Claimant's unauthorised absence could be the subject of disciplinary proceedings. He asked for medical certificates by 12 June 2013. Mr Atkinson also enclosed a medical consent form for completion and return. He said that now that the grievance procedure had been completed it was appropriate for a further OH report to be prepared. Although not in the bundle (at least as far as we can see) it appears that a form Med3 was provided by the Claimant dated 3 June 2013 covering a period of two months from 17 May 2013.
- 65 The Claimant had not returned the medical consent form by 17 July 2013, and on that day Mr Atkinson wrote to the Claimant again. He asked that by 26 July 2013 the Claimant either confirm that she would attend an appointment with the Respondent's OH advisers, or if she would prefer to be referred to an independent consultant. Mr Atkinson sent a reminder on 30 July 2013. On 30 July also the Claimant was issued with a form Med3 covering the period of two months from 17 July 2013.
- 66 The Claimant attended for an OH assessment on 4 September 2013, and the report is dated the following day. Dr Naghavi, a Consultant in Occupational Medicine, recorded that the Claimant had symptoms of depression, and he advised that the Claimant's condition was likely to cause her to be a disabled person within the 2010 Act. He added as follows:
- [The Claimant] tells me that she does not want to return to the same work environment. She does not feel that she can return to education and work with children in the future, due to the nature of the allegations made against her by her employer, which she had found very stressful.
- 67 On 24 September 2013 the Claimant was issued with a further form Med3 for the period of one month from that date.
- 68 Mr Atkinson wrote to the Claimant on 27 September 2013 saying that a hearing was to be arranged under the Respondent's policy mentioned

above. The hearing was to be conducted by two senior members of the Respondent. Mr Atkinson referred the Claimant to the section in the policy dealing with long term absences. Mr Atkinson said that he was preparing a report for the hearing and the Claimant was warned that a possible outcome of the hearing was that she would be dismissed. The hearing was arranged for 5 November 2013 to be chaired by Mrs Moon, with Mrs Elms accompanying her.

- 69 Mr Atkinson prepared a report summarising the history of the Claimant's absences. He recorded that the medical certificates referred to anxiety with depression and that the Occupational Health report said that the Claimant attributed her anxiety to work related issues. Mr Atkinson set out what he considered to be the effect of the Claimant's continuing absence on the Respondent, and also on its pupils. He recommended that before any decision to dismiss was taken the Respondent 'tries to explore again with [the Claimant] why she considers that it is impossible for her to return to teaching at the Academy and whether this can be rectified.' He added that if the Claimant were not able to return to work then consideration may be given to the termination of her employment.
- 70 On 17 October 2013 Mr Nichols wrote to the Claimant saying that a hearing to consider the Claimant's absence would be held on 5 November 2013 and that he would on balance be recommending the dismissal of the Claimant.
- 71 On 4 November 2013 the Claimant issued a questionnaire under section 138 of the Equality Act 2010 which was then in force. The Claimant said that the questionnaire was for those attending the hearing on 5 November 2013 saying that it was 'reasonable and just to submit [it] as a "reasonable adjustment" to be considered in facilitating my return to work as a class teacher.'
- 72 There was no specific time limit in section 138, but the Tribunal was entitled to draw an inference from a failure to reply within eight weeks. The questionnaire contained 71 questions. A reply was provided on 23 December 2013, which was seven weeks after the date of service.
- 73 The hearing concerning the Claimant's absence was held on 5 November 2013. In addition to Mrs Moon, Mrs Elms and the Claimant, Mr Nichols was present, as also was Mr Atkinson as notetaker and adviser. It is not necessary to set out all that occurred but there are some very significant points. There was a discussion about the length of the Claimant's absence, and the fact that the grievance process had ended on 21 May 2013. There was a discussion about the impact that the Claimant's absence was having on the management of the school and its finances. The Claimant made it clear that those who had made allegations about her suitability to work with children and had questioned whether she was a danger to a child remained at the Academy, and were creating a hostile environment. That hostility was the primary issue. In answer to a question from Mrs Elms the Claimant agreed that 'a whole new bunch of people [would have to replace] some of the existing people in the Primary' and 'that she did not consider it realistic that this would happen.' The notes record the Claimant as saying that she was 'not ready to return to teaching but she was getting there', and also that 'she

was unwilling to return to the Academy because the people who were hostile to her remained.’ Further, she was not prepared ‘to let people trash her reputation.’

- 74 Mrs Moon wrote to the Claimant on 8 November 2013 dismissing her. Three reasons were given as follows. The Claimant had said that she did not feel able to return to the Primary Section, that she felt that a return could trigger a relapse, and that she considered that the Academy was a hostile environment and that no reasonable adjustments could be made to overcome that.
- 75 The Claimant appealed by a letter of 14 November 2013. That letter was acknowledged by Mr Garnham on 25 November 2013 saying that an Appeals Committee would be convened as soon as practicable. On 27 January 2014 Mr Atkinson wrote to the Claimant saying that the appeal would be heard on 6 February 2014. The hearing took place on that date, chaired by Ms Gordon. The Claimant was notified by letter dated 13 February 2014 that the appeal was dismissed.

Submissions

- 76 We have mentioned that Mr Massarella provided an opening skeleton argument. He also provided written closing submissions to which he spoke. Mr Williams made oral submissions at the conclusion of the hearing. We have taken those submissions into account and will refer to them where appropriate.

Discussions and conclusions

- 77 The elements of the original claim which were remitted by the Employment Appeal Tribunal all relate to the making of reasonable adjustments within sections 20 and 21 of the 2010 Act and associated provisions. Section 20(3) has three components. The first is that there should be a provision, criterion or practice (‘PCP’). The second is that that PCP puts a disabled person at a substantial disadvantage by comparison with persons who are not disabled. The third element is the making of reasonable adjustments. Those matters must be considered in sequence. The final relevant provision is in paragraph 20 of Schedule 8 to the Act which provides that an employer is not under a duty to make reasonable adjustments where it did not know, and could not reasonably have been expected to know, that the employee was a disabled person and was likely to be placed at the relevant disadvantage.
- 78 We start with the question of the Respondent’s knowledge (or deemed knowledge) of the Claimant’s disability, because without such knowledge the Respondent is not under any duty to make reasonable adjustments. This is a critical issue in the light of the various periods covered by the PCPs set out in the list of issues above.
- 79 Mr Massarella referred to the impairments of depression and PTSD separately. As we understand paragraph 4 of his submissions under the heading ‘Knowledge of disability’ Mr Massarella is simply saying that the concession by the Respondent as to disability covers the whole of the period covered by this claim, and we accept that submission. The Tribunal must consider on an objective basis whether the Respondent knew (actually or constructively) both (1) that the employee was disabled

at the material time and also (2) that she was disadvantaged by the disability in the way set out in section 20(3) of the 2010 Act.

- 80 Mr Massarella criticised the Respondent for not referring the Claimant for any Occupational Health report until November 2012. He correctly pointed out that it was Mr Atkinson's evidence that he would have made a referral earlier in the year, and that it was one of the first things he did after taking up his post. Mr Massarella also mentioned concerns which had been raised by the Claimant, and also expressed by others, about her health.
- 81 Mr Massarella reminded the Tribunal of the evidence given by the Claimant about matters which occurred in her childhood and the impact of the death of her aunt upon her. He also mentioned the Assessment Summary by Oxleas NHS Foundation Trust dated 2 November 2011 which referred to severe depression and anxiety and the Claimant's resensitisation to childhood memories.
- 82 Mr Williams submitted that the first date of the Respondent's knowledge of any disability was on receipt of the OH report of 21 November 2012.
- 83 As we have mentioned, the Respondent did not have a copy of the medical report of 2 November 2011. We do not accept that the comments made by the Claimant to Ms Michalski in December 2011 and in the email of 10 February 2012 were sufficient for the Respondent to have reasonably known that the Claimant was a disabled person, or indeed had an impairment which was above and beyond the normal vicissitudes of life. There was nothing in the December 2011 discussions to indicate that the personal issues facing the Claimant were anything other than temporary and had been triggered by the death of her aunt. The email of 10 February 2012 related to the behaviour of certain pupils and cannot in our judgment be read to be referring to the Claimant's health in general. The Claimant is recorded as having said on 19 March 2012 that grieving was a normal process.
- 84 We find that on receipt of the first form Med3 dated 29 February 2012 the Respondent became aware for the first time that the Claimant was suffering from reactive depression. However, of course, for an impairment to be a disability it must have lasted, or be likely to last, for at least 12 months. That form Med3 covered a period of only two weeks. The successive forms Med3 which were issued also covered relatively short periods of time. The OH report of 21 November 2012 stated that the Claimant's symptoms had probably begun in September 2011. That does not mean that as at September 2011 the Respondent ought reasonably to have been aware that any symptoms which the Claimant had at that time were likely to last until November 2012, particularly taking into account the short periods covered by the forms Med3.
- 85 The other impairment in issue is PTSD. That goes back to some of the Claimant's experiences as a child. It is difficult, or impossible, to disentangle this from reactive depression and treat it as an entirely separate impairment. It is not mentioned specifically in either of the OH reports. The first time it was specifically mentioned by the Claimant was on 18 July 2012. The Respondent has accepted that that was an

impairment forming a disability. We find that it was from 18 July 2012 that the Respondent was actually aware of the fact of the impairment, and that before that date it was not reasonable for the Respondent to have been aware of it. We do not accept that such references as there were by the Claimant to memories of childhood were sufficient to create deemed knowledge of the impairment of PTSD as separate from reactive depression. We do not accede to Mr Massarella's submission that an earlier OH referral would have disclosed the condition. The form Med3 dated 15 November 2012 was the first such form which referred to PTSD. The OH reports that we do have did not identify it separately.

86 It is of course speculation what the outcome of any OH referral would have been if the appointment had been in, say, March, July or September 2012. We note that the report of 21 November 2012 stated that the prognosis for full recovery was good subject to the Claimant's work issues being resolved, and we see no reason to conclude that the prognosis would have been any different if the Claimant had been referred for an OH assessment at an earlier date. By the date of the 21 November 2012 report one year had expired after the symptoms had first appeared, and therefore the 'long term' element of the definition of disability had been satisfied. We therefore conclude that it was only on receipt of the report that the Respondent became aware, or ought reasonably to have become aware, of the Claimant's disability.

87 Mr Massarella did not specifically address the somewhat elusive concept of a PCP. As set out towards the beginning of this document he listed the various PCPs for which he contended. Mr Williams submitted that when considering whether there was any one of the PCPs contended for it was necessary to consider the facts carefully and the reasons(s) for such delay(s) as did occur.

88 The EHRC Code of Practice on Employment (2011) provides in paragraph 6.10 as follows:

The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions.

89 We have noted the judgment of Langstaff P in *Nottingham City Transport Ltd v. Harvey* UKEAT/0032/12 relating to the not dissimilar point as arises in this case where it was argued that the defective administration of a disciplinary process was a PCP.⁸

[18] In this case it is common ground that there was no provision that the employer made nor criterion which the employer applied that could be called into question; the issue was the practice of the employer. Although the Act does not define "provision, criterion or practice" and the Disability Rights Commission's Code of Practice: Employment and Occupation 2004 deals with the meaning of provisions, criteria and practices by saying not what they consist of but what they include (see para 5.8), and although those words are to be construed liberally, bearing in mind that the purpose of the statute is to eliminate discrimination against those who suffer from a disability, absent provision or criterion there still has to be something that can qualify as a practice. "Practice" has something of the element of repetition about it. It is, if it

⁸ *Harvey* was decided under slightly different wording in section 4A of the Disability Discrimination Act 1995 but the difference is not material.

relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply. These points are to be emphasised by the wording of the 1995 Act itself in its original form, where certain steps had been identified as falling within the scope to make reasonable adjustment, all of which, so far as practice might be concerned, would relate to matters of more general application than simply to the individual person concerned.

[19] Given the fact, as it is conceded by [the representative for the employee] to be, that there was no evidence here that the employer made a practice of holding disciplinary hearings in a way that eliminated consideration of mitigation or in a way in which there was no reasonable investigation, it seems to us that there was no sufficient evidence to show that the application of the Respondent's disciplinary process in the case of the Claimant was a provision, criterion or practice. It was something that represented unfair treatment of him, as the finding by the tribunal in respect of unfair dismissal recognises, but not all unfair treatment involves a failure to adjust that which is a provision, criterion or practice.

- 90 The first PCP (or PCPs) for which the Claimant contends are set out in paragraph 4.1 of the list of issues reproduced above, being the arrangements or practice for dealing with the Claimant's grievance of 29 February 2012. Mr Massarella addressed us upon each of the subparagraphs of paragraph 4.1, and we will deal with those individually, rather than paragraph 4.1 as a whole.
- 91 The first issue is in paragraph 4.1.1 and covers the period of nearly four months from 19 March to 10 July 2012 before Ms Haylett produced her report. This is of course a period before the date upon which we have found that the Respondent became aware of the Claimant's disability. Nevertheless we will deal with the matter.
- 92 Mr Massarella referred to the Respondent's policy as requiring 'tighter timescales', although he did not elaborate on the point. The informal stage under the Respondent's policy does not include any specific timescales. It refers to a meeting 'at the earliest opportunity'. The formal stage does refer to a hearing within 15 school days of the date of the grievance, with a decision being provided within 10 days thereafter. Mr Massarella submitted that the period of four months was excessive, and pointed out that Ms Haylett had agreed that it had taken longer than she would normally take, and that she had referred to the difficulty in obtaining information from Ms Michalski and Mr Nicholas.⁹
- 93 Mr Williams pointed out that the Claimant was absent from work from 29 February 2012, and that she had accepted that during her absence Ms Haylett had kept in touch with her. Further, she had accepted that during the period in question she had not asked Ms Haylett to speed up the investigation process.
- 94 The facts so far as we know them are these in outline. The details of the Claimant's grievances were made known on 19 March 2012. Ms Haylett then interviewed staff on 23 March 2012. The grievance investigation then took second place to an investigation into a complaint against the Claimant. That resulted in an informal warning on 25 April 2012. There were then attempts by Ms Haylett to discuss the Claimant returning to

⁹ We have recorded above that Ms Haylett did not elaborate on that point.

work, together with a means of resolving the grievance by having a 'clear the air' meeting.¹⁰ The Claimant did not readily respond to the efforts made by Ms Haylett.

- 95 It is not sufficient for the Claimant to establish that objectively the length of the investigation was excessive. What the Claimant has to establish is a PCP which was applied, or would be applied to others. We have concluded that what occurred does not fall within that concept. We have noted that Ms Haylett stated that any such investigation would normally have been speedier, and consequently we fail to see how the length of time this investigation took can properly be described as a PCP. It is inherent in the concept of a PCP that there be an element of repetition about it. There was no evidence that that was the case, and indeed to the contrary.
- 96 There were reasons why the investigation took longer in these circumstances than would ordinarily be the case. We accept that Ms Haylett was seeking to contact the Claimant in an attempt to have the issues of concern resolved informally, and such attempts were unsuccessful for a time. That is one reason for the length of time involved. However if that is seen as misguided (which we do not accept) then that does not by itself create a PCP of delays. What occurred is akin to one-off defective disciplinary process in *Harvey*.
- 97 The second alleged PCP in paragraph 4.1.2 of the issues above is the setting aside of Ms Haylett's report and the commissioning of a fresh investigation by Mr Atkinson. Again this occurred before 21 November 2012, and so no duty to make any adjustment arose, but we will deal with the matter.
- 98 We accept that what occurred was a PCP in that such a report prepared in respect of a non-disabled employee would have been treated in exactly the same way. We put it quite bluntly. The report of Ms Haylett was simply not fit for its intended purpose. Mrs Elms was expecting that Ms Haylett would investigate the grievances made by the Claimant and summarise the evidence obtained so that an executive decision could hopefully be made as to whether to uphold the grievance or not. The findings consisted of only nine lines. Further, Ms Haylett stated that there were concerns as to how Ms Michalski and Mr Nicholas had sought to resolve concerns about the Claimant's performance. She criticised their leadership. Ms Haylett had not been instructed to go into such matters. It cannot be said to be a proper HR report by a HR professional into the grievance complaint. Mrs Elms quite properly sought to improve upon the document by asking Ms Haylett for the evidence upon which her report was based. Documents were supplied. However, many of the documents were Ms Haylett's manuscript notes of meetings. They could not possibly be safely relied upon by Mrs Elms, nor indeed by Mr Atkinson at a later stage. Having decided that the report was not appropriate and that insufficient clearly documented evidence had been

¹⁰ We do not understand why it was that Ms Haylett was seeking to effect a meeting while at the same time preparing a more formal report for the Executive, but be that as it may.

obtained, it was inevitable that a fresh investigation of some kind would have had to be undertaken.

- 99 We will accept for present purposes that the Claimant was put at a substantial disadvantage by comparison with non-disabled employees by Mrs Haylett producing an inadequate document. Further delay became inevitable. The adjustment contended for on behalf of the Claimant is that the Respondent should have acted promptly upon the report. We have no hesitation in deciding that it would not have been a reasonable adjustment to utilise Ms Haylett's report on its own. It was simply not an appropriate document and, as already mentioned, it was also not possible for Mrs Elms or Mr Atkinson safely to rely on the manuscript notes made by Ms Haylett of her investigatory interviews. In coming to that conclusion we have noted that when her attention was drawn to certain words in the notes Mrs Elms accepted that they supported the Claimant's complaints. That is a different matter from being able safely to come to any conclusion from reading the documents.
- 100 The other point made by Mr Massarella was, as we understand it, that Mrs Elms had accepted in cross-examination that another method of dealing with the Claimant's grievance would have been for her and Mrs Moon to hold a grievance hearing, and to require all those involved to come to the that hearing and give evidence. That could have been done within a short time after the beginning of the autumn term. We fail to see the material difference between Mr Atkinson seeking to ascertain the necessary information by interviewing the relevant individuals on the one hand, and that task being undertaken by Mrs Moon and Mrs Elms at one or more hearings on the other hand. We do not understand Mr Massarella to be complaining, on behalf of the Claimant, of the arrangement made of having enquiries made by a HR officer rather than a member of the management team.
- 101 Mr Massarella referred to paragraph 7.2 of the list of issues (being a proposed reasonable adjustment) and submitted that the report prepared by Ms Haylett ought to have been disclosed to the Claimant and that she should have been permitted to respond to it. That suggestion was not linked by him to any specific PCP, and we cannot see obviously to which it relates. It is also not apparent to us, working backwards, how it is said that such disclosure would have reduced any disadvantage caused to the Claimant as a disabled person.
- 102 The next matter alleged to have been a PCP in paragraph 4.1.3 of the list of issues was what is said to be the delay from 10 July 2012 until 11 January 2013 in the preparation of the second report. Mr Massarella submitted that the evidence obtained by Ms Haylett should not have been disregarded by Mrs Elms and Mr Atkinson. This ties in with the point above. We agree with that submission, noting the specific wording used by him. Apart from the notes of the meeting of 19 March 2012 all the other notes of meetings or interviews are in manuscript. As already stated in our view it would have been extremely dangerous for Mrs Elms or Mr Atkinson to seek to read and then attempt to interpret those notes before coming to a conclusion on the Claimant's grievances.

- 103 We look at what occurred. Mrs Elms took over the meeting on 18 July 2012 without having had an opportunity to prepare for it. Ms Haylett had left unexpectedly, and Mrs Elms was coping with a tragedy. Mrs Elms understood that it had been agreed at that meeting as recorded in the notes of it that the Claimant would set out her grievances in writing and send the details to her by email. That was not done and Mrs Elms wrote to the Claimant on 17 August 2012 during the summer vacation. It was on 2 September 2012 that the Claimant told Mrs Elms that reliance should be placed on the notes of the meeting of 19 March 2012. That explains what happened over the summer. There was no PCP, but simply a misunderstanding as to how progress was to be made.
- 104 The issue then appears to us to be whether Mr Atkinson should have adopted a different procedure from the beginning of September 2012. It is at this stage that we part company from the Respondent as to the appropriateness of the procedure which was adopted by Mr Atkinson. Mr Massarella's submissions concerning this period were particularly powerful. He criticised Mr Atkinson for adopting a formalistic procedure. He particularly criticised him for asking questions in his letter of 5 December 2012. Mr Williams quite properly pointed out that Mr Atkinson acted swiftly after the commencement of his appointment. He submitted that Mr Atkinson was seeking to assist the Claimant in formulating her grievance, and in so doing was acting reasonably. Mr Williams accepted, as he had to do on the evidence, that Mr Atkinson could have obtained answers to some of the questions he asked in his letter of 5 December 2012 from other sources. We are not persuaded by the submissions of Mr Williams.
- 105 We find from the evidence of Mr Atkinson that the manner in which he dealt with the grievance investigation was indeed a practice that he normally adopted, and he would have adopted in respect of a grievance raised by any other member of staff. We acknowledge that these were unusual circumstances in that Ms Haylett had carried out her own process previously but that does not affect the matter on this point. It is not being said that the practice adopted by Mr Atkinson was itself a PCP, but rather the delay resulting from it. However we will treat the two as one and the same.
- 106 Mr Atkinson inherited a grievance investigation which had not been efficiently carried out. In our view the procedure he adopted of seeking to clarify with the Claimant exactly what her grievances were by adopting the process which he did adopt could have been a proper one but for what had already occurred, and most importantly the fact that the Claimant had made it clear to Mrs Elms that she wanted the matter to be dealt with informally. Mr Atkinson did have the note of the meeting of 19 March 2012, the manuscript notes of the investigatory interviews which had been held, and Ms Haylett's report. Whatever other criticisms we have of Ms Haylett's report we note that she did identify the two major complaints which the Claimant was raising. Mr Atkinson also had the notes of the meeting with Mrs Elms of 18 July 2012 which referred to the procedure which the Claimant preferred as being informal, and he had the letter from the Claimant to Mrs Elms of 2 September 2012 in which

the Claimant had specifically said that her grievances were as set out in the meeting notes of 19 March 2012.

- 107 Mr Atkinson accepted in cross-examination that it was essential that grievances be dealt with promptly, and also accepted that the delay which occurred in his investigation of the grievance had a greater detrimental effect on the Claimant because of her mental health difficulties than would have been the case otherwise. Thus the 'substantial disadvantage' has been accepted for the purposes of section 20(3) of the 2010 Act. The duty to make reasonable adjustments therefore arose.
- 108 We see absolutely no reason why Mr Atkinson could not have utilised the documentation supplied to him in the first half of September. The two issues raised by the Claimant at the meeting on 19 March 2012 and recorded in the notes of that meeting principally involved Ms Michalksi. Mr Atkinson could have interviewed her without delay based upon those meeting notes, and also the manuscript notes made by Ms Haylett of her meetings with Ms Michalski on 22 and 23 March 2012. We have stated that those notes were insufficient to be relied upon for the purposes of coming to any conclusion on the grievance, but they are more than sufficient to have enabled Mr Atkinson to ask Ms Michalski to repeat what she had told Ms Haylett. He could have used them as a prompt.
- 109 Mr Atkinson eventually prepared his report which was dated 11 January 2013. We conclude that any investigation could probably have been dealt with perfectly adequately by Mr Atkinson by the end of September 2012, and a report prepared by that date. We say 'probably' because the informal grievance procedure provides for an informal meeting to have been held between both parties, and of course the Claimant was away from work at the time. The PCP adopted was an unduly formalistic approach that caused the Claimant a substantial disadvantage as a disabled person, and we find that a reasonable adjustment which would have minimised delay would have been for Mr Atkinson to abandon his 'standard' procedure and instead to build on the work done by Ms Haylett. We therefore find that the Claimant succeeds under this head of complaint. However that finding can only relate to the period from 21 November 2012 onwards.
- 110 The further delay in question is issue 4.1.4 and relates to the period from the date of the report of 11 January 2013 to 21 May 2013. As Mr Atkinson had by then transformed the grievance into one to be conducted under the formal process a hearing was held which took place on 18 January 2013. It was originally planned for 16 January 2013, just over a week after the beginning of term. After the holding of the grievance hearing Mr Nichols (in our view justifiably) instructed Mr Anderson to make further enquiries as a consequence of points made by the Claimant during the hearing. The Claimant was told that the grievance was not upheld by a letter of 11 February 2013. The appeal process was not concluded until 21 May 2013.
- 111 We find this slightly more difficult because the whole appeal process was based upon the grievance by then being dealt with under the formal part of the policy, as opposed to the informal procedure wanted by the

Claimant. There must be a PCP in the first place before any other aspects can be considered. We find that by this stage there was a practice in the Respondent of unnecessary formality resulting in delay. Mr Atkinson had already caused unnecessary delay, and Mr Garnham accepted in cross-examination that the time taken for him to provide a decision on the Claimant's appeal was also too long.¹¹ The time involved has to be placed against the period of 15 school days stated in the policy. Mr Garnham also accepted the fact of disadvantage to the Claimant as a disabled person caused by the delay.

- 112 We conclude that it would have been a reasonable adjustment in order to minimise the effect on the Claimant to have sought to resolve the appeal more quickly. We therefore find that the Claimant succeeds in this part of her claim.
- 113 The next alleged PCP is in paragraph 4.1.5 of the list of issues and relates to the alleged delay in replying to the statutory questionnaire between 4 November and 23 December 2013. We do not accept that there was a unjustifiable delay. There was no specific adjustment suggested in this respect. There is no evidence of a practice of delaying in replying to such questionnaires and we do not accept that a single incident of this nature amounts to a PCP. Further there was no evidence of any substantial disadvantage to the Claimant.
- 114 However, if we are wrong on those points, then in our judgment it would not have been a reasonable adjustment for the Respondent to have had to provide the answers earlier. As already stated it is a very substantial document, as indeed is the document containing the replies. In the light of inferences which could be drawn from any replies it was obviously important that care be taken to provide accurate answers. and it would not have been appropriate to shirk that task.
- 115 The next issue raised in paragraph 4.2 is an alleged lack of communication with the Claimant and accounting to her for the processes and alleged delays was a PCP. That included not disclosing Ms Haylett's report to the Claimant. This is an even more amorphous alleged PCP than the ones previously mentioned. Mr Massarella submitted that the Respondent made a series of unilateral decisions about the conduct of the Claimant's grievance, and that those decisions had a huge impact on the Claimant. He did not elaborate.
- 116 We are not prepared to accept that there was a PCP in the general sense raised by Mr Massarella of a failure to consult with the Claimant concerning the grievance process. He did not seek to identify specific matters apart from Ms Haylett's report. There was no evidence to support any allegation that whatever it is of which complaint is made put the Claimant to a substantial disadvantage. The evidence is that there was a considerable amount of communication with the Claimant. If the allegation is really that Mr Atkinson ought to have sought to discuss the proposed procedure with the Claimant to agree upon it, rather than impose his own procedure, then that point has been dealt with above.

¹¹ According to our notes he later said that the time involved was not unreasonably long.

- 117 The final matter which we must consider under the heading of PCPs is in paragraph 4.3 of the list of issues and relates to the alleged pressure placed on the Claimant from September 2012 until the end of her employment. The proposed relevant adjustments were that periods of absence caused or contributed to by the Respondent's delay in dealing with the Claimant's grievance ought to have been disregarded, and that the Claimant should not have been dismissed.
- 118 Mr Massarella submitted that it was self evident that the grievance had not been resolved in a proper or timely manner making it harder for the Claimant to return to work and comply with the attendance policy. He submitted that it would have been reasonable to ignore periods of absence caused by the Respondent. He further submitted that the Claimant should not have been dismissed, but a proper rehabilitation process put in place instead.
- 119 We of course accept that the Respondent's policy is capable of being a PCP as it is described as a policy. However, we do not accept that in the circumstances its application put the Claimant at a substantial disadvantage by comparison with others who were not disabled, but otherwise in the same position. The report prepared by Mr Atkinson and the notes of the meeting of 5 November 2013 both refer to the Claimant having said that she did not want to return to work with the Respondent, and indeed that she did not feel she could return to education. The link with the Claimant's disability has not been made out.
- 120 With respect to Mr Massarella we do not understand the relevance of the submission that any periods of time caused by the delays of Mr Atkinson ought to have been ignored. Such delays as there were have no relevance to the issue of adjustments to reduce the adverse effect of a disability. We acknowledge that in cross-examination Mr Atkinson accepted that it would have been reasonable to disregard some of the delays caused by the Respondent. However, this is not a case of the mechanistic application of a sickness management policy under which an employee is dismissed under some form of 'totting-up' process. In such circumstances it may have been reasonable to make an adjustment to the policy.
- 121 Finally, in the light of the clear statement by the Claimant that she did not feel able to return to work with the Respondent, or indeed in education at all, we cannot see that there was any alternative to dismissal. The reason(s) for the Claimant's absence resulting in her dismissal clearly related to allegations which had been made against her, rather than any delays which had occurred.
- 122 The final issue with which we must deal is the issue of jurisdiction. Logically of course this ought to be the first issue, but it is almost inevitable in cases of discrimination that findings must be made whenever the question of a just and equitable extension of time arises, as is the case here. The claim form was presented to the Tribunal on 7 February 2014, which was before the ACAS early conciliation procedure was introduced. Thus anything before 8 November 2013 is prima facie out of time. That was the date of the Claimant's dismissal.

- 123 Mr Massarella submitted that the Respondent had sufficient documentation concerning the issues raised by the Claimant that the problem often encountered of the possibility of memories fading was reduced. Further, the focus in this case was on the reasonableness of courses of action, rather than upon more subjective issues as might be the case in direct discrimination claims. The Claimant, he said, had sought to resolve the issues internally, including the issuing of the statutory questionnaire. There was little if any prejudice to the Respondent in extending time. Mr Massarella did not seek to argue that what occurred was an act extending over a period save that the PCP of being required to attend work continued until the Claimant's dismissal.
- 124 Mr Williams submitted that it would not be just and equitable to extend time. He noted that the Claimant had taken legal advice in December 2012. She had not explained why it was just and equitable to extend the time limit. Further, said Mr Williams, none of the Respondent's witnesses were employed by the Respondent at the time of the hearing.
- 125 We have concluded that it is just and equitable to extend the time for the consideration of the Claimant's claims. We note the point made by Mr Williams as to the witnesses not now being employees of the Respondent. That may well have been a relevant factor if the point had been raised at a preliminary hearing when jurisdiction had been an issue being decided. The fact is that the witnesses did attend and gave evidence. There was no suggestion by Mr Williams that the evidence had in any way been compromised by the delay. We accept the submission by Mr Massarella that the prejudice to the Claimant in not being allowed to pursue her claims outweighs the prejudice to the Respondent in having to defend them, and we do take into account that the dismissal appeal process was continuing at the date when the claim form was presented. Although not pleaded as an act extending over a period for the purposes of section 123 of the 2010 Act we are entitled to take into account the fact that the issues between the Claimant and the Respondent were continuing. This is not a case where a claimant seeks to pursue a claim months after the last potentially material incident has occurred.
- 126 For the above reasons the claim succeeds to the extent set out above in respect of the period from 21 November 2012.

**Employment Judge Baron
31 August 2017**